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MENTAL HEALTH LAW: MAJOR ISSUES. By *David B. Wexler*. New York: Plenum Books. 1981. Pp. x, 270. \$25.

The past decade has seen both substantial advances in the rights of the mentally ill and unprecedented judicial intervention into the administration of mental health services. These developments have been prompted, at least in part, by an ever-growing body of academic commentary criticizing the treatment of the mentally ill by both the legal system and mental health professionals.¹ One of the most well-known and influential of those commentators is Professor David Wexler of the University of Arizona Law School. In *Mental Health Law*, Professor Wexler summarizes a number of his previously published articles on the effects of the legal system on the administration of mental health services.² Recognizing the "fully multidisciplinary" nature of mental health law, Wexler has attempted to provide a "quasi-treatise" that will aid "students, researchers, and practitioners" in a number of different fields (pp. 2-3).

To correspond to what he sees as the two major categories of developments in mental health law (p. 3), Professor Wexler has divided his book into two parts. In Part I, he discusses theoretical and practical problems of the civil and criminal commitment systems that have already been covered extensively by other writers.³ Part II examines the legal restrictions that courts have placed on therapists' treatment of their mentally ill patients. Wexler concludes, contrary to the view of many mental health professionals, that certain of these restrictions have actually resulted in more effective treatment. As a

1. The right to treatment, for example, appears to have originated in two articles that advocated the recognition of such a right. See Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960); Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO ST. L.J. 28 (1960).

2. The following works by Wexler form the basis for the content of *Mental Health Law: The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971) (with S. Scoville et. al); Book Review, 85 HARV. L. REV. 1489 (1972); *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972); *Token and Taboo: Behavior Modification, Token Economies and the Law*, 61 CALIF. L. REV. 81 (1973); *Foreword: Mental Health Law and the Movement Toward Voluntary Treatment*, 62 CALIF. L. REV. 671 (1974); *Of Rights and Reinforcers*, 11 SAN DIEGO L. REV. 957 (1974); *Behavior Modification and Other Behavior Change Procedures: The Emerging Law and the Proposed Florida Guidelines*, 11 CRIM. L. BULL. 600 (1975); CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS (1976); *Criminal Commitment Contingency Structures*, in THE CRIMINAL JUSTICE SYSTEM 121 (B. Sales ed. 1977); *Foreword: Current Currents in Institutionalization*, 14 SAN DIEGO L. REV. 979 (1977); *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAVIOR 37 (1978) (with J. Monahan); *Patients, Therapists, and Third Parties: The Victimological Virtues of Tarasoff*, 2 INTL. J.L. & PSYCH. 1 (1979).

3. See, e.g., B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW (1972); K. MILLER, MANAGING MADNESS (1976); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975); T. SZASZ, PSYCHIATRIC JUSTICE (1965); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).

response to critics of judicial intervention, therefore, Part II should spark considerable interest among members of the mental health community.

One of the focal points of Part II is a discussion of the therapist's "duty to warn," which emerged in *Tarasoff v. Regents of the University of California*.⁴ In this 1976 case, the Supreme Court of California ruled that a psychiatrist who learns or should have learned that his patient poses a serious threat of violence to another person must attempt to protect the potential victim from harm. Frequently, the adequate discharge of this duty will require a psychiatrist to warn the potential victim of the danger. Not surprisingly, *Tarasoff* set off a storm of protest in the psychiatric community. Mental health professionals argued, quite plausibly, that patients would not be completely honest if they knew that their thoughts and feelings might be discussed outside of the therapist's office. Without complete candor on the part of patients, they claimed, the prospects for successful treatment would greatly diminish.

Wexler rejects this view, and sees *Tarasoff* as a potential catalyst for much-needed changes in the treatment of mentally ill patients. According to Wexler, violence-prone patients who feel hostility toward particular individuals, such as spouses or lovers, could be treated more effectively with some form of group, rather than individual, therapy (p. 168). Wexler believes that attempts to treat the patient without the presence of the potential victim, whose behavior frequently triggers the patient's hostility, are doomed to failure. *Tarasoff* may inspire the therapist to contact the potential victim and gradually work him into the patient's therapy sessions. This type of participation, Wexler argues, may eventually lead to more effective therapy for violence-prone patients (pp. 175-76).⁵

Wexler also supports court decisions that restrict the use of behavior modification programs in mental hospitals. Behavior modification is often used to treat long-term psychotic patients who have failed to respond to conventional therapy. One common behavior modification technique calls for the establishment of a "token economy," in which patients are provided with the bare minimum of

4. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), *vacating* 13 Cal. 3d 117, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

5. Wexler extensively reviews the literature on victimology, the study of how victims of violence engage in behavior that precipitates their own injury. He cites studies showing that frequently, until the moment that the offender strikes out and causes harm, the roles of offender and victim are virtually interchangeable. There is no way for a casual observer to predict who will be the aggressor and who will be the victim. P. 166. For further discussion of victimology, see Arison, *Victims of Homicide*, in 4 VICTIMOLOGY: A NEW FOCUS 55 (I. Drapkin & E. Viano eds. 1975); Silverman, *Victim Precipitation: An Examination of the Concept*, in 1 VICTIMOLOGY: A NEW FOCUS 99 (I. Drapkin & E. Viano eds. 1974); Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1 (1957). See generally the volumes of VICTIMOLOGY: A NEW FOCUS (I. Drapkin & E. Viano eds.).

creature comforts — a bed in a crowded ward, unappetizing food, no outside activities, and no television. To acquire any improvements in their spartan existence, patients must cooperate with the hospital staff. By engaging in certain desired behavior, such as improved self-grooming and participation in therapy sessions, patients can earn tokens. These tokens can then be used to purchase desired amenities.

Token economy programs are threatened, however, by recent court decisions that have established the constitutional rights of mental patients to a long list of basic amenities. In *Wyatt v. Stickney*,⁶ for example, a federal district court held that a mental patient is entitled to a comfortable bed with adequate privacy, good food, visitation rights, and grounds privileges. According to many behaviorists, the trend toward guaranteeing patients more amenities is counter-productive because it removes the incentive for self-improvement — the primary goal of behavior modification therapy. If patients have all of the creature comforts that they desire, therapists ask, why should they change their behavior to obtain more? By undermining token economy programs, courts may be denying therapists access to one of their most effective tools.

These arguments for restricting patients' rights, however, do not persuade Wexler. He argues that token economy programs relying on deprivation have not been notably successful. Although patients in these programs may respond by working in the institution, they are not prepared to function independently in the real world (p. 225).⁷ And the price paid for these meager results is the violation of the patients' dignity and self-respect. These criticisms are especially significant in light of the other successful token economy programs identified by Wexler that use much less degrading means to motivate patients. In these projects, careful observations of individual patients revealed idiosyncratic desires (*e.g.*, to feed kittens, to eat soft-boiled eggs instead of hard-boiled ones, and to order items from a mail-order catalogue). Therapists can play upon these desires to motivate patients as effectively as they can by denying them basic neces-

6. 344 F. Supp. 373 (M.D. Ala. 1972), *affd. in part, revd. in part, and remanded in part sub. nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). For examples of other cases where the courts have recognized rights to basic amenities for patients in mental institutions, see *Scott v. Plante*, 532 F.2d 939, 947 (3d Cir. 1976); *Davis v. Hubbard*, 506 F. Supp. 915, 922 (N.D. Ohio 1980); *New York State Assn. for Retarded Children v. Carey*, 393 F. Supp. 715, 717 (E.D.N.Y. 1975).

7. As an alternative to token economies, Wexler discusses the experiments of George Fairweather. Using the principles of social psychology and small group therapy, Fairweather succeeded in moving many chronic psychotics out of the hospital and into cooperative communities. His programs provided all patients with television, movies, magazines, good food, and weekly passes, regardless of their progress in the program. Pp. 226-28. See G. FAIRWEATHER, D. SANDERS, H. MAYNARD, D. CRESSLER & D. BLECK, *COMMUNITY LIFE FOR THE MENTALLY ILL* (1969); *SOCIAL PSYCHOLOGY IN TREATING MENTAL ILLNESS* (G. Fairweather ed. 1964).

sities (p. 226). By expanding patients' legal rights, Wexler concludes, judicial intervention has forced therapists to find more humane incentives for motivating their patients.

In these two examples, and throughout the book, Wexler attempts to downplay what some have viewed as the adversarial nature of the relationship between courts and therapists. Wexler sees the law not as an obstacle to the therapeutic process, but as an aid in ensuring that an individual's dignity and self-respect are preserved — the ultimate product of any successful program of therapy. This lesson is an important one for lawyers involved in mental health advocacy and for mental health professionals who are worried about the effects of such advocacy on the commitment and treatment of the mentally ill. One can only hope that the lesson will not be lost on the courts, which now seem increasingly unwilling to expand upon the protections afforded institutionalized individuals.⁸

8. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).