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Foreword

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FOREWORD

In the final edition of Volume 20, the Loyola of Los Angeles Law Review proudly presents our annual Symposium issue. This year, the Symposium focuses on issues facing both mentally and physically disabled individuals. Five selections, authored by experts in the field of disability law, explore methods by which disabled persons can secure rights granted them by federal and state constitutions and statutes. Each Article is uniquely crafted to provide advocates with fresh ideas for employing legal instrumentalities to eradicate barriers facing their disabled clients.

The Symposium commences with a comprehensive study authored by Professor Michael Perlin. In his Article, Professor Perlin suggests that “the notion of wide-ranging institutional and procedural reform in Federal Court cases involving the mentally disabled” is no longer an idea with “‘good currency.’” Professor Perlin analyzes alternative forums and sources for new causes of action for the mentally disabled. After examining the historical background of state constitutional developments, methodologies employed in construing state constitutional provisions and their role as a source of rights for the mentally disabled, Professor Perlin contends that the importance of state constitutions in securing rights for the disabled will continue to grow. While state statutory provisions, including state statutory bills of rights for the institutionalized mentally disabled, have received relatively little attention, state courts appear willing to interpret state statutory rights more broadly than required by the federal Constitution. Since it is unlikely that the current Supreme Court will be favorably disposed to expanding the rights of the mentally disabled, Professor Perlin concludes that “the use of state constitutions and state statutes in state courts may be the last frontier for the mentally disabled.”

In their Article discussing confinement of the mentally disabled, Steven Schwartz and Cathy Costanzo criticize the involuntary community treatment proposal as being neither conceptually correct nor practically feasible. The authors first trace legal justifications for civilly restraining people labelled mentally ill, then apply a least restrictive alternative analysis to determine whether coerced community care meets this constitutional standard. After examining current statutory and judicial state law concerning such community treatment programs, the authors identify several obstacles to their implementation. The authors

suggest that in areas where community mental health services are provided responsively, adequately and voluntarily (as exemplified in western Massachusetts), schemes for compelling treatment are both superfluous and potentially harmful. Although community treatment proposals are a beneficent attempt to improve conditions for mentally disabled individuals, the authors conclude that ultimately, it will only detract from their present struggle.

The third Article in our Symposium, authored by Attorneys Marc Charmatz and Sarah Geer, presents a cogent analysis of section 504 of the Rehabilitation Act of 1973. Congress designed section 504 to protect disabled individuals from discrimination in "any program or activity receiving federal financial assistance." The statute is applied in a variety of contexts, including employment, education, health, welfare and social services. Courts hearing claims by disabled plaintiffs face a critical issue regarding the definition of the terms "program or activity." Under a broad construction of those terms, all parts of an institution, such as a college or university, would be subject to section 504 if any one part received federal funds for any purpose. Conversely, recent United States Supreme Court decisions interpret those terms narrowly, requiring identification of the specific program that actually received federal funds prior to imposing any civil rights obligations. Thus, if a disabled person's civil rights are violated by a subunit of an institution, section 504 is not triggered when the particular subunit received federal funds directly or benefits indirectly from federal funds given to the institution. Although the Court has restricted its scope, the authors illustrate how section 504 still remains a viable remedy for a substantial number of handicapped individuals suffering discrimination.

Also analyzing section 504 of the Rehabilitation Act, the next Article considers whether federally assisted programs can evade their duty to provide disabled individuals "meaningful access." In "The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Law," Attorney Anthony Cook examines this issue and concludes that while the duty is not absolute, any cost of compliance with section 504 *cannot* outweigh the disabled individual's right to meaningful access. His thoughtful piece includes a discussion of *School Board v. Arline*, the United States Supreme Court's most recent decision concerning section 504. To reach his conclusion, the author examines the voluminous legislative history of section 504, administrative agencies' regulations promulgated on the statute, and other judicial interpretation of this imposed duty.

Our Symposium concludes with an essay in which Professor Jan

Costello and Attorney James Preis analyze the landmark United States Supreme Court decision of *Youngberg v. Romeo*, arguing that the federal Constitution remains an important source of the right of mentally disabled persons to community-based treatment. Professor Costello and Mr. Preis demonstrate how their theory of such a right both builds upon and may be distinguished from the earlier doctrine of right to treatment "in the least restrictive alternative." The authors critically analyze post-*Youngberg* decisions, finding in them support for their position that mentally disabled persons who are, or have been inappropriately confined, are entitled to the treatment services which will enable them to exercise their liberty in the community and avoid future hospitalization. Finally, the authors posit extending the right to mentally disabled persons who have never been confined in an institution, but whose liberty is restricted by the state in other ways.

Following the Symposium, issue four also includes two student authored selections and a Book Review. The first student Comment discusses a controversial area of California defamation law. In *Rosenbloom v. Metromedia, Inc.*, a plurality of the United States Supreme Court embraced the idea that to encourage robust debate on those public issues which lie at the core of the first amendment, any mass media reports concerning issues of public or general interest should be protected by the *New York Times Co. v. Sullivan* actual malice rule. Although the *Rosenbloom* doctrine was abandoned by the Court in *Gertz v. Robert Welch, Inc.*, the doctrine still retains vitality in some state jurisdictions. In California, one court of appeal has concluded that the *Rosenbloom* doctrine is alive and well in this state and emanates from section 47(3) of the California Civil Code. Conversely, another court of appeal has concluded that section 47(3) is not nearly so broad, and only serves to codify a limited qualified privilege for interested communicators to share information among themselves. Now, after five years of conflict in the appellate courts, the California Supreme Court, in the pending case of *Van Nuys Publishing Co. v. Superior Court*, has elected to determine just how much, if at all, section 47(3) protects press reports on matters of public concern. The author concludes that for public policy reasons, the supreme court should hold that section 47(3) does embody *Rosenbloom's* public interest privilege.

Our second Comment discusses the need for proposed congressional amendment of federal copyright law to augment current computer software protection. The author explores the problem of software piracy and examines whether existing protections, including licensing and embedded codes, are adequate. The Comment suggests that piracy has cre-

ated economic disincentives for research and development of software—a result contrary to the intention of the Copyright Act. The author concludes that because present protection is inadequate, new legislation scheduled for introduction in the United States Congress should be adopted.

The fourth issue concludes with a critical review of Lenore Weitzman's book, *The Divorce Revolution*. The author of the book review, Attorney Stanley Tobin, rejects Ms. Weitzman's calls for radical changes in divorce laws. In her book, Ms. Weitzman documents what she considers to be the disastrous effect of no-fault divorce laws on women's economic status. Weitzman argues that additional forms of property, such as a spouse's future earning potential, should be included in the property divided at divorce. This, Ms. Weitzman postulates, will help remedy the inequities that currently favor men in divorce settlements. Mr. Tobin criticizes the substance of Ms. Weitzman's proposals and questions the data from which they are derived. Mr. Tobin asserts that Ms. Weitzman's proposals, if adopted, would have counterproductive results, including discouraging marriage.