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DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES. By Bruce Dennis Sales, D. Matthew Powell, Richard Van Duizend, and Associates. New York, New York: Plenum Press 1982.

*Reviewed by Stanley S. Herr**

Advocates for disabled persons have been relatively nimble in shifting forums to advance their clients' interests. In the 1950's, the focus was localized as consumer organizations concentrated on horrendous conditions close to home. By the 1960's, encouraged by the Kennedy Administration, federal legislation and "comprehensive planning" had become the new vehicles for reform.¹ From 1971 on, judicial activism captured national attention and dramatized the gaps in service systems and the disregard of the potential and the humanity of mentally and physically disabled citizens. Inequities in the treatment of disabled persons persist, not only with respect to those living in different states but even for those living in different parts of the same state. Without supplemental strategies, litigation is apt to exaggerate rather than to reduce those disparities. Moreover, a number of trends—the Reagan Administration's retrenchment on social programs, the pull toward federal deregulation, and the Supreme Court's apparent distaste for judicial surveillance of systems serving disabled persons²—give new urgency to efforts at changing the policies and laws that emanate from state capitals. In remaking disability law, the advocacy movement must come full circle, back to its state and local roots, back to the legislative bodies with primary responsibility.

Disabled Persons and the Law: State Legislative Issues is designed as a sourcebook and a blueprint for this new round of advocacy. Ambitious in scope, technical in style, and encyclopedic in

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1. See Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. No. 88-156, 77 Stat. 273, (codified at 42 U.S.C. §§ 1391-1394 (1976)); H. FOLEY, COMMUNITY MENTAL HEALTH LEGISLATION: THE FORMATIVE PROCESS 31-33, 54-56 (1975).

2. E.g., *Youngberg v. Romeo*, 102 S. Ct. 2452, 2462 (1982); *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981).

content, the book offers summaries of existing state laws as well as detailed model laws and commentaries on sixteen selected topics. It is a timely, indeed long-awaited publication.

This project originated in 1977 as a federal grant from the then Developmental Disabilities Office of the Department of Health, Education, and Welfare to the American Bar Association's (ABA) Commission on the Mentally Disabled. In the field of mental health law, the National Institute of Mental Health and the Mental Health Law Project had undertaken a similar law reform effort.³ Building on that experience, the ABA's Developmental Disabilities State Legislative Project assembled a full-time research staff and recruited an advisory board representing the Commission and eleven other national advocacy, professional and consumer organizations. Thus, the project aimed to review "all past legislative developments," identify "the most appropriate approaches," and spare individual states the time and expense of collecting the comparative data, and analyzing the often esoteric policy questions.⁴ Although the ABA, the federal government, and other participating national organizations have issued the ritualistic disclaimer that the contents of this book do not represent their official policies, it is fair to say that this volume represents the progressive consensus view in the developmental disabilities field. Furthermore, the ABA label, if not the ABA imprimatur, lends authority to the recommendations and model statutes presented within the 879 pages of this work.

The primary audience for this book are those involved with legislative reform at a state level. Advocates, law professors, legislative committees, professional and consumer organizations, and state agencies providing services are all part of that constituency. Two special targets of this writing are components of the state-based, but federally-funded developmental disabilities program: State Planning Councils and Protection and Advocacy (P&A) Systems. Although

3. Mental Health Law Project, *Legal Issues in State Mental Health Care: Proposals for Change*, 2 MENTAL DISABILITY L. REP. 55-159, 265-354, 439-535, 613-78 (1977-78).

4. B. SALES, D. POWELL, R. VAN DUIZEND, & ASSOCIATES, *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* xi-xii (1982) [hereinafter cited as *DISABLED PERSONS AND THE LAW*]. Although not referred to in this book, an earlier study published by the National Association for Retarded Children in cooperation with the George Washington University Institute of Law, Psychiatry and Criminology compared the enactments of all states relating to public institutions. *INSTITUTIONALIZATION OF THE MENTALLY RETARDED: A SUMMARY AND ANALYSIS OF STATE LAWS GOVERNING ADMISSION TO RESIDENTIAL FACILITIES AND LEGAL RIGHTS AND PROTECTIONS OF INSTITUTIONALIZED PATIENTS* (R. Newman ed. 1967). While much of that data is now outdated and the scope of current concern is far wider, one problem persists: the stark difference between actual practice and norms. *Id.* at 4.

the former have a priority-setting and systemic advocacy role, the P&A's are more activist, client-oriented agencies with a more explicit law reform mission.⁵ Discussion editions of various chapters, some relatively little changed in this final version, were previously circulated to such agencies and interested individuals. Their contents have already stirred debate and contributed to legislative proposals in this country and as far away as New Zealand.⁶ Given the formidable price tag (seventy-five dollars) of the collected chapters, one hopes that libraries, bar associations, human rights commissions and other book lenders will add this volume to their reference shelves.

Yet this book deserves a better fate than relegation to library stacks. It should be mined by empirically-oriented social scientists for research projects to illuminate how current and proposed laws depart or can be predicted to depart from their lofty purposes and rational design. The volume should be closely scrutinized by state legislators, their staffs and lobbyists so as to identify legislative lacunae and obsolescent paradigms lurking in existing laws. It should be dog-eared and underlined by advocates seeking to adapt its recommendation to the exigencies of policy and the dictates of their own principles, as well as those of their clients. Indeed, the authors of this book invite a result-oriented evaluation of their labors, boldly declaring that "[i]n a very real sense, a test of our efforts and measure of its results and benefits will be the number of 'have not' states that become 'have' states in important legislative areas."⁷

The provocative notion, however, that states can be classified as somehow legally developed or underdeveloped in terms of disability law is never really amplified. Dividing the states along such lines would raise some interesting quandries. For example, New York, despite its detailed code⁸ and broadly liberal principles would fall far short of the ABA yardstick on many counts. New Mexico, in contrast, has some wondrous statutes but a set of fiscal, administrative, and attitudinal constraints that tend to undermine their prom-

5. 42 U.S.C.A. § 6012 (West Supp. 1978-81). See *DISABLED PERSONS AND THE LAW*, *supra* note 4, at 810-21.

6. NEW ZEALAND INSTITUTE OF MENTAL RETARDATION, *GUARDIANSHIP FOR MENTALLY RETARDED ADULTS: SUBMISSIONS TO THE MINISTER OF JUSTICE 24-25* (Sept. 1982) (endorsing many aspects of the ABA model statute recommending increased due process safeguards, least restrictive alternatives, and other substantive and procedural limits on protective services).

7. *DISABLED PERSONS AND THE LAW*, *supra* note 4, at xii.

8. N.Y. MENTAL HYG. LAW §§ 15.01-.35 (McKinney 1978). See S. HERR, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* 79-86, 136-41, 189-92 (1983).

ise.⁹ Indeed, this book causes one to speculate as to what constitutes "legislative success." Is it the ability to get reform laws enacted? Is it the ability to obtain funding for such laws? Is it the ability to get laws internalized in the behavior of the public and officials? Or is "legislative success" a combination of all of the above? Perhaps it is the nature of model laws that this volume focuses on the first constellation of problems, the content of new enactments and leaves these other equally important and vexing problems for another day.

Several of the book's most controversial and timely chapters would extend judicial and administrative intervention in decision-making areas traditionally reserved for parents and doctors. Ross Dolloff has usefully combined supportive approaches, such as parental counselling, financial reimbursement for medical care and treatment, with coercive measures of last resort, including court-ordered treatment and physician reporting of violations. In view of cases of older children denied essential medical treatment such as that of Phillip Becker,¹⁰ states should, however, broaden such measures to protect those beyond the stage of infancy, age two being the cutoff point recommended by these draftsmen.¹¹ Professor James Ellis has innovatively proposed a statute that goes further than most institutional admissions laws to set criteria and procedures for entry into nonresidential services, small residential facilities, and large residential facilities. While this model statute draws back from the outright abolition of involuntary civil commitment for retarded persons, a path that has proven successful in various states and Scandinavian countries,¹² it would add such strict substantive and procedural standards as to deter unnecessary nonvoluntary admissions. Considering the historic abuses in institutionalization and the risks to the lives

9. N.M. STAT. ANN. §§ 43-1-1 to 43-1-25 (1979). See Ellis & Carter, *Treating Children Under the New Mexico Mental Health and Development Disabilities Code*, 10 N.M.L. REV. 279, 293 (1980). Although such statutes have improved the quality of habilitation plans and individualized decisionmaking, the failure of states to create sufficient least restrictive alternatives tends to be their Achilles' heel.

10. Guardianship of Becker, No. 101981 (Cal. Super. Ct., Santa Clara Co., Aug. 7, 1981), *aff'd sub nom.*, Guardianship of Phillip B., 188 Cal. Rptr. 781 (Cal. Ct. App. 1983).

11. DISABLED PERSONS AND THE LAW, *supra* note 4, at 93. The necessity for such legislative protection is underscored by the recent decision of Judge Gerhard Gesell which invalidates the so-called Baby Doe rule. American Academy of Pediatrics v. Heckler, No. 83-0774 (D.D.C. Apr. 14, 1983). Judge Gesell's opinion seems to invite further congressional and state statutory actions in "these difficult and sensitive situations where life may hang in the balance . . ." for a disabled child. *Id.* slip op. at 17, 20.

12. These states include Arizona, Kansas, Maryland, Massachusetts, New Jersey, Tennessee, and Virginia. Norway, Sweden and Denmark have also abolished a specific power to involuntarily commit persons on the basis of mental retardation. S. HERR, *supra* note 8, at 39, 246.

of persons with disabilities, the thrust of these proposed statutes is sound, even if their machinery seems sometimes too detailed.

In summary, *Disabled Persons and The Law* is a work full of optimism, methodical research, and interdisciplinary collaboration. It is properly skeptical of labels, although its stress on a functional analysis of disability still leaves us with new labels in the end. The tension is especially evident when the writers seek broad labels to establish eligibility for affirmative services, such as special education, and narrow labels to avoid undue limitations on individual choices and civil rights. To ensure sensitive application of these statutes, we will need administrators, clinicians, and advocates who believe in the value of personal autonomy and who understand the different intents behind statutes which regulate services and those which, one would hope, should only grudgingly restrict fundamental freedoms.

There are a few minor problems in a group effort of this kind. There is inevitably some repetition, in part due to bringing together chapters that were originally intended to be read as separate monographs. Different chapters exhibit varying degrees of thoroughness and detail. For example, almost a quarter of the text is devoted to guardianship and conservatorship, while the ethically and legally knotty problem of emergency medical treatment is canvassed in less than a dozen pages. As the authors note, the research for this volume was done between 1977 and 1980, and readers might have benefitted from an update on major developments in the timespan prior to publication. Furthermore, a model statute on rights in residential facilities, rather than simply an appendix on existing provisions,¹³ might have brought into clearer focus such vital topics as the right to refuse treatment and the appropriate standards of care that statutes should or should not enshrine.¹⁴

These points do not alter the unique and important place of this book in the literature on developmental disability law. *Disabled Persons and The Law* tells us where we are at the close of the 1970's and

13. DISABLED PERSONS AND THE LAW, *supra* note 4, at 847-64. See Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 STAN. L. REV. 637 (1979); *Naughton v. Bevilacqua*, 458 F. Supp. 610 (D.R.I. 1978), *aff'd*, 605 F.2d 586 (1st Cir. 1979).

14. This would be especially appropriate in light of the failure of Congress to implement an enforceable bill of rights for developmentally disabled persons, and this book's goal of providing model state legislation to assure developmentally disabled citizens "equal access to quality services, consistent with the philosophy and requirements of P.L. 94-103 and other pertinent federal enactments." DISABLED PERSONS AND THE LAW, *supra* note 4, at xi (footnote omitted). See 42 U.S.C. § 6011 (1976 & Supp. IV 1980); see also *id.* § 9501 (Supp. IV 1980).

where we should go in the 1980's if a new vision of normalization and reasonable risk-taking by individuals with disabilities is to prevail. The question remains as to whether this society can summon the political will, ethical commitment, and fiscal resources to realize this alternative future. The answers will largely depend on the kind of advocacy coalitions that can be mustered state-by-state and issue-by-issue.