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## The New Chinese Mental Health Laws


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# THE NEW CHINESE MENTAL HEALTH LAWS

ZHIYUAN GUO<sup>1</sup> AND FLOYD FEENEY<sup>2</sup>

## ABSTRACT

*The United Nations Convention on the Rights of Persons with Disabilities is by far the most important international agreement yet developed concerning the mentally disabled. China adopted this Convention in 2008. In 2012 China went further—making major changes in the way that China deals with mental health issues in both its criminal and its civil law. Coming first was a new Criminal Procedure Code that adds a whole new dimension to the way that China deals with the mentally ill who are charged with crimes. Equally important was the new civil mental disabilities law that China adopted later in the year. Many years in the making, this new law is China's first comprehensive modern civil mental disabilities law. This article discusses both the major features of these new laws and some of the more important tasks that remain for the future.*

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## INTRODUCTION

Like every other modern society China recognizes mental illness as an important issue. Seeking to further improve its approach, China has in the last decade adopted three major new mental health laws. In 2008 it ratified the United Nations Convention on the Rights of Persons with Disabilities. In 2012 China made major changes in the mental health portions of its Criminal Procedure Code and adopted its first modern civil mental health law.

Mental illness is not a new problem. Modern societies tend to approach this issue much differently, however, than older, more traditional societies. Because ancient societies kept few statistics, it is impossible to know how the amount of mental illness then compares with the amount of mental illness today. It seems clear, however, that mental illness today is an important problem. Chinese government statistics indicate that over 100 million Chinese citizens suffer from some form of mental illness and that more than 16 million have a serious mental illness.<sup>3</sup> Chinese prosecutors charge the mentally ill with at least 10,000 crimes each year.<sup>4</sup>

Because China is the world's most populous country and one of the world's most important nations, its new mental health laws have great intrinsic importance. China's enormous status in the world is not the only reason, however, for paying close attention to these new laws. China's new mental health laws are the newest kids on the block. No other major nation has in the last few years made such a thorough overhaul of its mental health laws. Outsiders may agree or disagree with the choices that China has made. A careful study of these choices is likely, however, to be of value to all.

This article proceeds in seven parts. Part I provides a brief overview of the legal approaches used by China in the past to deal with mentally disturbed persons. Part II supplies more detail about the three major developments already mentioned. Part III analyzes the impact of

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3 See Kent Ewing, *Down and Out in China*, ASIA TIMES ONLINE (May 8, 2010), <http://www.atimes.com/atimes/China/LE08Ad01.html> (last visited Feb. 17, 2017) (indicating that the World Health Organization reports that seven percent of China's population – about 100 million people – suffer from some form of mental illness).

4 See Chen Weidong (陈卫东), *Goujian Zhongguo Tese Xingshi Tebie Chengxu* (构建中国特色刑事特别程序) [*Constructing Special Criminal Proceedings of Chinese Characteristics*], 6 CHINESE LEGAL JURIS. 40 (2011).

international legal norms on Chinese mental disabilities law, while Parts IV and V concern the practical effects of these new laws. Part VI suggests some possibilities for future reform. The conclusion (Part VII) calls for greater coordination between the rules governing civil commitments and those governing criminal commitments.

### I. A BRIEF HISTORY OF THE CHINESE APPROACH TO MENTAL DISABILITIES

As early as the Warring States Period (475-221 BCE), Han Fei Zi, a noted ancient Chinese philosopher, addressed the issue of how mentally ill persons who commit crimes should be punished. Mental illness, Han Fei Zi argued, should not be a reason for eliminating punishment.<sup>5</sup> Confucian thinking stigmatized people with mental illness and required families to carry the burden of caring for such persons. Ideas such as these were a consistent thread in China's policy relating to persons with mental illness for a very long period of time.

In the 1700s the Qing dynasty began to adopt more interventionist measures. Amendments to the Great Qing Code required families to notify the authorities when family members were suffering from mental illnesses. In addition to mandatory registration, these amendments required families to keep the mentally ill in strict confinement.<sup>6</sup> By isolating persons with mental illness, the Code sought to protect society from violent behavior. If the mentally ill actually committed violent acts, the Great Qing Code—like the earlier codes—called for punishment of the violent acts.<sup>7</sup>

Over the next several centuries medical practice and the law continued to evolve. By the 1920s and 1930s some major Chinese cities, in order to improve social control, began to establish hospitals for the “psychopathic.”<sup>8</sup>

<sup>5</sup> See Liu Xiehe, *Psychiatry in Traditional Chinese Medicine*, 138 BRIT. J. PSYCHIATRY 429 (1981) (Han Fei Tzu wrote that a psychotic cannot escape punishment according to the law). See also BASIC WRITINGS OF MO TZU, HSUN TZU & HAN FEI TZU (Burton Watson trans., 1967). For a brief history of the Chinese criminal justice system, see PHILLIP M. CHEN, LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C. TO 1960 A.D. (1973); T'ANG-YIN-PI-SHIH: PARALLEL CASES FROM UNDER THE PEAR-TREE (R.H. Van Gulik trans., 1956); JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION (1968).

<sup>6</sup> VIVIEN W. NG, MADNESS IN LATE IMPERIAL CHINA: FROM ILLNESS TO DEVIANCE 63-87 (1990).

<sup>7</sup> See, e.g., THE GREAT QING CODE (William C. Jones trans., 1994). The original Great Qing Code, like the earlier Chinese codes, had no special categories for the insane. Insanity was not an excuse. Because Chinese society was organized quite differently from Western society, the Chinese legal codes were constructed differently from Western legal codes. *Id.* at 1-28. See also Elisa Nesossi, *The 2012 Mental Health Law – An Interview with Guo Zhiyuan*, THE CHINA STORY (Jan. 23, 2013), <http://www.thechinastory.org/2013/01/the-2012-mental-health-law>. For a brief worldwide history of mental illness and its treatment, see RISDON N. SLATE et. al., THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM 11-25 (2d ed. 2008).

<sup>8</sup> See, e.g., Liu Xiehe, *supra* note 5. In earlier times the burden of caring for people with mental

In addition to restricting the liberty of mentally ill persons who had committed violent acts, these hospitals provided medical care and treatment.<sup>9</sup>

After the founding of the People's Republic of China in 1949, psychiatric hospitals were gradually established in each province. The goal was to improve security and stability. During the Maoist era Chinese psychiatry was heavily influenced by Soviet psychiatric theory. Noting that the Soviet Union during this time sometimes used psychiatry to combat counterrevolutionaries and political and religious dissenters, some writers suggest that Chinese mental health practices at this time may have had similar goals.<sup>10</sup>

During the Cultural Revolution (1966-1976) many argued that mental illness resulted from the corruption of the old political system. Those with this view believed that it was society that needed to be cured rather than the persons who appeared to be mentally ill. Thought reform, they contended, was the appropriate treatment for mental aberrations.<sup>11</sup> Beginning in 1978 psychiatric services began to be re-established. In 1979 China adopted its first modern Criminal Code and its first modern Criminal Procedure Code.<sup>12</sup> The Criminal Code contained a section dealing with mentally ill persons accused of crime.<sup>13</sup> Gradually these codes and other new measures<sup>14</sup> led to

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illness fell on the family.

9 Ji-Nian Hu et. al., Editorial, *Development and Limits to Development of Mental Health Services in China*, 16 CRIM. BEHAV. & MENTAL HEALTH 69 (2006).

10 See Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. 1, 4-6 (2000).

11 Nesossi, *supra* note 7.

12 Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., July 1, 1979) [hereinafter "China Criminal Code of 1979"]. For a brief history of the China Criminal Code of 1979, see *Introduction to THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA* 1-7 (Wei Luo trans., 1998). For the background of the 1979 China Criminal Procedure Code, see *Introduction to THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA* 1-7 (Wei Luo trans., 2000). For an English language version of the texts of the 1979 Criminal Procedure Code, the 1979 Criminal Code, the People's Courts Code, and the Public Prosecutions Code, see *A FULL TRANSLATION OF THE CRIMINAL LAW CODE, CRIMINAL PROCEEDINGS CODE, ORGANIZATIONS OF THE PEOPLE'S COURTS CODE, ORGANIZATIONS OF THE PEOPLE'S PUBLIC PROSECUTIONS DEPARTMENTS CODE OF THE PEOPLE'S REPUBLIC OF CHINA* (Yu Wen-ch'ing trans., 1980). A more extended history of the pre-2012 development of the Chinese criminal law appears in JIANFU CHEN, *CRIMINAL LAW AND CRIMINAL PROCEDURE IN THE PEOPLE'S REPUBLIC OF CHINA* 4-54 (2013).

13 China Criminal Code of 1979, *supra* note 12, art. 18.

14 See, e.g., Sifa Jianding Chengxu Tongze (司法鉴定程序通则) [The Procedural Rules on Forensic Analysis] (promulgated by the China Ministry of Justice, Aug. 7, 2007, repealed on May 1, 2016). For a description of earlier developments, see Beilin Gao et. al., *Forensic Psychiatry in the People's Republic of China*, 17 J. PSYCHIATRIC PRAC. 129 (2011).

new legal and administrative regimes for handling the mentally ill.<sup>15</sup> The first wave of these new legal regimes was not comprehensive. The primary goal at this time was that of maintaining social order. Rights protection for the vulnerable mental health population was not a major priority.

## II. THREE MAJOR CHINESE REFORMS

In August 2008 China ratified the United Nations Convention on the Rights of Persons with Disabilities.<sup>16</sup> In March 2012 China completed a major revision of its Criminal Procedure Code. An important part of this revision concerned persons with mental disabilities. In October 2012 China adopted its first comprehensive modern civil mental health law.

### A. *United Nations Convention on the Rights of Persons with Disabilities*

This Convention was the first legally enforceable United Nations instrument specifically addressing the rights of persons with disabilities. This Convention applies to the mentally ill as well as to the physically disabled. The Convention requires nations to respect the “inherent dignity” of its mentally disabled citizens, to follow the principle of “nondiscrimination,”<sup>17</sup> and to establish “freedom from torture or cruel, inhuman or degrading treatment or punishment.”<sup>18</sup> To assist in implementing these important values the Convention requires states to provide “freedom from exploitation, violence and abuse,”<sup>19</sup> guarantee “integrity of the person,”<sup>20</sup> and assure “equal recognition before the law”<sup>21</sup> and equal “access to justice.”<sup>22</sup> China’s ratification demonstrates a national commitment to the rights of persons with disabilities—in the community, in psychiatric institutions, and in correctional facilities. The treaty, however,

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<sup>15</sup> See generally for a brief history of mental illness worldwide DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* (1996); SLATE, *supra* note 7, at 13-26.

<sup>16</sup> China signed the Convention in March 2007 and ratified it on August 1, 2008. See Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en) (last visited February 17, 2017). The United Nations General Assembly adopted the Convention on December 13, 2006 [hereinafter “UN Disabilities Convention”]. For general commentary, see MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW* 13-14 (2012).

<sup>17</sup> UN Disabilities Convention, *supra* note 16, art. 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* art. 16.

<sup>20</sup> *Id.* art. 17.

<sup>21</sup> *Id.* art. 12.

<sup>22</sup> *Id.* art. 13.

is not self-executing. In China, as in countries such as the United States, national or local legislation is generally necessary if treaty rights are to become a part of everyday law and practice.<sup>23</sup>

*B. The Chinese Criminal Procedure Code of 2012<sup>24</sup>*

Forensic evaluations have long played a crucial role in Chinese criminal cases. In 2006 a high-profile case involving Qiu Xinghua generated an intense debate over who should be responsible for initiating mental examinations in criminal cases.<sup>25</sup> Arousing great interest both in China and abroad, Yang Jia's killing of a police officer in 2008<sup>26</sup> intensified this debate. The following year Akmal Sheik, a British citizen believed by many to be mentally ill, was sentenced to death and executed for drug offenses committed in China.<sup>27</sup> This case generated huge interest both inside and outside of China about the risk of punishment for crimes committed while mentally ill.

The 2012 revision of the Chinese Criminal Procedure Code responded to these high profile cases by increasing the protections available to defendants with mental disabilities.<sup>28</sup> The new law gives mentally disabled

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<sup>23</sup> See *infra* Parts IV and V.

<sup>24</sup> Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 14, 2012) [hereinafter "China Criminal Procedure Code of 2012"]. An English translation is available at <https://www.chinalawtranslate.com/criminal-procedure-law/?lang=en> (last visited Apr. 9, 2018).

<sup>25</sup> See *Qiu Xinghua's Murder Case*, <http://news.sina.com.cn/z/qiuxhsx/index.shtml>, SINA NEWS, (last visited Nov. 18, 2017). Qiu Xinghua was a Shanxi villager who suspected that the head of a Taoist Temple had had an affair with his wife. Qiu Xinghua killed the head of the temple and for no apparent reason ten innocent people. Qiu's killings were extremely vicious. Having removed and fried one of the deceased's intestines, Qiu then fed the intestines to a dog. Qiu was convicted and sentenced to death for murder and robbery. Prior to Qiu's appellate hearing, Qiu's wife and his defense lawyer filed applications arguing that Qiu may have suffered from a serious mental illness. They requested a professional examination of Qiu's mental status. See Yuan Xiaobing, *Murder Case in Jiangyin, Shanxi*, SINA NEWS, <http://news.sina.com.cn/s/1/2006-08-08/091910662894.shtml> (last visited Feb. 20, 2017). The appellate court rejected the application. Qiu Xinghua was executed without having had a mental examination. See *The Higher People's Court Rejected the Application for Mental Examination*, SINA NEWS, <http://news.sina.com.cn/z/qiuxhsx/index.shtml> (last visited Feb. 20, 2017).

<sup>26</sup> See Zhiyuan Guo, *Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Capital Cases*, 33 HASTINGS INT'L & COMP. L. REV. 21, 22 (2010).

<sup>27</sup> See, e.g., Jonathan Watts, *Akmal Shaikh's Final Hours*, THE GUARDIAN (Dec. 29, 2009), <http://www.guardian.co.uk/world/2009/dec/29/akmal-shaikh-final-hours-china>.

<sup>28</sup> The China Criminal Procedure Code of 2012, *supra* note 24, revised the Code adopted in 1996. The 1996 Criminal Procedure Code revised the 1979 Code. Extensive discussions preceded the adoption of the 2012 Code. See, e.g., Chen Guangzhong, *Issues In the Reform of China's Public Prosecution System—Against the Backdrop of New Revisions to the Criminal Procedure Law*, in COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA 153 (Mike McConville & Eva Pils eds., 2013). For a discussion of the China Criminal Procedure Code of 1996, see YI YANYOU, UNDERSTANDING CHINA'S CRIMINAL PROCEDURE (2013).



persons charged with crimes a right to the assistance of counsel.<sup>29</sup> The new law also gives defendants with mental disabilities a right to the assistance of mental health experts when necessary to confront the prosecution's expert witness.<sup>30</sup> If an order for compulsory treatment or mandatory hospitalization is being considered, the new law gives mentally disabled persons a right to a special kind of judicial review.<sup>31</sup>

### C. *The Chinese Mental Health Law of 2012*

It is important for society to know how many crimes the mentally ill commit. It is also important to recognize that family members and others sometimes make false accusations of mental illness in order to steal money, seek revenge, or gain some other unfair advantage. In recent years China has had a number of highly publicized cases in which family members and others have tried to have fully competent persons treated as insane.

In a 2010 case Zhu Jinhong's mother and sister had Zhu committed to a mental hospital so that they could continue to collect rental money belonging to Zhu.<sup>32</sup> A few years earlier Wen Xiuqin's husband sent her to a mental hospital in order to get rid of her.<sup>33</sup> In another high profile case a school teacher had his wife committed to a mental hospital when she

<sup>29</sup> China Criminal Procedure Code of 2012, *supra* note 24, arts. 34, 286.

<sup>30</sup> *Id.* art. 187. Article 187 allows the defense and other parties to request that witnesses, including expert witnesses, be required to testify. When multiple experts present conflicting opinions about the effects of mental disabilities or the defense disagrees with the opinion of the prosecution expert, such requests seem likely. If an expert witness declines to testify after having been subpoenaed by a court, article 187 excludes the expert's opinion. Article 192 grants the defense a right to request the assistance of mental health experts.

<sup>31</sup> See *id.* arts. 284-290 and *infra* Parts IV(D) and IV(E). For a general description of the China Criminal Procedure Code of 2012, see Mou Luye, Note, *Breakthroughs and*

*Limitations of Judicial Reform: A Brief Review of China's New Criminal Procedure Law*, 1 PEKING U.L.J. 459 (2013-2014); Yi Yanyou, *State Ideology Transition and Procedure Model Reformation: China's Criminal Procedure Law and Its Revisions*, 4 TSINGHUA CHINA L. REV. 159 (2012); and Ye Quing, *A Discussion on the Provisions of the Exclusionary Rule Against Illegally Obtained Evidence in China's Criminal Procedure Law*, 2 J. E.-EUR. CRIM. L. 9, 14 (2015).

<sup>32</sup> See *A Thorny Road Out of the Asylum*, CRIENGLISH.COM (Dec. 19, 2010, 20:01), <http://english.cri.cn/8706/2010/12/19/2041s610942.htm>.

<sup>33</sup> See *Taiwan Businessman Sent His Wife to A Psychiatric Hospital in Order to Seek Divorce*, CHINA NEWS (Feb. 5, 2006), <http://news.creaders.net/china/2006/02/05/494330.html> (last visited Nov. 12, 2017). Qiu Guoshi, a Taiwanese businessman living in Shanghai, had for many years had a bad relationship with his wife. She refused, however, to agree to a divorce. In 2001 Qiu called the Shanghai Mental Health Center, saying that his wife was suffering from a serious mental illness. Going to the wife's workplace, a doctor and several nurses forced her to come to the Mental Health Center for treatment. Qiu signed a consent authorizing her hospitalization. After three days Qiu's wife sought help from her daughter. The daughter succeeded in having Qiu's wife returned to Taiwan. Qiu's wife filed a complaint in China alleging that her husband's conduct had been criminal. This led to a conviction and a fourteen month prison sentence.

discovered that he was having an affair.<sup>34</sup> Xu Lindong's case presented a different kind of problem. He was incarcerated in a psychiatric hospital for years because he helped a neighbor file complaints.<sup>35</sup> His case illustrates how persons considered to be "troublemakers" can sometimes be treated as mentally incompetent.

Arbitrarily hospitalizing persons for personal gain or other illegal purposes is a particularly frightening kind of problem. Cases of this kind generate discussion and pressure for change. In October 2012, after intense debate, the Standing Committee of the National People's Congress (China's legislative body) adopted a new civil mental health law.<sup>36</sup> This new law includes many important provisions. It prohibits discrimination against the mentally ill,<sup>37</sup> requires schools to be more conscious of things that create stress and harm to the mental health of students,<sup>38</sup> and regulates the fields of psychology and psychiatry.<sup>39</sup> One feature that attracted great attention both in China and abroad concerned a new process for initiating voluntary hospitalization. The new law seeks to make voluntary hospitalization and treatment the first-line approach to treatment. Before an individual can be voluntarily accepted into a mental hospital, the new law requires that the patient or the patient's guardian give informed consent.<sup>40</sup> The new law

34 See *School Teacher Forced His Wife into Psychiatric Hospital after His Affair was Discovered* (July 20, 2010), <http://news.sina.com.cn/s/2010-07-20/041820713882.shtml>. Seeking justice, Li Yuping sought mental examinations in several other hospitals. Her final examination report stated that "although Li Yuping was confined in a mental hospital for a period of 127 days, her diagnosis indicates that she was mentally sound." Li sued the first mental hospital for ¥100,000 for three years of lost wages and emotional damage. She also filed a divorce case against her husband.

35 See, e.g., Luohe Cunmin Xu Lindong Shijian (漯河村民徐林栋事件) [*The Story of Xu Lindong, a villager from Luohe*], <http://henan.sina.com.cn/z/lhnmjsby/> (last visited Nov. 18, 2017), for a series of articles about Xu Lindong, a villager in Henan province. Xu Lindong's attempts to help a disabled neighbor resolve her complaints about her care led to incarceration in a series of psychiatric hospitals for six and a half years. He was put under physical restraint forty-eight times and given electric shocks on fifty-four occasions. Having tried several times to escape and twice attempted suicide, Media coverage of his case generated public pressure and led to Xu Lindong's release.

36 Zhonghua Renmin Gongheguo Jingshen Weisheng Fa (中华人民共和国精神卫生法) [China Mental Health Law] (promulgated by the Nat'l People's Cong., Oct. 26, 2012) [hereinafter "China Mental Health Law of 2012"]. This act has a long history. For general discussions in English of China's new mental health law, see X. Zhao & J. Dawson, *The New Chinese Mental Health Law*, 21 PSYCHIATRY, PSYCHOL. & LAW 669 (2014); Ding Chunyan, *Involuntary Detention and Treatment of the Mentally Ill: China's 2012 Mental Health Law*, 37 INT'L J.L. & PSYCHIATRY 581 (2014); D.F. K. Wong et. al., *A Critical Review of Mental Health and Mental Health-Related Policies in China: More Actions Required*, 23 INT'L J. SOC. WELFARE 195 (2014); Albert Yeung, *A New Mental Health Law to Protect Patients' Autonomy Could Lead to Drastic Changes in the Delivery of Mental Health Services: Is the Risk Too High to Take?*, 24 SHANGHAI ARCHIVES PSYCHIATRY 41 (2012).

37 China Mental Health Law of 2012, *supra* note 36, art. 5.

38 *Id.* art. 16.

39 *Id.* arts. 23 and art. 66; ch. 6.

40 *Id.* art. 30.

restricts the use of involuntary treatment to cases that involve danger or a risk of danger to others.<sup>41</sup>

### III. INTERNATIONAL LEGAL NORMS CONCERNING MENTAL DISABILITIES

Neither the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), nor the International Covenant on Economic, Social and Cultural Rights (1966) identified disabled persons as a group that was particularly vulnerable to human rights violations. More recently, however, international agencies have established a number of policies that seek to protect the rights of people with mental disabilities. In 1975 the United Nations General Assembly adopted its Declaration on the Rights of Disabled Persons. This declaration proclaimed that all disabled people are entitled to equal protection of the law, freedom from arbitrary treatment, and respect for their inherent dignity as human beings.<sup>42</sup>

In 1984 the UN Economic and Social Council passed Resolution 1984/50 entitled “Safeguards guaranteeing protection of the rights of those facing the death penalty.”<sup>43</sup> This resolution forbade use of the death penalty as punishment for persons who have become insane.<sup>44</sup> The resolution also made it clear that mental disability should be taken into account at all stages of the criminal justice process—including determinations of competence to stand trial, sentencing, and execution of the sentence.<sup>45</sup>

In 1991 the UN General Assembly adopted “Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.”<sup>46</sup> Much more specific than the UN legislation already discussed, the Principles have played a critical role in recognizing the important connection between international human rights norms and mental disability rights.<sup>47</sup>

41 American law generally allows involuntary commitment when there is a risk of danger to self or to others. The Chinese law does not mention danger to self.

42 See G.A. Res. 3447, U.N. Doc. A/res/30/3447 (Dec. 9, 1975).

43 See Economic and Social Council Res. 1984/50, Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, ¶ 3 (May 25, 1984), <http://www.ohchr.org/Documents/ProfessionalInterest/protection.pdf>.

44 *Id.*

45 In paragraph 3 the Resolution states: “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women or on new mothers, or on persons who have become insane.” *Id.*

46 G.A. Res. 46/119 (Dec. 17, 1991) [hereinafter “1991 UN Mental Illness Principles”].

47 The 1991 UN Mental Illness Principles, *supra* note 46, have been used by international oversight and enforcement bodies. The Principles have also been directly incorporated into the mental health legislation of a number of countries, including Australia, Hungary, Mexico, and Portugal. See Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.

Among other things the 1991 UN Mental Illness Principles established standards for treatment and living conditions within psychiatric institutions. In addition to establishing substantive rules and procedural protections designed to prevent arbitrary detention in psychiatric facilities,<sup>48</sup> the 1991 UN Mental Illness Principles also provide a broad array of other protections within institutions. These include protection against “unjustified medication as well as protection against abuse by other patients, staff, or other persons.”<sup>49</sup> They require monitoring and inspection of facilities to ensure compliance with the 1991 UN Mental Illness Principles.<sup>50</sup> They also require that treatment be “based on an individually prescribed plan” and that such treatment “be directed towards preserving and enhancing personal autonomy.”<sup>51</sup> Because they recognize that every patient has a “right to be treated and cared for, as far as possible, in the community in which he or she lives,”<sup>52</sup> the UN Mental Illness Principles also have major implications for the whole structure of mental health systems.

2006 brought an even more important development—the UN Convention on the Rights of Persons with Disabilities.<sup>53</sup> By far the most significant international human rights law development concerning mental disabilities ever achieved, this Convention was the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. In addition to providing advocates for the rights of persons with disabilities with a tremendous resource, it obligates signatory governments “to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.”<sup>54</sup> By extending “existing human rights . . . to take into account the specific rights experience of persons with disabilities,”<sup>55</sup> the Convention ushers in a “new era in human rights protection.”<sup>56</sup>

The UN Disabilities Convention is a symbolic document of great importance. Representing a profound shift in the conception of human

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L. SCH. J. INT'L & COMP. L. 21, 469, 488-489 (2002).

48 1991 UN Mental Illness Principles, *supra* note 46.

49 *Id.*

50 *Id.* Principle 22.

51 *Id.* Principle 9.

52 *Id.* Principle 7.

53 UN Disabilities Convention, *supra* note 16.

54 *Id.* art. 4(a).

55 Frederic Megret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 494 (2008).

56 From the title of a paper by Lisa Waddington, *A New Era in Human Rights Protection in the European Community: The Implications of the United Nations' Convention on the Rights of Persons with Disabilities* for the European Community (Maastricht Faculty of Law Working Paper No. 2007-4, 2007).

rights,<sup>57</sup> it goes much further than the earlier treaties in spelling out the steps that signatory governments must take to prohibit discrimination against persons with disabilities.<sup>58</sup>

In China international norms are regarded as goals for legislative reform. Chinese scholars and others seeking criminal justice reform, for example, frequently mention the UN Convention on Civil and Political Rights.<sup>59</sup> China's ratification of the UN Disabilities Convention<sup>60</sup> in August 2008 was therefore an extremely important event.<sup>61</sup> China's ratification did not, however, automatically turn the Convention into Chinese law. Like the United States and many other countries, China—in order to implement international treaties—generally requires the adoption of domestic legal reforms.<sup>62</sup>

Because some UN member countries follow the common law system and others follow the civil law or some other system, United Nations treaties

<sup>57</sup> Penelope Weller, *Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law*, 4 PUB. SPACE J. L. & SOC. JUST. 74, 89 (2009).

<sup>58</sup> The United States signed the UN Convention on the Rights of Persons with Disabilities in 2009. The US Senate in 2012 voted 61 to 38 to ratify the Convention. This vote failed, however, to obtain the two thirds majority necessary for ratification. See Rosalind S. Helderman, *Senate Rejects Treaty to Protect Disabled Around the World*, WASH. POST (Dec. 4, 2012), [https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5\\_story.html?utm\\_term=.1272f87f82c3](https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5_story.html?utm_term=.1272f87f82c3). A number of world regions have adopted treaties designed to protect the rights of the disabled. The European Convention on Human Rights, for example, contains a comprehensive plan. This includes Article 5 which guarantees a right to liberty and security of the person. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, E.T.S. No. 005. The Organization of American States, another important regional body, introduced the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, June 7, 1999, O.A.S.T.S. No. A-65.

<sup>59</sup> An important Chinese book discusses the relationship between reforming the Criminal Procedure Code and the international conventions. EXPLORING CRIMINAL JUDICIAL REFORM IN CHINA: FROM THE PERSPECTIVE OF THE UNITED NATIONS STANDARDS (Bian Jianlin ed., 2007).

<sup>60</sup> In this article “mental health law” is used interchangeably with “mental disabilities law.” See, e.g., Phil Fennell, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95, 107 (2008) (suggesting that the UN Convention on the Rights of Persons with Disabilities re-conceptualizes “mental health rights as disability rights”).

<sup>61</sup> See *supra* Part II (A). Some authorities argue that “a country’s ratification of a human rights treaty generally strengthens the hand of domestic and international rights advocates and may therefore contribute to norm change over time.” See, e.g., RANDALL P. PEERENBOOM ET. AL., HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 56 n.14 (2006).

<sup>62</sup> Countries vary in their approach to international treaties. Some countries automatically consider international treaties that the country ratifies to be part of the country’s internal law. Other countries require the adoption of internal legislation to implement the treaty. In the United States some international treaties become part of the internal American law when the treaty is ratified by the United States Senate. Such treaties are called “self-executing.” Other treaties are “non-self-executing,” meaning that they do not automatically become part of the American law. Whether a treaty is “self-executing” or “non-self-executing” is a complicated question. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (AM. LAW INST. 1987).

that touch on the criminal law are necessarily often written in general terms so that the treaty can apply in the world's many different legal systems. Each country that adopts a UN treaty concerning the criminal law must therefore find a way to apply the treaty in its own domestic criminal justice system.

China takes its international obligations seriously. In 2012 it adopted two very important new laws affecting the mentally disabled--a revised Criminal Procedure Code in March and a new Mental Health Law in October. These new laws implement many of the provisions of the UN Convention on the Rights of Persons with Disabilities.

#### IV. HOW THE 2012 LAWS AFFECT CHINESE CRIMINAL LAW AND PROCEDURE

In the United States legal decisions concerning the mental status of persons charged with crime can arise in five different circumstances: (1) when an offense is charged; (2) at trial; (3) at sentencing; (4) during the sentence; and (5) after completion of the sentence.

If at the time of trial a defendant is suffering from a mental disease or defect that renders her unable to understand the proceedings or assist in her defense, American law does not allow the defendant to be tried.<sup>63</sup> American law generally requires that the defendant be committed to a mental institution until she recovers her sanity. The decision as to whether a defendant is competent to stand trial is made by a judge after a hearing.

If the defendant is mentally competent at the time of trial but claims to have been insane at the time of the offense, California and a number of other states apply the *M'Naghten* test to determine whether the defendant is able to claim the defense of insanity.<sup>64</sup> Under this test a defendant is legally insane if a mental disease or defect caused the defendant not to know the nature and quality of her act or not to know that the act was wrong.<sup>65</sup> If the defendant is found to have been legally insane at the time the crime was committed, the defendant will be acquitted.<sup>66</sup> Another group of states

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63 As a practical matter, "competency" in the United States is a relatively low standard. *See, e.g.*, WAYNE R. LAFAYE, CRIMINAL LAW 529-537 (6th ed. 2017). Defendants with IQs of 70 or less are generally found to lack the competency to stand trial. *See also* Moore v. Texas, 137 S. Ct. 1039 (2017).

64 *M'Naghten's Case* (1843), 8 Eng. Rep. 718, 10 Cl. & F. 200.

65 *See* LAFAYE, *supra* note 63, at 495-512; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 343-346 (6th ed. 2012); JUDICIAL COUNCIL OF CAL., INSTRUCTION 3450: INSANITY, DETERMINING EFFECT OF VERDICT, CALIFORNIA JURY INSTRUCTIONS (2017).

66 British law also continues to use the *M'Naghten* standard. Leading authorities, however, indicate that this standard is modified to some extent by the British Human Rights Act 1998 and the European Convention on Human Rights. *See, e.g.*, ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 141-146, 48-51 (7th ed. 2013).

applies the Model Penal Code test. These states consider a defendant to be insane if a mental disease or defect leads the defendant not to know the nature and quality of her act or not to appreciate that the act was wrong.<sup>67</sup> Although a few states claim to have “abolished” the defense of insanity, these states allow evidence of mental disease or defect to negate the mental state required for the offense charged.<sup>68</sup> If a defendant is found to be insane, most states say that the defendant is not guilty of the offense charged. Although not guilty, such defendants rarely go free. They are instead generally turned over to correctional or mental health authorities for treatment.

In the United States mental health issues at the time of sentencing are generally treated in the same way as mental health issues at the time of trial.<sup>69</sup> Mental health issues that arise during a sentence are generally handled by the agency responsible for custody.<sup>70</sup> After a defendant who was found to be sane has completed the sentence imposed and is released from custody, any new mental health issues are generally treated as matters to be resolved by the civil courts rather than the criminal courts. Defendants who are charged with new crimes go back to the criminal courts.

Although public discussion about insanity in criminal cases in the United States tends to focus on the tests used to determine whether the defendant was insane at the time the crime was committed, there appear to be far more competency-to-stand-trial cases than cases involving the insanity defense at trial.

#### A. *How Insanity Affects Chinese Criminal Trials*

The modern Chinese Criminal Code recognizes insanity as a factor that under appropriate circumstances can excuse or mitigate criminal responsibility.<sup>71</sup>

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67 MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 61-73 (AM. LAW INST. 1985). For a time, the District of Columbia sought to apply a purely medical test of insanity. This test was highly controversial, however, and eventually the U.S. Court of Appeals for the District of Columbia switched to a different test. *See United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). Two older but still quite valuable resources on issues related to insanity in criminal cases are MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* (1984) and ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* (1967). Under some circumstances defendants in criminal cases who cannot afford to employ the services of a psychiatrist are entitled to have such assistance at state expense. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

68 LAFAYE, *supra* note 63, at 491-495.

69 *Id.* at 529.

70 *See, e.g.*, Barbara A. Weiner, *Mental Disability and the Criminal Law*, in SAMUEL J. BRAKLE ET. AL., *THE MENTALLY DISABLED AND THE LAW* 705-06 (3d ed. 1985).

71 The ancient Chinese law did not recognize insanity as an excuse. *See supra* note 5.

A person with mental illness who causes harmful consequences at a time when he/she is unable to recognize or control his/her own conduct, upon verification and confirmation through legal process, shall not bear criminal liability; but his/her family members or guardian shall be ordered to subject him/her to strict surveillance and medical treatment.

A person with intermittent mental illness who commits a crime when he/she is in a normal mental state must bear criminal liability.

A person with mental illness who commits a crime when he/she has not yet completely lost the ability to recognize or control his/her conduct must bear criminal liability, but may be given a lighter or a mitigated punishment.

An intoxicated person who commits a crime must bear criminal liability.<sup>72</sup>

The Chinese Criminal Code has no formal counterpart to the American category of incompetent to stand trial. The Chinese police, however, routinely refer persons who have committed crimes but who appear to be insane to psychiatrists for evaluation. If the psychiatrist concludes that an individual is insane, that person will generally be released to her family, admitted to voluntary treatment at the request of the individual's family, or recommended for compulsory treatment.<sup>73</sup>

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72 Article 18 of the China Criminal Code of 1997 was added on March 14, 1997, by the Fifth Session of the Eighth National People's Congress. A somewhat similar provision was included in China Criminal Code of 1979 art. 15, *supra* note 12. For a discussion of the 1997 revisions of the Chinese Criminal Code, see Cai Dingjian, *China's Major Reform in Criminal Law*, 11 COLUM. J. ASIAN L. 213 (1997); Chen Jianfu, *Legalism with Chinese Characteristics: The Revision of the Criminal Law in the PRC*, 21 CHINA PERSPECTIVES 5 (Jan.-Feb. 1999). For useful background information, see Harold J. Berman et. al., *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIM. 238 (1982).

73 Article 18 as revised in the China Criminal Code 1997, *supra* note 72, authorizes compulsory treatment but does not specify the procedure. In practice the police often have the final decision. The 1995 China Police Law art. 14 authorizes the police to take temporary protective measures for persons with severe mental illnesses. As a practical matter, the police often make the initial decision as to whether persons with mental illness should be given compulsory treatment. In many cases the mentally ill, their legal representatives, and other interested parties have little opportunity to participate in the decision. Empirical studies indicate that there is often little opportunity for judicial review. In the absence of explicit criteria the police have sometimes in the past based their decisions on political considerations. Persons with mental illness have at times been detained for longer than necessary.



### B. *The Right to Counsel*

The UN Disabilities Convention requires “State Parties” to take “appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>74</sup> The Convention’s goal is to ensure that persons with disabilities enjoy human rights. It defines “discrimination against any person on the basis of disability” to be “a violation of the inherent dignity and worth of the human person.”<sup>75</sup> One way of assuring such dignity is by providing dedicated and effective counsel.<sup>76</sup> Without the presence of counsel, legal reform—in nations with developing economies as well as other countries--“will all too often be a hollow shell.”<sup>77</sup>

Representation by counsel is particularly important for persons with mental disabilities. Their mental disability often limits their ability to defend themselves. In addition, they are often confined in institutions. Allowing the mentally disabled to retain their own attorneys is extremely helpful. Many persons with mental disabilities, however, lack the resources to pay for their own attorney. Recognizing this problem, the Chinese Criminal Procedure Code of 2012 provides indigent accused persons with mental disabilities who are indigent a right to free counsel:

When the criminal suspect or defendant is ... a mentally ill person who has not completely lost his capacity to comprehend or to control his behavior, and such person has no appointed defender, the people’s court, the people’s prosecutor’s office, or the public security authority should notify the legal aid agency to assign an attorney as his defender.<sup>78</sup>

The 2012 revision of this article grants criminal defendants with mental disabilities the same right to free counsel as that long provided to persons with physical disabilities.<sup>79</sup> This represents important progress in protecting

<sup>74</sup> UN Disabilities Convention, *supra* note 16, art. 12(3).

<sup>75</sup> *Id.* at Preamble ¶ H.

<sup>76</sup> As one international expert noted, the presence of a vigorous, independent advocacy system (with trained, specialized counsel) is perhaps the most critical issue in determining whether any true mental health law reform is possible in any jurisdiction. See PERLIN, *supra* note 16, at 159.

<sup>77</sup> *Id.* at 162.

<sup>78</sup> China Criminal Procedure Code of 2012, *supra* note 24, art. 34. The English wording of the statutory language is provided by the authors of this article.

<sup>79</sup> The Criminal Procedure Code of 1996 gave defendants who were blind, deaf, or mute a right to appointed free counsel. The 1996 Code did not, however, give this right to mentally ill defendants. The first modern Chinese Criminal Procedure Code, the 1979 Criminal Procedure Code, drew heavily on a Russian model that had in turn relied to some extent on a German model. Like other inquisitorial systems these codes placed the primary responsibility for fact finding on the trial judge rather than the attorneys. Adopting a more adversarial approach, the 1996 China Code of Criminal Procedure gave prosecutors

the rights of persons with mental disabilities.

American experts have sometimes urged American courts to require special training for defense attorneys who represent defendants with mental problems. In a notable case many years ago the New Jersey public advocate stated the issue:

A defense attorney in a criminal trial involving the insanity defense, who is realistically expected to fulfill his proper role of adducing probative evidence in support of his client's claim and in challenging the State's evidence, must acquire the requisite psychiatric expertise to accomplish that task.<sup>80</sup>

While acknowledging that rigorous and skillful cross-examination of an opposing psychiatrist partially fulfills the goal of providing good representation,<sup>81</sup> the New Jersey public advocate argued that “calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense.”<sup>82</sup> Chinese defense attorneys face the same problem. Most have no more psychiatric expertise than their American counterparts.

Recognizing these problems, the 2012 Chinese Criminal Procedure Code offers a highly practical solution. Article 192 allows the defense to ask the court for a psychiatrist who can work with the defense. It states that: “The prosecutor, the defendant and the defender, and the agent ad litem may apply to the court for persons with specific expertise to appear before court to present their opinion on the opinion provided by a forensic examiner.”<sup>83</sup> In cases involving insanity issues, the defendant will frequently ask the court to appoint a psychiatrist with the “specific expertise” necessary to testify about the defendant’s condition and who can help the defense attorney cross-examine the prosecution’s witnesses, and who can assist with the case in other ways. Permitting the defense to use its own expert makes the trial more meaningful.

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and defense attorneys a considerably larger role. To assist in the transition, three law professors published a comparison in Chinese of how a hypothetical case would be handled in Germany (an accusatorial system), California (an adversarial system), and in China under the Chinese Criminal Procedure Code. See FLOYD FEENEY, JOACHIM HERRMANN & LILING YUE., ONE CASE: TWO SYSTEMS (2006). An earlier English language version did not include the Chinese comparison. FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE: TWO SYSTEMS (2005).

80 See Brief of Amicus for the New Jersey Department of the Public Advocate at 43, *Ake v. Oklahoma*, 470 U.S. 68 (1985).

81 *Id.* at 44.

82 *Id.* (quoting Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 746 (1974).

83 China Criminal Procedure Code of 2012, *supra* note 24, art. 192.

### C. *Right to Question and Confront Expert Witnesses*

The ordinary people whom lawyers call “lay witnesses” are often very important. They describe things that they have seen or heard. Their testimony is frequently relevant to the defendant’s mental status. Psychiatrists can generally go even deeper into the thinking process of the person accused. They can often identify the elusive and sometimes deceptive symptoms of insanity. They can tell the fact-finder why their observations are relevant. Some psychiatrists are able to go even further. They can translate their medical diagnoses into language that will assist judges and other decision-makers. The right of defendants in criminal cases to question and confront witnesses, including expert witnesses such as psychiatrists, is an important right. In the past defendants in criminal cases in China did not always have this right. Psychiatric testimony in the past was frequently presented by deposition rather than by live, in-court testimony.

The Chinese Criminal Procedure Code of 2012 requires expert witnesses to testify when (1) the opposing parties disagree about the expert testimony or (2) the judge finds it necessary for the expert witness to testify. An important part of the new Criminal Procedure Code excludes out-of-court statements by an expert witness if the expert refuses to testify after being subpoenaed by the court.<sup>84</sup>

Because cross-examination is sometimes able to clarify the testimony of experts and others as well as expose personal biases and questionable information, some Chinese experts believe that the defense should have a right to question the prosecution’s expert witnesses.

### D. *Court Supervision of Treatment*

The most important difference between the Chinese and the American procedures for handling the mentally ill who are charged with crimes concerns the issue of treatment. In the United States treatment decisions are generally entrusted to mental health or correctional agencies. The courts are rarely involved. In China, however, the courts are very involved.<sup>85</sup>

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<sup>84</sup> “Where the public prosecutor, the party or the defender, or the agent ad litem objects to the opinion of a forensic examiner, and the people’s court believes it to be necessary for a forensic examiner to appear before the court, the forensic examiner should appear to give testimony. Where a forensic examiner has been notified but does not appear to give testimony, the forensic examiner’s opinion may not be used as a basis for a decision.” China Criminal Procedure Code of 2012, *supra* note 24, art. 187(3).

<sup>85</sup> China, the United States, and many other countries provide a wide variety of private and

In the United States the most important treatment decisions generally come after the trial. At the trial the jury will be asked to decide whether the defendant is guilty or innocent. If the defendant claims that she was insane at the time of the crime, the jury will generally make the decision as to whether the defendant was legally insane at the time of the offense. If the jury finds the defendant not guilty by reason of insanity, the defendant rarely goes free. Most states require that the defendant be turned over to the mental health authorities for treatment.<sup>86</sup> Most of the decisions about how persons acquitted by reason of insanity will be treated will be made administratively by the treatment agency. The courts may occasionally be involved in issues such as the time of release or allegations of abuse. As a general matter, however, the courts are not deeply involved in treatment issues. Such decisions are generally left to the mental health and other agencies concerned.

The Chinese procedure is quite different. The courts are much more involved. Recognizing that “compulsory treatment” deprives mentally ill persons of their liberty, the Chinese Criminal Procedure Code of 2012 established a special procedure. Entitled “Compulsory Medication Procedures for Mentally Ill Persons,” this new procedure defines the scope, methods, and supervision mechanisms required for compulsory psychiatric treatment in criminal cases. Before a court may order compulsory treatment, the court must find three criteria to have been satisfied: (1) The mentally ill person has committed a violent crime, endangered public security, or caused death or injury to others; (2) The mentally ill person was found not guilty

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governmental voluntary treatment possibilities. Although these treatment possibilities are extremely important, this article does not attempt to describe them. For a discussion of the role of the law with respect to voluntary treatment, see Bernadette McSherry, *The Right of Access to Mental Health Care: Voluntary Treatment and the Role of the Law*, in *RETHINKING RIGHTS-BASED MENTAL HEALTH LAWS* 379 (Bernadette McSherry & Penelope Weller eds., 2010).

<sup>86</sup> In the United States the jury generally decides the issue of guilt or innocence. The judge, sitting without a jury, generally decides the sentence. If the defendant is found guilty of a serious crime, the defendant is generally sentenced to a correctional institution. How the defendant will be treated is then generally a matter for the correctional and mental health authorities rather than a matter for the courts. If the defendant is found not guilty by reason of insanity, the defendant is not guilty. The criminal case is over. Most American jurisdictions, however, generally require that the defendant be committed to the state mental health authority. The question of treatment, compulsory or otherwise, is then up to the mental health authorities.

If the defendant is found not guilty of the crime, the criminal case is at an end. Defendants who have been acquitted are generally free to seek help from the mental health authorities if they wish to do so. They are not, however, generally required to seek help. If the government authorities believe that the person who has been acquitted needs medical or other mental health help and the acquitted person chooses not to seek or accept such help, the government authorities have two choices: (1) let the acquitted person do what he or she wishes or (2) use civil commitment statutes to try to force the acquitted person to accept treatment.

because of insanity; (3) And the mentally ill person poses a continuing risk of danger to public safety. If the court finds that all three criteria have been met, the court is permitted to order that the mentally ill person receive medical treatment in a designated psychiatric hospital. Such hospitals are now called “Compulsory Treatment Centers”<sup>87</sup> Although evaluating “potential dangerousness” (or “continuing risk”) is difficult, the statutory criteria help practitioners identify the mentally ill who need compulsory treatment. The mental health agency, the police, or any other administrative agency involved may request compulsory treatment. A panel of judges, however, must hear the case and render the final decision.<sup>88</sup>

Judicial review does not stop with the initial commitment. The 2012 Criminal Procedure Code requires periodic judicial review of the need for continued compulsory treatment. The facility responsible for a detainee’s compulsory treatment must at specified times submit evaluations concerning the need for continued compulsory treatment. In addition, the individual undergoing compulsory treatment or his close family members may apply for a judicial order terminating the compulsory treatment. When the individual undergoing compulsory treatment or his family asks for a review, the court must convene a collegiate panel, perform a review, and within one month determine if the compulsory treatment should be terminated.

The 2012 Chinese Criminal Procedure Code recognizes the importance of protecting the rights of persons with mental disabilities who are undergoing or facing compulsory treatment. The law gives persons with mental disabilities who are accused of crime a right to the assistance of counsel.<sup>89</sup> If the accused cannot afford counsel, the accused is permitted to

87 China’s psychiatric service system is institutionally complex. It is uncertain how many administrative systems have their own psychiatric facilities. Four different departments provide most of the mental health services. The Ministry of Health and its local bureaus maintain the largest mental health service system. Nationally, these public psychiatric hospitals are accessible to urban and rural citizens who have health insurance. The Ministry of Civil Affairs and its local departments are the second largest provider. These facilities serve those who are jobless or homeless as well as families who are too poor to pay for their own care. The third largest system belongs to the military. Military hospitals are primarily for military personnel and their families. In recent years a number of these hospitals have begun providing care on a fee-for-service basis to local citizens. The provincial and municipal departments of public security provide a fourth system called “Ankang Hospitals”; these facilities provide care for mentally ill criminal offenders. *See* Yang Shao et. al., *Current Legislation on Admission of Mentally Ill Patients in China*, 33 INTL J. LAW PSYCHIATRY 52 (2010). Although most Ankang Hospitals are under the direct control of the public security organs, some are not. In a few provinces normal mental hospitals have been changed into Ankang Hospitals managed by the mental health authorities rather than the public security organs.

88 China Criminal Procedure Code of 2012, *supra* note 24, art. 286 provides that “[w]hen the people’s court admits an application for compulsory medical treatment, it should form a judicial panel for the hearing.”

89 *Id.*

ask the court to order the government to pay for counsel.<sup>90</sup> When the accused, a crime victim, the legal representative of either party, or a near relative of either party objects to a decision ordering compulsory treatment, the party that objects may appeal to the court at the next higher level.<sup>91</sup> In addition both the persons subject to compulsory treatment and those persons' family members can apply for termination of the compulsory treatment at any time.

The 2012 Chinese Criminal Procedure Code strengthened the prosecution's role in the decision-making process concerning compulsory treatment. The new law allows the prosecution to seek compulsory treatment and to express its views about how the administrative agency concerned is carrying out any compulsory treatment that has been authorized.<sup>92</sup>

It remains to be seen how such reforms will play out in practice. One thing is, however, now clear: compulsory treatment has been brought under the rule of law.

#### *E. Who Should Initiate Mental Examinations in Criminal Cases?*

There has long been a debate in China about which governmental agency should have the right to initiate mental examinations. The Criminal Procedure Code of 2012 did not attempt to resolve this issue. Like its predecessors it gives multiple agencies (police, prosecution, and the judiciary) the right to initiate mental examinations.<sup>93</sup> The 2012 law also, however, includes an important clarification.<sup>94</sup> It places the authority to initiate compulsory treatment squarely in the hands of the judiciary.<sup>95</sup>

Under the 2012 law, the defense has no right to initiate mental examinations. If one of the official agencies initiates an evaluation, the defense is allowed to apply for a supplementary evaluation after the governmental agency has completed its evaluation. Some Chinese scholars and practitioners believe that the defense should have an equal right to initiate mental examinations.<sup>96</sup> Preferring modest change rather than more

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* art. 287.

<sup>92</sup> *Id.* art. 289.

<sup>93</sup> See Zhiyuan Guo, *Who Should be Entitled to Initiate a Mental Examination Process? An Empirical Perspective*, in *COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA* 12 (Mike McConville & Eva Pils eds., 2013).

<sup>94</sup> China Criminal Procedure Code of 2012, *supra* note 24, art. 285(2).

<sup>95</sup> Although consistent with the international standards requiring judicial review, some Chinese scholars argue that this change is inconsistent with the mentally disabled person's right to autonomy.

<sup>96</sup> This approach uses an "adversarial" model.

fundamental reforms, most Chinese practitioners prefer the current model.<sup>97</sup> Many regard giving defendants a right to initiate mental examinations as a double-edged sword. Giving defendants a right to initiate mental examinations would, they believe, result in a great increase in the number of examinations. This would place huge additional burdens on a criminal justice system that already has workload problems. A further concern is the subjective and retrospective nature of such examinations. Many scholars believe that elements of this kind can easily be manipulated. Greatly increasing the number of examinations would, these scholars believe, increase the concerns that many government officials already have about the objectivity of such examinations.

Because there are important differences between capital cases and ordinary criminal cases, a twin-track approach may be appropriate. In capital cases, a policy of quasi-mandatory mental examinations should be adopted. Whenever a capital defendant requests a mental examination, official agencies should grant the request unless the defendant's sanity can be established by proof beyond a reasonable doubt. In non-capital cases, the official agencies should be required to give written justifications when they reject defense applications for mental examinations. When official agencies are uncertain about the existence of a psychiatric problem, they should consult with experts. Rejections should be supported by at least two written professional opinions.

Procedural safeguards for the defense should also be strengthened. First, when an official agency rejects an application for a mental examination, the defense should have a right to be informed in writing of the decision and the justifications. Second, the defense should be allowed to challenge decisions to deny examination. Possible remedies include a right to appeal or to request reconsideration. Third, the defense should be entitled to retain its own mental health professionals to witness and participate in any mental examination initiated by the official agencies.<sup>98</sup>

## V. CIVIL COMMITMENT REFORM

In some countries the most important legislation protecting the rights of persons with mental disabilities is the country's mental health law. As discussed earlier, China adopted its first modern mental health law in 2012.<sup>99</sup> The new law seeks to regulate the provision of mental health

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<sup>97</sup> See Zhiyuan Guo, *Empirical Survey Report on Procedural Safeguards for Mental Examinations in Criminal Proceedings*, 6 EVIDENCE SCIENCE 66 (2012).

<sup>98</sup> *Id.*

<sup>99</sup> This law had a long gestation period. Some authorities say that the drafting took twenty seven

services and to mobilize social institutions, including mental health departments, to promote awareness of mental health issues. The part of the new law that attracted the most attention—both inside and outside China—was the civil commitment procedure. This attention was not surprising. The policies governing involuntary civil commitments affect basic human rights and constitute one of the most fundamental components of any nation's mental health system.<sup>100</sup>

The United Nations Convention on the Rights of Persons with Disabilities views institutionalization “as a last resort”<sup>101</sup> and takes a “stronger” position on this issue than any prior UN document.<sup>102</sup> The Convention asserts that persons with disabilities should enjoy the right to liberty and security of person on an equal basis with others.<sup>103</sup> The “existence of a disability,” it provides, “shall in no case justify a deprivation of liberty.”<sup>104</sup> In other words, the existence of disabilities “will never provide adequate grounds for detention in a prison, hospital or other residential institution that a person simply has a particular physical, intellectual or psycho-social condition.”<sup>105</sup> Psychiatric commitment should in most cases follow the principle of voluntariness. This is the only way to be consistent with the Convention's bedrock principles—the right to autonomy, dignity, privacy, and bodily integrity. Although the Convention does not abolish involuntary civil commitments, it requires that involuntary “commitment be absolutely the last resort, that such commitment be based on a finding of serious mental illness (and significant dangerousness to self or others as a result of that mental illness).”<sup>106</sup> The World Health Organization seeks to establish autonomy and informed consent as the basis of the treatment and rehabilitation of people with mental disorders.<sup>107</sup> Applying these international standards, China's 2012 Mental Health Law adopts voluntary hospitalization as a basic principle. The new Mental Health Law also recognizes, however, the need for involuntary civil

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years.

100 See generally *supra* Part I.

101 See Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 565 (2009).

102 *Id.*

103 UN Disabilities Convention, *supra* note 16, art. 14.1.

104 *Id.* art. 14(b).

105 Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT'L L. & COM. 563, 612 (2007).

106 See PERLIN, *supra* note 16, at 156 n.41.

107 See World Health Organization, *Promoting and Protecting the Rights of People with Mental Disorders*, [http://www.who.int/mental\\_health/policy/Promoting\\_and\\_protecting\\_rights\\_English1.pdf](http://www.who.int/mental_health/policy/Promoting_and_protecting_rights_English1.pdf) (last visited Feb. 5, 2018).



commitments for persons who are dangerous.<sup>108</sup>

#### A. *Principle of Voluntariness for Diagnosis*

China's new mental health law embraces the principle of voluntariness. An individual may not be medically evaluated to determine whether he or she has a mental disorder against his or her own will. Close family members may, however, deliver a person suspected of having a mental disorder to a medical establishment for a mental disorder diagnosis.<sup>109</sup> This exception is necessary because persons with mental disorders are sometimes so incapacitated that they cannot function on their own. They need outside help. Close family members are often the persons in the best position to provide the help needed.<sup>110</sup> When family members present a relative for diagnosis, such diagnoses must be performed without delay.<sup>111</sup>

#### B. *Principle of Voluntariness for Hospitalization*

Mental hospitals in China have traditionally, at the request of patients' relatives<sup>112</sup> or the police,<sup>113</sup> been authorized to take patients from their homes and forcibly admit them. In the past voluntary hospitalization and treatment of persons was not the norm. In 2002, for example, a national survey covering seventeen Chinese cities showed that only 18.5 percent of the admissions to mental health hospitals were voluntary.<sup>114</sup> Although

108 For a brief overview of American mental health law principles for persons not involved in the criminal justice system, see Richard J. Bonnie, *Three Strands of Mental Health Law: Developmental Mileposts*, in *THE EVOLUTION OF MENTAL HEALTH LAW* 31 (Lynda Frost & Richard J. Bonnie eds., 2001). For a sample of current commentary see Sara Gordon, *The Danger Zone: How the Dangerousness Standard in Civil Commitment Proceedings Harms People with Serious Mental Illness*, 66 CASE WEST. L. REV. 657 (2016).

109 China Mental Health Law of 2012, *supra* note 36, art. 28.

110 While close family members often have the best interests of their relatives in mind, this is not always the case. If a close family member wants to control a child or a relative, civil commitment can be a powerful weapon. A few years ago, for example, the Chinese media reported a case in which one spouse committed the other spouse for treatment in order to claim the marital assets. In another case the parents of Chen Dan (a female Beijing engineer) delivered their daughter for diagnosis because they disapproved of her boyfriend. The Chinese on-line sources that reported these matters are no longer available. They are, however, on file with the authors.

111 China Mental Health Law of 2012, *supra* note 36, art. 29. Early drafts of this law limited the period for diagnoses of this kind to seventy-two hours.

112 See Sharon LaFraniere & Dan Levin, *Assertive Chinese Held in Mental Wards*, N.Y. TIMES (Nov. 11, 2010), <http://www.nytimes.com/2010/11/12/world/asia/12psych.html>.

113 In China a basic form of involuntary admission at the request of police is called "medical protection hospitalization." Such hospitalization requires a specific and confirmed mental disorder diagnosed according to China's diagnostic system (CCMD-3) or diagnostic criteria adopted internationally (ICD-10). See Yang Sharo et al., *Current Legislation on Admission of Mentally Ill Patients in China*, INT'L J. LAW & PSYCH., Jan.-Feb 2010, at 52, 54.

114 Pan Zongde et. al., *A Survey on Psychiatric Hospital Admission and Related Factors*, 13 J.

involuntary admissions help some patients get much-needed treatment, such admissions have the potential to do harm as well as good.

The principle of voluntariness is important for hospitalization and other forms of residential treatment as well as for less intrusive types of treatment.<sup>115</sup> The new mental health law embodies this principle. The new law recognizes, however, that there must be some exceptions. It states that when the person involved “has already exhibited self-harming conduct or there is a danger of self-injury; or [the person involved] ... has already exhibited conduct that endangers the safety of others, or there is danger that he or she will endanger the safety of others,” the person with mental illness may be committed to a mental hospital against his or her will<sup>116</sup>

The new law emphasizes voluntary hospitalization and voluntary care as the first-line of treatment. Before providing treatment, the new law requires mental health providers to obtain informed consent from the patient or the patient’s guardian. Involuntary treatment can be used only when authorized by the patient’s guardian or when necessary to prevent danger or the risk of danger. To minimize the risk of harm from involuntary treatment, the Mental Health Law gives both mental patients and their guardians the right to contest the decision to use involuntary hospitalization. When the person suspected of being mentally ill has already exhibited self-harming conduct or shown a danger of self-injury, the new law gives that person’s guardian the authority to agree to residential therapy. If the person suspected of being mentally ill or that person’s guardian opposes residential treatment, either can request a second diagnosis or an independent expert evaluation.<sup>117</sup> The new mental health law also grants both patients and their guardians the right to file lawsuits if they believe the patient’s rights have been infringed.<sup>118</sup>

Most of the safeguards in the 2012 law assume that guardians will act in the patient’s best interests. Some experts have concerns about whether the 2012 law includes adequate controls over the patient’s guardians.<sup>119</sup>

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CLINICAL PSYCHOL. MED. 270 (2003).

<sup>115</sup> See China Mental Health Law of 2012, *supra* note 36, art. 30 (“In-patient therapy for mental disorders follows a voluntariness principle”).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* art. 32.

<sup>118</sup> China Mental Health Law of 2012, *supra* note 36, art. 82 states: “When persons with mental disorders or their guardians or close family members feel that an administrative organ, medical establishment or other relevant unit or individual has violated this law and infringed a person with a mental disorder’s lawful rights and interests, they may file suit in accordance with law.”

<sup>119</sup> For a more detailed discussion of problems with guardians, see Jeremy Daum, *Still Crazy After All These Years*, CHINA LAW TRANSLATE (May 20, 2013), <http://www.chinalawtranslate.com/still-crazy-after-all-these-years/?lang=en> (last visited Feb. 5, 2018).

## VI. PROPOSALS FOR FUTURE MENTAL HEALTH LAW REFORMS

The new Chinese mental health law is a major accomplishment and a significant advance. New laws, however, are rarely perfect. This section discusses some of the more important proposals for future reforms.

### A. *Right to Effective Counsel in Criminal Cases*

Under China's new Criminal Procedure Code persons with serious mental illnesses who are accused of crimes are entitled to the assistance of counsel. If the accused cannot afford to hire a defense attorney, the court must appoint a free defense attorney.<sup>120</sup> The Code does not require the appointment of a defense attorney for the mentally ill, however, until the court has scheduled a commitment hearing.<sup>121</sup> Commitment hearings can occur at any stage of the proceeding—either early or late.<sup>122</sup> If the accused has diminished capacity instead of a serious mental illness, the accused is in an even better position. The accused is entitled to a free defense counsel as early as the investigation stage of the proceeding.<sup>123</sup> As a practical matter, persons with diminished capacity now enjoy greater protection than those found not responsible by reason of insanity.

The right to free counsel throughout the whole process of criminal proceedings is the most important step now needed for defendants in criminal cases who have mental problems.<sup>124</sup> A second issue that should be

<sup>120</sup> China Criminal Procedure Code of 2012, *supra* note 24, art. 286 states that “[i]f the subject of the application or defendant has not been appointed a litigation representative, a legal aid organization shall be contacted to appoint a lawyer to serve as his legal representative and to provide him with legal assistance.”

<sup>121</sup> A suspect or defendant with a mental disability cannot be called “the subject of application” until the prosecutor’s office files an application for compulsory treatment with the court. The earliest opportunity for a free defense counsel is after this application has been filed.

<sup>122</sup> When a commitment hearing occurs depends on when the case is diverted from the regular criminal proceeding. If the police initiate a mental examination and the suspect is found to be insane, the commitment hearing occurs at the investigative stage. If a prosecutor initiates the mental examination, the commitment hearing occurs at the prosecution stage. If a court discovers the potential insanity issue, the commitment hearing generally occurs at the trial stage.

<sup>123</sup> “When the criminal suspect or defendant is blind, deaf or mute, or is a mentally ill person who has not completely lost his capacity to comprehend or to control his behavior, and such person has not appointed a defender, the people’s court, the people’s prosecutor’s office or the public security authority should notify the legal aid agency to assign an attorney as his defender.” China Criminal Procedure Code of 2012, *supra* note 24, art. 34.

<sup>124</sup> In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that indigent defendants in criminal cases have a right to the assistance of defense counsel. The U.S. Supreme Court stated that the right to counsel was one of the “fundamental safeguards of liberty ... protected against state invasion by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 341. In later

considered in the future is the need for further efforts to ensure that any defense counsel provided is effective. Prominent writers have long argued that the right to counsel should mean something more than placing “a warm body with a legal pedigree next to a defendant.”<sup>125</sup> Without the presence of adequate counsel, judicial systems have difficulty providing human rights protections for persons with mental disabilities.

Persons with mental disabilities often lack the ability to defend themselves. Typically, they are both vulnerable and powerless. Because there is considerable prejudice against the mentally disabled, their situation is particularly difficult.<sup>126</sup> Some lawyers lack significant knowledge about mental disease. Sometimes they distrust their mentally disabled clients. Occasionally they even go so far as to trivialize their clients’ defenses.<sup>127</sup> Some authorities believe that the only truly effective solution is to require that those who wish to represent the mentally ill undergo special training in psychiatry and the mental health sciences.

Although China has many excellent criminal defense attorneys, the overall quality of legal representation afforded defendants needs considerable improvement.<sup>128</sup> For the present, however, the goal of improving access to basic legal representation is much more important.

### *B. Access to Psychiatric Assistance at State Expense in Criminal Cases*

Most modern governments make the defendant’s mental condition a factor in determining whether a defendant is guilty of a crime. Many excuse defendants who are found to have been insane at the time of the offense. In some legal systems the testimony of lay witnesses is sufficient to support a defendant’s claim of insanity. Lay witnesses are likely, however, to consider only the most severe symptoms to be indications of mental illness.

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cases the U.S. Supreme Court expanded the right to defense counsel to other stages of the criminal process.

<sup>125</sup> See, e.g., David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 819 (1976). See also *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronin*, 468 U.S. 648 (1984).

<sup>126</sup> Professor Perlin calls this prejudice “sanism.” PERLIN, *supra* note 16, at 34.

<sup>127</sup> *Id.* at 165-166. Knowledgeable observers believe that defense attorneys sometimes fail to form authentic attorney-client relationships, sometimes reject their clients’ potential contributions to the development of effective case strategies, and sometimes fail to evaluate correctly the degree of harm that particular case outcomes will have on their clients. Some authorities argue that prejudice permeates the legal representation process both in cases in which mental capacity is a central issue and in those cases in which mental capacity is a collateral question.

<sup>128</sup> This impression comes from an empirical survey on effective counsel in a number of Chinese jurisdictions during 2012 and 2013. Conducted by Guo Zhiyuan, the survey has not yet been published.

Judges and other factfinders sometimes find it difficult to evaluate the observations and conclusions of the lay witnesses. They often give preference to the testimony of mental health experts—particularly the testimony of psychiatrists and psychologists. As the U.S. Supreme Court sensibly pointed out: “[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.”<sup>129</sup> In China, as a practical matter, a defendant has little chance of succeeding with an insanity defense without expert assistance. Unfair prejudice may result if a defendant cannot rebut the testimony of the prosecution’s experts. The new Chinese Criminal Procedure Code solves this problem by allowing each party to retain its own experts to conduct cross-examination in the courtroom.<sup>130</sup> Some Chinese defendants are able to make good use of this part of the new law. Others, however, lack the resources necessary to hire psychiatric experts.

Future law reformers should consider whether indigent defendants with mental problems need this kind of expert assistance. If yes, the reformers should consider how this kind of expert assistance can be provided. Appointed psychiatrists could provide mental examinations and act as a defense consultant. This would help to ensure that indigent defendants would not be in a worse position than wealthy defendants with regard to psychiatric assistance. Rationales similar to those justifying legal assistance for all defendants in criminal cases (*e.g.*, equal protection, due process, and meaningful access to justice) strongly support providing psychiatric assistance at state expense to those mentally ill defendants who are indigent.

### C. *Least Restrictive Alternative Treatment in Criminal Cases*

International norms entitle persons with mental disabilities to the least restrictive alternative course of treatment. This principle applies even if the mental patient is institutionalized.<sup>131</sup> China’s new Criminal Procedure Code

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<sup>129</sup> *Ake v. Oklahoma*, 470 U.S. 68, 82 (1986), citing among other sources, Martin R. Gardner, *The Myth of the Impartial Psychiatric Expert--Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 L. & PSYCHOLOGY REV. 99, 113-114 (1976). In the United States, for example, it is widely believed that indigent defendants’ inability to obtain payment for expert witnesses and investigators has sometimes resulted in erroneous convictions.

<sup>130</sup> China Criminal Procedure Code of 2012, *supra* note 24, art. 192. The defense can consult with a psychiatrist anytime but cannot initiate the first mental examination. If an official agency (police, prosecutor, or judge) orders a mental examination, the defense can hire a psychiatrist to reexamine and can introduce expert testimony concerning any examination that has been made.

<sup>131</sup> UN Disabilities Convention, *supra* note 16, art. 14(2) provides that “States Parties shall ensure

adopts this principle.<sup>132</sup> To prevent persons with mental disabilities from posing a threat to the safety of themselves or others, the Code provides that “[w]ith respect to a mentally ill person who has committed acts of violence, the relevant public security organ may take protective and temporary restraining measures thereon before the people’s court renders a decision on compulsory medical treatment.”<sup>133</sup>

To implement this part of the new Criminal Procedure Code, the Ministry of Public Security created a set of case-handling rules. These rules require all restraints to be approved by high level Ministry officials.<sup>134</sup> The Ministry rules also require that restraints be removed when there is no further danger to society.<sup>135</sup> The Ministry’s rules say that the means, methods, and intensity of the restraints used should not go beyond what is needed to avoid danger to the public security and to the personal safety of the persons with mental illness.<sup>136</sup> These rules reflect the public security organ’s desire to restrict the use of temporary protective restrictions to situations in which such measures are necessary. The restrictions imposed by the Ministry are clearer than the language of the Criminal Procedure Code, but still not as precise as desirable.

#### *D. Community-based Treatment in Both Civil and Criminal Cases*

The 1991 UN Mental Illness Principles recognized community integration as an important goal. The principles provide that “every person with a mental illness shall have the right to live and work, to the extent

that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.” Article 2 states that “[r]easonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

<sup>132</sup> 2012 Mental Health Law art.30 (“In-patient therapy for mental disorders follows a voluntariness principle.”).

<sup>133</sup> China Criminal Procedure Code of 2012, *supra* note 24, art. 285.

<sup>134</sup> Ministry of Public Security Regulation on Implementation of the Criminal Procedure Law art. 333, U.S.-ASIA LAW INST., <https://static1.squarespace.com/static/55d21ffce4b0d22e803fdca1/t/564f9309e4b0735fa769f393/1448055561267/MPSRegulations.pdf> (requiring such officials to be county level or above) (last visited Apr. 17, 2018) [hereinafter *Regulation*].

<sup>135</sup> *Id.* art. 334. In China a basic form of involuntary admission at the request of police is called “medical protection hospitalization.” See Yang Shao et al, *supra* note 113, at 54.

<sup>136</sup> For those mentally ill persons who do not pose a danger to society, *Regulation, supra* note 134, art. 334 provides that, if restraining measures can be removed without creating a danger to society, the public security organs shall remove the temporary protective measures.

possible, in the community,<sup>137</sup> and that “every patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives.”<sup>138</sup> The community integration principle is a logical corollary of the mental patients’ right to the least restrictive alternative course of treatment. This principle has major implications for the structure of mental health systems. It requires state parties to provide community-based, rather than institution-based, care to persons with psychosocial and intellectual disabilities.

Writing for the U.S. Supreme Court in *Olmstead v. L.C.*, Justice Ginsburg concluded that “[u]njustified isolation...is properly regarded as discrimination based on disability.”<sup>139</sup> The Supreme Court majority recognized, however, that in order to develop effective systems, the individual states must have considerable leeway in planning and implementation. “If, for example,” the Court said, “the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace, the standard would be met.”<sup>140</sup>

Because involuntary commitment constitutes a deprivation of liberty, alternative treatments should be offered to the extent possible. This is the meaning of the community integration principle. Future reforms should consider going further with this idea. Psychiatric probation is one promising idea that should be considered for future implementation. Psychiatric probation is a type of community-based treatment. It allows out-patient treatment for those who are able to regain control of their actions while taking medicine, with maintaining a drug regimen as a condition of release. Psychiatric probation could be offered to persons with mental disabilities as a less restrictive treatment option or as a method for post release treatment.

#### *E. Judicial Review of Involuntary Civil Commitments*

Many consider the idea that all people are entitled to a full and impartial judicial hearing prior to a loss of liberty to be a basic jurisprudential principle.<sup>141</sup> Especially in the area of involuntary civil commitment law the presence of regular and ongoing judicial review has served as a bulwark of protection against arbitrary state action. To reduce the discretion of

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137 The 1991 UN Mental Illness Principles, *supra* note 46, Principle 3.

138 *Id.* at Principle 7(1).

139 527 U.S. 581, 597 (1999).

140 *Id.* at 605-606. See PERLIN, *supra* note 16, at 95.

141 See Larry Gostin, *Human Rights in Mental Health: A Proposal for Five International Standards Based Upon the Japanese Experience*, 10 INT’L J. L. & PSYCHIATRY 353, 360 (1987).

physicians and limit medical paternalism many countries have enacted laws transferring the authority to order an involuntary admission from physicians to non-medical authorities. Although the new Chinese Mental Health Law can be triggered by an act of violence or a court proceeding before commitment, neither is required. A risk of dangerousness to other persons that is verified by a psychiatrist suffices.<sup>142</sup> If the mentally disturbed person or that person's guardian objects to commitment, the case will be reviewed by two additional psychiatrists. If the two additional psychiatrists agree that the patient is dangerous to others, the patient may request an opinion from psychiatrists or other experts. If dissatisfied with this final review, the disturbed person or that person's guardian may hire a forensic evaluator for a final review.<sup>143</sup> Taken as a whole, these provisions suggest that the diagnosis of mental disorders under the Mental Health Law of 2012 is a medical, not a legal, determination. The courts have little or no role.<sup>144</sup>

Article 82 of the Mental Health Law of 2012 gives individuals, their guardians, and their family members a right to sue for violations of the Mental Health Law or of a patient's legal rights. The courts play a role that is more remedial than supervisory. The Mental Health Law procedures are medical in nature. Lacking the procedural protections of the courtroom, they provide an easy way to confine a person indefinitely without court review.

The World Health Organization (WHO) has developed a checklist of international standards for mental health legislation. China's new Mental Health Law lacks some of the protections on the WHO checklist. The missing protections include: (1) the existence of an independent authority to authorize all involuntary admissions; (2) speedy time frames during which the independent authority must make a decision; and (3) timely periodic reviews of admission by an independent authority.<sup>145</sup> Many of the shortcomings of the Chinese Mental Health Law reflect a longstanding bias which prioritizes the patient's right to receive treatment over the patient's right to autonomy.

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142 China Mental Health Law of 2012, *supra* note 36, art. 29, provides that "the diagnosis of mental disorders shall be made by certified psychiatric physicians." Nationally, China has about 3,000 psychiatric evaluators.

143 *Id.* at art. 32.

144 There still lingers a longstanding stigma against mental illness. The popular assumption is that mentally ill persons pose a threat to the social order. As a result, there is a long history of legislation leaning more toward the ensuring of public safety than the guaranteeing of patients' rights. See L. Park et al., *Mental Health Care in China: Recent Changes and Future Challenges*, 6 HARV. HEALTH POL'Y REV., Fall 2005, at 35-45.

145 See Yang Shao et al., *supra* note 87.



*F. Free Counsel in Civil Commitment Cases*

One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel.<sup>146</sup> The Convention on the Rights of Persons with Disabilities commands that:

State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>147</sup>

When a person is facing a potential loss of liberty, it is essential for that person to have access to a court and the opportunity to be heard either in person or if necessary through some form of representation. The right to legal representation is just as important as judicial review. Granting individuals the right to retain their own attorneys to represent them is insufficient. Many are simply unable to pay for an attorney. The law should go further and clearly state that individuals who are subject to the involuntary commitment process have a right to representation by an attorney. If they cannot afford an attorney, an attorney should be provided free of charge.<sup>148</sup> As previously mentioned, the Criminal Procedure Code of 2012 grants indigent persons charged with crimes the right to free counsel.<sup>149</sup> This right was not, however, granted to indigent persons facing involuntary civil commitment under the Mental Health Law. This disparity between the Criminal Procedure Code and the Mental Health Law is unfair.

The right to an attorney is essential to ensure that the patient's rights are protected in the involuntary civil commitment process. If attorneys are to play this role effectively, they need to have adequate training and skills as well as mere presence.<sup>150</sup>

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<sup>146</sup> See PERLIN, *supra* note 16, at 159.

<sup>147</sup> UN Disabilities Convention, *supra* note 16, art. 13(1).

<sup>148</sup> MENTAL DISABILITY ADVOC. CTR., MENTAL HEALTH LAW OF THE KYRGYZ REPUBLIC AND ITS IMPLEMENTATION, §4.1.2.i. See PERLIN, *supra* note 16, at 88.

<sup>149</sup> See *supra* note 120.

<sup>150</sup> *In re Mental Health of K.G.F.*, 29 P.3d 485, 493-494 (Mont. 2001). See Michael L. Perlin, *I Might Need a Good Lawyer, Could Be Your Funeral, My Trial: Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J. L. & POL'Y 241, 246-249 (2008).

### G. Greater Control Over Guardians

Under China's 2012 Mental Health Law guardians play an important role in protecting the rights of persons with mental disabilities. The new law confirms and clarifies the traditional responsibility that guardians have had for the care of persons with mental disabilities. The new law gives guardians extensive powers. If the mentally ill person has already exhibited self-harming conduct or there is a danger of self-injury, the new law allows the guardian to decide whether residential therapy is appropriate or not.<sup>151</sup> Guardians also have the right to see the patient's medical file even when the patient is not allowed to see the file.<sup>152</sup>

The new guardianship provisions are a significant improvement over the older law. One issue that warrants consideration in the future is whether guardians should be required for all mentally disturbed persons. The pre-2012 Chinese civil law required guardians for all mentally disturbed children. Mentally disturbed adults, however, were required to have guardians only if the mentally disturbed adult was legally incompetent.<sup>153</sup> The new Mental Health Law defines "guardians" as "persons who may assume the role of guardian as provided in the relevant provisions of the General Principles of the Civil Law."<sup>154</sup>

A second issue warranting future consideration is whether all guardians should be appointed by a court. The 2012 law does not require court appointment. It appears to assume that a person is mentally incompetent when a person authorized to act as a guardian begins to act as a guardian. The 2012 law also appears to assume that the guardian will always behave in the best interests of the person with mental disabilities. This creates a risk that some guardians will violate the rights of the persons with mental disabilities. A third question for future consideration is whether all guardians or some guardians should be required to report periodically to a court.<sup>155</sup>

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151 China Mental Health Law of 2012, *supra* note 36, art. 31.

152 *Id.* art. 47.

153 Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated at the Fourth Session of the Sixth Nat'l People's Cong., April 12, 1986, effective Jan. 1, 1987), arts. 16, 19.

154 China Mental Health Law of 2012, *supra* note 36, art. 83, ¶ 3.

155 A New York case, *Matter of Mark C.H.*, 28 Misc.3d 765 (2010)), discusses this kind of problem. The court relied in part on U.N. Disabilities Convention, *supra* note 16, art. 12. *See also* PERLIN, *supra* note 16, at 221.

### H. *Need to Consider Special Problems*

The very important issues discussed in sections (A)-(G) concern general questions of the criminal and civil laws related to the mentally ill that China will need to consider at some point in the future. In addition to these general matters that apply across a broad spectrum of the criminal and the civil law, China like most other countries may find it desirable to consider some much more specialized problems. One such problem that is now attracting attention in the United States is the issue when the mentally ill should be considered competent to give consent in sexual matters.<sup>156</sup>

## VII. CONCLUSION: COORDINATING CRIMINAL AND CIVIL COMMITMENTS AND THE WORLD BEYOND

Any detailed comparison of the process required in China for making involuntary commitments in criminal cases with the process used for involuntary commitments in civil cases will show that the pace of development in these two areas is uneven. The law governing involuntary civil commitments should provide better protection of the rights of persons with mental disabilities. Among other things the law should provide free and adequate counsel and regular judicial review.

Serious consideration should also be given to better coordination and better integration of the two systems. The patients in one system are often past or future patients in the other system. Should transfers from the criminal system to the civil system be made easier? If a community integration program is in place, for example, mentally ill persons who are released from the criminal justice system are much less likely to commit new offenses if they receive services from the civil system.<sup>157</sup> The Mental Health Law already mobilizes social forces to participate in the care of persons with mental illness in the local area.<sup>158</sup> Such care could include supervision over those released under psychiatric probation orders.

An even greater obstacle to community-based treatment may be the lack of professionals who can work in the community to ensure that out-patients take their medicines every day. Very few medical students want to be psychiatric experts due to the longstanding stigma attached to both persons with mental illness and mental health professionals. Better protection for those with mental illness may depend ultimately on changing public

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<sup>156</sup> See, e.g., Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y. U. L. REV. \_\_\_\_ (forthcoming 2018).

<sup>157</sup> Lack of medication and supervision is a common cause of new offenses.

<sup>158</sup> See China Mental Health Law of 2012, *supra* note 36, ch. 4 (Recovery from Mental Illness).

attitudes towards mental illness and disability. This will not be easy, but it is possible.

Predicting the future is hazardous. There are, however, good reasons to believe that the next twenty-thirty years will vastly increase our knowledge about how the human brain works. The mapping of the human genome and other powerful new analytic tools have already led to knowledge that would have seemed impossible a generation ago.

In 2013, the United States and Europe each began a separate major new initiative focused on the human brain.<sup>159</sup> These initiatives are unlikely to produce earthshaking new revelations of the kind brought about by the fabulous new telescopes of the last century.<sup>160</sup> These new initiatives are, however, likely to produce major new understandings as to how the human brain works. These initiatives will take a decade or two, however, to complete their work. And it is likely to take even more time before any new knowledge about the brain leads to a deeper understanding of insanity and other brain malfunctions. Eventually, however, as this new knowledge begins to come on stream, it is likely to have a profound effect on the way that humans live.<sup>161</sup> It is also likely to have a profound effect on the way that China and every other nation deals with the problem of mental health.

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159 The American initiative is called The Brain Initiative. Its official name is “Brain Research through Advancing Innovative Neurotechnologies.” This initiative is aimed at revolutionizing human understanding of the human brain. By accelerating the development and application of innovative technologies, researchers will be able to produce a revolutionary new dynamic picture of the brain that, for the first time, shows how individual cells and complex neural circuits interact in both time and space. The European initiative is called the Human Brain Project. This large ten-year scientific research project started in 2013 and aims to build a collaborative scientific research infrastructure to allow researchers across the globe to advance knowledge in the fields of neuroscience, computing, and brain-related medicine. Largely funded by the European Union, the project is based in Geneva, Switzerland. For a glimpse into both the potential and the problems involved in the emerging science, see KEVIN DAVIS, *THE BRAIN DEFENSE: MURDER IN MANHATTAN AND THE DAWN OF NEUROSCIENCE IN AMERICA’S COURTROOMS* (2017); A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE (Stephen J. Morse & Adina L. Roskies eds., 2013).

160 “Hunting the Edge of Space” was a public television series demonstrating how the dramatic telescopes of the 1900s expanded human knowledge of the universe. The series is available at: *Hunting the Edge of Space: How Telescopes Have Expanded our View of the Universe*, PBS, <http://www.pbs.org/wgbh/nova/space/hunting-edge-space.html> (last visited Dec. 30, 2017).

161 See, e.g., YUVAL N. HARARI, *HOMO DEUS: A BRIEF HISTORY OF TOMORROW* (2017); ADAM PIRE, *THE BODY BUILDERS: INSIDE THE SCIENCE OF THE ENGINEERED HUMAN* (2017); Leslie Nguyen-Okwu, *Why America Will Lose the Biohacking Race*, OZY.COM (Mar. 21, 2017), [http://www.ozy.com/pov/why-america-will-lose-the-biohacking-race/75817?utm\\_source=dd&utm\\_medium=email&utm\\_campaign=03212017&variable=7e70547aeff414dfd0b54c250871b5d5](http://www.ozy.com/pov/why-america-will-lose-the-biohacking-race/75817?utm_source=dd&utm_medium=email&utm_campaign=03212017&variable=7e70547aeff414dfd0b54c250871b5d5).