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Book Reviews

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LEGAL RIGHTS OF THE MENTALLY HANDICAPPED. Edited by *Bruce J. Ennis*† and *Paul R. Friedman*,†† with assistance by *Bonnie Gitlin*. New York: Practising Law Institute—Mental Health Law Project, 1973. Pp. 1533 in three volumes.[1] $20.00.

This three-volume collection was originally prepared for distribution to a seminar on the legal rights of the mentally handicapped, held in November of 1973; because almost the whole area of mental health law is new and unsettled, much of the material came from opinions, briefs, and portions of the trial records of only a small handful of cases which may prove to be landmark cases in the area. The remainder of the compilation includes detailed essays, usually in outline form, by lawyers with litigation experience in the mental health area and by other mental health professionals, and a topic list and annotated bibliography of cases, articles, and briefs on each of the separate issues discussed.

The work is designed as a practical guide for the legal practitioner in the mental health area; thus, there is little academic discussion of how society should deal with the mentally handicapped as a matter of public policy, and a great deal of material[2] concerning one approach to the improvement of the conditions of mentally handicapped confined in institutions—the "right to treatment" suit.

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1. Volumes 57, 58, and 59 of the *Criminal Law and Urban Problems Course Handbook Series*.

2. *E.g.*, the volumes contain two articles which would appear to be a must for anyone involved in litigation in this area—a brief essay, by Bruce J. Ennis, *Litigation: Strategies and Techniques*; and a somewhat longer work, by Patricia M. Wald and Lawrence Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs*, which the editors have reprinted by permission of the *American Criminal Law Review*. Both articles contain valuable tips on such matters as how to choose a plaintiff; how to gather information before drafting the complaint; how to draft the complaint so as to allege only those facts which will institute a denial-of-adequate-treatment action which can be proved by the use of witnesses who will be available at trial; and how best to use discovery in order to build your case and achieve results.

Such a suit, on behalf of the residents of an institution, was the subject of *Wyatt v. Stickney*.[3] Right to treatment suits are based on the contention that involuntarily confined mentally handicapped individuals are entitled to a certain minimum standard of care under the equal protection clause, the due process clause, and the prohibition against cruel and unusual punishment contained in the United States Constitution. *Wyatt* was the first instance of a judicial recognition of a right to treatment in a case specifically brought to compel the administrators of a mental institution to provide adequate treatment. The court developed standards designed to guarantee the plaintiff-residents the adequate treatment to which, the court concluded, they had a constitutional right.

The wealth of material from the record of *Wyatt* contained in these volumes[4] discloses much that would not be apparent from a reading of the opinion. For example, the reader learns the origins of the standards adopted by the district court as the "Minimum Constitutional Standard for Adequate Treatment of the Mentally Ill," and the "Minimum Constitutional Standards for the Adequate Rehabilitation of the Mentally Retarded."[5] Both sets of standards include provisions against uncompensated patient labor; minimum nutritional requirements; provisions requiring individualized examinations and treatment plans; a requirement that every mentally handicapped citizen have the least restrictive setting necessary for treatment; provisions for transitional services after release; and detailed physical requirements and restrictions on the use of medicine, discipline, and invasion of privacy by the institution to insure a

3. 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The first cases to recognize a "right to treatment" were Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); and Nason v. Superintendent, 353 Mass. 604, 233 N.E.2d 908 (1968). Both cases were brought on behalf of individual residents of mental institutions who attacked their confinements because they were allegedly not receiving the treatment, the provision for which was the government's justification for confinement. *See also* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated and remanded, 422 U.S. 563 (1975).

4. In addition to the full reprinting of the opinion of the district court, this work also includes the brief filed by amici curiae American Association on Mental Deficiency, American Civil Liberties Union, American Orthopsychiatric Association, American Psychological Association, National Association for Mental Health and National Association for Retarded Children (two of the three attorneys who prepared this brief—Bruce J. Ennis and Paul R. Friedman of the Mental Health Law Project—are the co-editors of the work herein reviewed); excerpts from various post-trial memoranda prepared by amici; and excerpts from the trial testimony.

5. Both are attached at Appendix A to the opinion, 344 F. Supp. at 379, and 344 F. Supp. at 395.

humane psychological environment. The amici brief filed in the Fifth Circuit indicates that almost all of these standards were not only supported by the testimony of many nationally recognized experts who testified at two hearings held by the court, but were also either agreed to by all of the parties or were recommended by the defendants themselves.

The record, together with the brief comments of Paul Friedman and Charles Halpern, also discloses that the court did not adopt four other rules which the mental health professional groups which made up the amici had sought. These rules, which include a six month durational limitation on the involuntary confinement of a mentally ill individual, detailed staff-to-patient ratios for each of several staff levels in an institution, a requirement that an "advocacy unit" be established to insure that the defendants comply with the standards, and a set of commitment standards for commitment of mentally ill individuals including the requirement that an individual be proved beyond a reasonable doubt to have committed an overt act, attempt, or threat which establishes that he presents an actual danger of imminent physical harm to others or to himself are also discussed at length in this collection.[6]

Although much will be accomplished under the rubric of "right to treatment" if *Wyatt* is not reversed on appeal, the editors caution that, at the time the work was published, the right to treatment had not been clearly established.[7]

The authors recognize and discuss briefly some of the criticisms which have been made of the right to treatment approach as a strategy to ameliorate conditions in mental institutions. They appear sympathetic to charges that right to treatment litigations might legitimize the large state institutions which ought to be

6. *See also* Commonwealth *ex rel.* Finken v. Roop, 339 A.2d 764 (Pa. Super. 1975), an opinion by Judge Hoffman in which three members of the court concluded that the standard set forth in § 4406 of the Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, § 4406 (1966), for civil commitment, is unconstitutionally vague. That act requires a finding that the respondent is "mentally disabled and in need of care for his mental disability."

7. Specifically, the editors were referring to Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), in which the district court held that there is no constitutional "right to treatment" and that a hearing would not be held on allegations of violation of this right. This was reversed per curiam by the Fifth Circuit, 503 F.2d 1319 (5th Cir. 1974). In New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973), the court granted extensive relief to the plaintiff-inmates from Willowbrook, on the basis of the eighth amendment, but refused to find a constitutional right to treatment. (Extensive portions of the plaintiff's brief in this case are reprinted in these volumes.)

closed. They also admit the possibility that winning such suits, given the shortage, for political and other reasons, of available public resources, might mean that many of the class of plaintiffs on whose behalf right to treatment suits are brought will be worse off because they will be turned out into the community without the services and support they require. To this, the writers merely affirm that the mentally handicapped should be given the transitional and remedial services they require. It might have been helpful for the editors to have included some discussion of the situation occurring in many states where governments, with strong public support, are closing large state institutions for tax-saving more than humanitarian reasons. These same governments, however, again with public support, are not spending the kinds of resources which will be necessary if society is to undergo the fundamental change in its way of dealing with the mentally handicapped envisioned by the contributors to this work.[8]

In my opinion, based on my experience as one who has represented both petitioners and respondents in civil commitments under the auspices of the Allegheny County Bar Association's program with the County Mental Health/Mental Retardation Program, such a change will require great resources indeed. Many of the respondents did not commit, attempt, or threaten overt acts which would establish that they presented an actual danger of imminent physical harm to themselves or to others. However, often their behavior made it impossible for them to continue to live in society without seriously jeopardizing the emotional and physical health of those individuals, usually close family relatives, with whom they live. What do you do for a forty-eight year old chronic schizophrenic who has been living for years with his mother, now eighty-two years old? Understandably, when his condition worsens to the point where he refuses to eat, insists that all the lights be turned off in the home, refuses to accept medical treatment for a serious blood circulation condition, and generally becomes most difficult to live with, the rest

8. *See* Vonnegut, *Community Mental Health; Good Intentions Run Amok*, HARPERS, Jan. 1975, at 109. If the mentally handicapped who are not dangerous are not to be hospitalized, many will need extensive services to be provided for them in the community, including *inter alia*, vocational rehabilitation, physical therapy, education, psychiatric counseling, recreation and, in some cases, employment. Because, in many cases, the presence of a mentally handicapped person at home causes serious problems with other members of the person's immediate family, extensive family therapy and alternate housing will have to be provided in many cases as well.

of the family becomes worried, not only about the condition of their brother but also about their aging mother. Perhaps conditions in an institution for which he is eligible can be improved so that he is treated humanely, but will an individualized treatment program for such a patient be a possibility or will his care be nothing more than custodial? And what happens when the patient wants to leave and the court decides or the institution agrees that there is nothing more that can be done for him in the institution, especially considering the institution's already scarce resources?

Similarly, what do you do for a retarded adult who has been confined in a state institution since early childhood and, as a consequence, has experienced what has been called "institutional deterioration"?[9] Institutional deterioration is that process experienced by individuals who, as a result of being confined in inadequate institutions, tend to perform basic skills, like eating and walking, much less well than they did before they were institutionalized.

One new program for such individuals, designed as an alternative to confinement in the large state institutions, which are now becoming defendants in right to treatment suits, is the "community group home." Many states throughout the nation, including Pennsylvania, are seeking to establish such homes, designed to house eight to ten mentally handicapped individuals in a residential setting. Such homes must be convenient to the other state resources being provided for the mentally handicapped, like special schools for emotionally disturbed or retarded children, or sheltered workshops for retarded adults. Such homes must also be convenient to shops and public transportation so that the residents can become, at least to some extent, self-sufficient in the real world. Thus these homes need to be located within the urban community. Moreover, at least in Pennsylvania, such homes must comply with strict requirements of the Commonwealth Department of Labor and Industry. It is difficult to find properties which possess all of these features. The most suitable locations are usually large old homes. Such homes are usually in neighborhoods zoned for single family use which means that, even after a suitable property is found, a serious zoning problem must be confronted.

While this collection does contain a brief discussion of the zoning

9. *See* Brief for Plaintiff, New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

problems which those who wish to establish a community group home must face, it does not give much in the way of practical advice to the lawyer faced with these problems, inevitable in a work of this nature. The work, after all, deals with an area of law which is quite new and unsettled. While on some issues, like the so-called "right to treatment," a far-reaching decision in *Wyatt* has been made by a trial court on federal constitutional grounds which, if affirmed on appeal, could serve as a precedent across the country, on other issues, such as the right of the mentally handicapped to live in a supervised setting in a residential neighborhood, no such decision has been reached. The reason for this is not because a strong argument on federal constitutional grounds for such a right cannot be made. After all, a group of people who are related by blood or marriage are permitted to live together in a residential neighborhood zoned for single family dwellings no matter how large their number. Why should a group of handicapped people who are living together as a single family be treated differently? It is, after all, the intent of programs for community group homes that they will provide as "normal" a residential setting as possible. Like normal people, the residents of such homes will only live there. They will spend the bulk of their working hours during the week, like their normal counterparts, at schools if they are children, at "work" (in Pennsylvania, at sheltered workshops) if they are adults. Moreover, the residents of such a home can frequently be expected to live there for a lengthy period of time and the "houseparents" of such a home will definitely become long-term residents of the neighborhood. Thus, a community group home does not have the same impermanency deemed to be a legitimate concern of the zoning law in the decision of *Village of Belle Terre v. Boraas*.[10] Consequently, it can be argued that use of a parcel of residential property for a community group home is no more damaging to a residential neighborhood than any other normal residential use and any municipality's refusal to recognize that fact in its ordinance is a constitutional denial of equal protection. In addition, as is frequently the case, if the zoning ordinance totally excludes community homes from all residential neighborhoods, thereby denying most mentally handicapped the opportunity to ever live in such neighborhoods, it is a denial of due process as well.

10. 416 U.S. 1 (1974); *see* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

However, before the constitutional issues in a case involving the denial of a permit to a group home in a residential neighborhood can be reached, a court will first decide whether the administrative agency involved in the initial decision denying the permit, the local zoning board, correctly interpreted the ordinance under which the permit was sought and correctly followed the applicable state procedures. Favorable decisions on either of these two grounds, while instructive, would have little precedential value in other municipalities or other states.[11] In addition, the many procedural steps which must be followed before a decision on constitutional grounds can be reached frequently take a great deal of time. It will be rare, indeed, for a large, desirable home in a residential neighborhood to remain unsold or off the market for as long as it would take for such a decision to be reached at a high appellate court level.

The lack of favorable decisions with nationwide applicability characterizes other areas involving the legal rights of the mentally handicapped. Thus, on such questions as the "Right to the Least Restrictive Alternative Setting for Treatment" and "Rights to Love, Marry and Bear Children, To Vote, Hold Property, Have a Job and Go to Court," to cite two of the articles contained in this work, the reader can only learn of decisions on analogous issues which might be helpful. Nevertheless, any practitioner interested in these areas would be wise to read the applicable material in this work as well as the bibliography provided therein on the questions involved.

As can be seen from the brief discussion of some of the issues discussed in this ambitious work, it will be of great practical value only to the handful of practitioners who will be involved in the complicated litigation, usually in the nature of class action, brought to obtain judicial protection or recognition of the rights of the mentally handicapped.[12] For them, however, the book is a must. Not

11. Admittedly, a right to treatment suit may sometimes be based on the wording of the specific state statute governing the operation of the state mental institution involved as well as upon the U.S. Constitution.

12. While this work does contain practical hints on "Representing a Mentally Ill Person in a Civil Commitment," and a great deal on the commitment process, particularly the opinion of the court and the plaintiff's memorandum of law in Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), Pennsylvania's practice has more procedural protections than those attacked in *Lessard*, and the obtainment of all the rights provided in *Lessard* will take more in time and resources than is available to an attorney representing a respondent under the Allegheny County Mental Health/Mental Retardation Program. *See* Commonwealth *ex rel.* Finken v. Roop, 339 A.2d 764 (Pa. Super. 1975).

only because the editors have included some of the few decisions which have already recognized those rights, and the legal reasoning, usually amici briefs, which formed the basis for those decisions, but also because the editors have included advice of a more practical nature. While some of the decisional law and the research may soon become dated as more and more precedents are set, the practical advice and the legal reasoning contained in this work shall remain the last word on the subject for some time to come.

*Errol S. Miller**

THE LAW OF ADVERTISING. By *George Eric Rosden* and *Peter Eric Rosden.*† New York: Matthew Bender & Co., 1974. Loose Leaf, in two volumes. $100.00.

Rosden's two volume work, *The Law of Advertising*,[1] tackles a topic of considerable scope with good results in the areas covered, but it dwells on certain topics that apparently hold some interest to the authors (and to this writer) while leaving other topics scarcely touched. For that reason it cannot be considered a complete answer to the needs of the general practitioner with a small ad agency client, or an "all in one place" compendium of answers for the ad executive. With those limitations, it does a fine job of handling the topics covered and takes a pro-advertising stance that is unusual among legal scholars. It is, though, a stance that I feel is necessary to preserve a society based on free enterprise and free speech.

There are, I am sure, still a number of large, publicly-held corporations which make no provision for legal review of their advertising and some outside counsel who have not advised their clients to establish such a review. My advice to them would be to spend an hour simply browsing through these two volumes. If they have somehow missed the fact that the Federal Trade Commission has

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† The authors are both members of the Bar of the District of Columbia. During the course of this discussion the authors will be referred to in the singular.

1. G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING (1974).

taken an aggressive posture in regulating advertising, they will find some eye-opening reading as Rosden recites a list of the "new remedies" of corrective advertising, affirmative disclosures, and restitution, as well as the traditional "cease and desist" power.

For those viewers of television commercials who have wondered why Ocean Spray Cranberries, Inc., aired a commercial a few years ago which started off by having a spokesman say: "If you wondered what some of our earlier claims meant, . . . food energy didn't mean vitamins and minerals, but meant calories," it was to comply with one of the earlier efforts at corrective advertising, still a hotly disputed remedy, and one which Rosden feels is beyond the powers of the Commission. It would force the advertiser to deliver the message written by the Federal Trade Commission on time purchased by the advertiser and would "correct the residual effect of misleading commercials."

The FTC is joined by state consumer protection agencies (enforcing "little FTC acts" or unfair deceptive trade practices acts), advertising review boards, television network clearance procedures, National Association of Broadcasters clearance procedures, and others. In fact, Rosden lists some 16 federal acts directly affecting advertising and 18 federal acts which have a limited effect on advertising practices. All in all, a previously unconcerned practitioner may quickly revise the corporate policies of his client to include a stringent legal review of advertising.

Volume 1 of the work spends considerable and worthwhile time dealing with the relationship between the advertiser, the advertising agency and the media. A question which has generated considerable confusion, though not much litigation, is whether a principal-agent relationship exists between the advertiser and the agency. The author points out that many of the attributes of a traditional "agency" relationship exist; for example, the advertising agency orders space or time in the name of the advertiser, and only at the express direction thereof. The compensation arrangement of the agency is either a fixed commission on the placement or is based upon time spent on behalf of the client; it is not a seller-buyer relationship, where the seller delivers a completed product at a set price. But, on the other hand, the agency is solely liable to the media for orders placed, and the agency does not keep separate the funds belonging to his principal. Agencies, as a matter of course, bill the client for the media purchases, collect the funds, and pay the media out of their

general account, not segregating their clients' particular payments. In fact, the agency often pays the media in advance of collection from the client and, because of the "sole liability" clause, is often out-of-pocket for the media cost if a client is unable to pay. The author, however, reaches the conclusion that agencies rarely operate as "independent contractors" in their relationships to clients. While that would generally be desirable from the agency's point of view, my experience is that it is less than universally recognized. Many courts treat agencies as dealing independently of the advertiser client and permit legal actions against the agency alone based on contracts they have made on behalf of their client. Further, the FTC has consistently refused to recognize an agency relationship and always names the advertising agency as a party to its actions against the principal.

Volume 1 also deals with some of the constitutional issues in advertising and related fields, including the access to media questions, and the broadcasting "fairness doctrine." The topics are interesting, and the coverage fairly extensive, but perhaps are allocated too much space in a volume on advertising. The basic case of *Valentine v. Chrestensen*,[2] which denies free speech coverage to advertising, is well covered, including the recent ruling in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[3] The questions in the *Chrestensen* case involved the owner of a vessel that had formerly been used as a U.S. Navy submarine and which was exhibited publicly for profit. After the owner was denied the use of a New York City-owned wharf and was forced to dock at a location which was not so commercially desirable, he advertised by means of a handbill which he distributed on the streets adjacent to the park. The New York City Police Department prohibited that distribution as being the distribution of commercial and business advertising matter, a violation of an ordinance. In the decision, the Court noted that the Constitution precludes restraint on free speech, but stated that "the Constitution imposes no such restraint on government as respects truly commercial advertising."[4] The authors feel that on the strength of *Chrestensen*, government regulation of commercial advertising is permissible to prevent deceptive practices.

But, should the fact that the message has some commercial signif-

2. 316 U.S. 52 (1941).
3. 413 U.S. 376 (1972).
4. 316 U.S. at 54.

icance be sufficient to deny the speaker his first amendment rights? For example, Sears Allstate Insurance has spent significant sums of money informing the public through paid commercial messages that it is their belief that air bags would lessen injuries and thus reduce insurance premiums. Unquestionably, there is a commercial connection since Allstate stands to profit if injuries are lessened. Is there not, however, an additional free speech interest which clearly would permit an individual to make such a statement? Why should a company be unable to deliver the message without a potential FTC citation for "advertising" claims that are unsubstantiated. The author argues that it should not be subject to governmental review, citing the importance of consumers receiving information, advertising being the backbone of media financial support, and the fact that framers of the Constitution did not discuss the various kinds of speech they meant to include, but wrote broad first amendment provisions on free speech. Perhaps the argument goes too far; I feel that there are two types of commercial messages. The first is the purely commercial advertising message which endeavors to create or sustain consumer interest in the purchase of the seller's product or service. This is not the type of speech envisioned by the framers of the Constitutuion as being protected from any governmental interference, but rather is closer to those types of speech for which there can be some governmental or individual right of action—such as obscenity or libel. Further, the government does not (and I do not think that generally it can) seek to preclude the advertising message by prior restraint, but rather attacks its legality after the statement is made. This is the case in libel and slander actions where the person may very well exercise his free speech and make a statement which he is forced to pay for later. What I think is needed is not a blanket reversal of the *Chrestensen* case, as Rosden argues, but rather a definition of the free speech rights of a company in a message which, while it may indirectly benefit the company, is primarily made for social reasons. These, I feel, should be provided all the first amendment protections and be free from governmental interference, particularly governmental determination as to whether they are "correct" on a scientific basis.

Also given full chapters are "Access to Media" dealing with the right of a newspaper to refuse advertising, and the "Fairness Doctrine" which deals with the FCC rules on treatment of issues of public importance. Each chapter is extensive in its coverage, per-

haps too much so in view of their limited application to advertising. Fewer pages are devoted to the use of trademarks and copyrights in advertising. As Rosden notes, both are fields dealt with at length in other treatises. But often the other coverage does not provide analysis dealing directly with advertising. Trademarks, for example, are often developed by the advertising agency and the marks usually become known to the public by the product advertising. A discussion of their development and usage from that standpoint, dealing with topics such as proper trademark usage within an advertisement (with the difficulties caused by the statutory notice and proper trademark use within the bounds of good creative work), would have been helpful. Similarly useful would have been information and advice on the utilization of copyright protection for print advertising and television commercials. Other copyright topics such as advertising use of fictional characters, slogans, and catch-phrases would also be worthwhile.

Volume 2 is devoted almost entirely to the Federal Trade Commission and is complete enough for the specialist, while being easily used by the occasional user. The organization, jurisdiction, and procedure of the FTC is fully explored, with complete case and source references. Rosden also provides some insight into the functionings of the Commission and its regulatory approach.

For example, what should be the "standard of perception" for the determination of whether an ad is deceptive? Should it be the "ignorant, the unthinking and the credulous" consumer often protected by the FTC, or should the Commission take note that the target audience, for say a Rolls Royce, is fairly canny? This sort of basic question is raised and fully discussed. Having established the criteria for deception, Rosden proceeds to list the specific representations that have been found to be deceptive. "Skidproof," "rustproof," "deodorize," and a plethora of other terms that have been the subject of Commission scrutiny are covered.

Perhaps it is unfair to provide a shopping list of advertising topics not covered by the two volumes. But there could be a third volume's-worth of coverage on important and recurring advertising questions such as lotteries and sweepstakes, privacy problems with the use of photos, names, and voices, co-op advertising, star-performer contracts, libel, television performer's union requirements and others. So, while the two volumes provide a useful and important addition to advertising legal literature, they cannot be

considered to answer "everything you ever wanted to know about advertising law."

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