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Book Review: Law and Psychological Practice, by Robert L. Schitzgebel and R. Kirkland Schwitzgebel

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Law and Psychological Practice, by Robert L. Schwitzgebel and R. Kirkland Schwitzgebel (New York: John Wiley & Sons, 1980), 418 pp., $16.50.

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The key to the problems presented by *Law and Psychological Practice* is revealed even before the reader reaches the table of contents; it appears in that most innocuous of sections—the acknowledgments. There, the authors—Robert L. and R. Kirkland Schwitzgebel, both veterans of the traffic jam at the law/mental health intersection[1]—recognize "the very valuable assistance" of an undergraduate student/researcher who "composed the first draft of most of the chapters of this book." (Acknowledgments) To emphasize this is not to denigrate the researcher's apparently extensive contributions, but rather to help explain the book's limitations. The work reads exactly as it was described by its authors: an attempt to synthesize and polish several only vaguely related, high quality term papers. This is not necessarily bad, of course, but it is something less than one might expect from two authors with the credentials of the Schwitzgebels.

The authors seek "to lead human services professionals and interested clients" (p. 1) through what is likely to be unfamiliar legal processes, so as to help them "resolv[e] conflicts or avoid . . . litigation in the areas of mental health, criminal justice and social welfare." (p. 3) This is clearly an ambitious goal, one which—if it is to be met successfully—requires a significant amount of thematic organization and integration. Unfortunately, it is these very characteristics that the book lacks.

Not that the authors have left out any subjects. They cover—with varying degrees of accuracy, comprehensiveness and perspicacity—the entire legal/mental health waterfront:

civil commitment, patients' rights, prisoners' rights, punishment, organic therapies, token economics, psychological testing, school law, family law, and seven other important areas. Reading the book, one inevitably conjures up a picture of the authors (and their research assistant) sitting around a table over a cup of coffee, and one of them saying, "Gee, that's an interesting subject; let's add a chapter on it." Perhaps that approach works in theory, but in this instance, the whole is considerably less than the sum of its parts.

As indicated above, the separate chapters are uneven. The chapter on civil commitment law contains certain factual errors: *e.g.*, an emergency admission in New Jersey lasts 7 days, not 20 as suggested in the text.[2] This 13-day differential is not particularly crucial in shaping a reader's view of mental health law, but it is the type of error (the misreading of one statute and the bypassing of a companion law) that suggests that the final editing was done more sloppily than one would expect.

Similarly, in discussing burden of proof at commitment hearings, the authors point out that there exists a range of burdens applicable in the different states (p. 7), but note that "the Supreme Court *is considering* a case that might have wide impact on the standard of proof required—*Addington v. Texas*." (p. 19 n.9) Ordinarily, one would assume that the time lag between preparation of the chapter and its ultimate publication was such that it was impossible to add even a short sentence on the court's ultimate decision in *Addington*[3] (which established the appropriate burden as "at least 'clear and convincing evidence.' ")[4] However, the authors *do* note briefly the Supreme Court's decision regarding "voluntary" juvenile commitments in *Parham v. J.R.*,[5] *a case decided 6 weeks after Addington.*[6] This lack of consistency is more than sloppy style; it is sloppy substance.

More substantial factual errors taint the chapter on patients' rights. The authors suggest that the right to treatment of *voluntary* mental patients "has seldom, if ever, been directly litigated." (p. 44) This is simply not so. Important class action treatment/habilitation cases have clearly and squarely included *all* patients—voluntary as well as involuntary—within their scope.[7] Further, the discussion of patient labor in the chapter is marred by an overbroad reading of the effect of *National League of Cities v. Usery*[8] on *Souder v. Brennan.*[9] Nothing in *National League* vitiates *Souder* with regard to private facilities (not an insignificant population);[10] and more importantly, in spite of *National League*, significant procedural due process considerations were applied to patient labor issues after *Souder* in the post *National League* landmark case of *Davis v. Balson,*[11] a decision nowhere mentioned by the authors.[12]

Finally, the issue of refusal of medication is handled comparatively poorly by the authors. Although they note correctly that the subject area is a "thorny one" (p. 50) which is in "development and flux," (p. 53) their characterization of the pertinent question—"If a person is judged so mentally ill that she/he has to be institutionalized, how can this person be able to make a judgment regarding taking or not taking certain drugs?" (p. 50)—reveals a serious misunderstanding of the underlying constitutional premises controlling this area. Both case law[13] and statutes[14] emphasize that institutionalization need not bespeak incompetence, especially in the area of refusal of medication,[15] where a host of other important constitutional considerations—privacy, procedural due process, freedom of thought, the least restrictive alternative, and freedom from harm, among others—must be carefully scrutinized. The undue—indeed, mistaken—simplicity of the authors' rhetorical question is underscored by the complexity of the subject matter.

Other chapters in the book fare better. The discussions of such topics as punishment, organic therapies, psychological

testing and behavioral research are comprehensive and helpful; it is probably no coincidence that these discussions are based primarily on psychological and behavioral data (rather than on legal analysis). Despite the authors' familiarity with the legal process, they appear more comfortable with the scientific method: this comfort is translated into clearer and more cohesive chapters on topics depending largely upon this method.

The book concludes with a "kitchen sink" collection of 41 appendices, ranging from a four-page glossary of legal terms ("hearsay" is defined; "expert witness" is not) to examples of "consumer/therapist contracts." As one might guess, the appendices are uneven both in emphasis and in quality; some are excellent, others barely superficial.

In sum, the book is disappointing. When a topic as ambitious as *Law and Psychological Practice* is dealt with, one should be able to expect the presentation of some kind of cosmic world view of the topic (especially given the fine credentials of the authors). The lack of any specific point of view and the authors' failure to integrate the material presented meaningfully, help to explain why the book disappoints. This is not to say that the book is a failure as a reasonably helpful guide to the reader (especially one just getting his/her feet wet in the whirlpools of mental health law); it is just that it should have been so much more.

Notes

1. *See, e.g.,* Schwitzgebel, "The Right to Effective Mental Treatment," 62 *Calif. L. Rev.* 936 (1974); Schwitzgebel, "Implementing a Right to Effective Treatment," 1 *L. & Psych. Rev.* 117 (1975); Schwitzgebel, "Federal Regulation of Medical Devices," 27 *Harv. L. School Bull.* 34 (1976).

2. *N.J.S.A.* 30:4-46.1. The statute cited in the text—*N.J.S.A.* 30:4-37 (at 18, n.5)—controls regular commitments, not emergencies. See Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976); L.R.C. v. Klein, 167 N.J. Super. 23, 400 A. 2d 496 (App. Div. 1979); Pressler, *Current N.J. Court Rules,* Comment to *R.* 4:74-7 (1981), at 830-831.

3. ___ U.S. ___, 99 S.Ct. 1804 (1979).

4. *Id.* at 1813.

5. ____ U.S. ____, 99 S.Ct. 2493 (1979).

6. *Addington* was decided on April 30, 1979; *Parham* on June 20, 1979.

7. *See, e.g.,* Goodman v. Parwatikar, 570 F. 2d 801 (8th Cir. 1978); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); United States v. Mattson, 600 F. 2d 1295 (9th Cir. 1979).

8. 426 U.S. 833 (1976).

9. 367 F. Supp. 808 (D.D.C. 1973).

10. The class in *Souder* was defined as "all patient workers in non-Federal institutions for the residential care of the mentally ill and mentally retarded who meet the statutory definition of employee," *id.* at 813; *National League* applies only to employees of states and their political subdivisions. More importantly, as *National League* applies only to "integral functions [of government] . . . in such areas as fire prevention, policy protection, sanitation, public health, and parks and recreation," state employees performing non-governmental functions are still covered by the Federal Labor Standards Act that was at issue in *National League.* Also, nothing in *National League* applies to *State* minimum wage laws. See, generally, 4 App., *Task Panel Reports Submitted to the President's Commission on Mental Health* 1359, 1387 (1978); Perlin, "The Right to Voluntary Compensated Therapeutic Work as Part of the Right to Treatment: A New Theory in the Aftermath of *Souder,*" 7 *Seton Hall L. Rev.* 298 (1976).

11. 461 F. Supp. 842 (N.D. Ohio 1978).

12. See, generally, sources cited at the conclusion of note 10, *supra;* Kapp, "Residents of State Mental Institutions and Their Money (Or, The State Giveth and the State Taketh Away)," 6 *J. Psych. & L.* 287 (1978).

13. *See, e.g.,* Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978), *supplemented,* 476 F. Supp. 1294 (D.N.J. 1979), *stay den.,* 481 F. Supp. 552 (D.N.J. 1979); McAuliffe v. Carlson, 377 F. Supp. 896, 907 (D. Conn. 1974), *supplemented,* 386 F. Supp. 1245 (D. Conn. 1975), *suppl. order rev'd on other gds.,* 520 F. 2d 1305 (2d Cir. 1975), *cert. den.,* 427 U.S. 911 (1976).

14. *See, e.g., N.J.S.A.* 30:4-24.2c.

15. *Rennie, supra* note 13.