BOOK REVIEW

THE MENTALLY ILL AND THE RIGHT TO TREATMENT. Edited by *Grant H. Morris.* Springfield: Charles C. Thomas, 1970. Pp. 136.

The impact of *Rouse v. Cameron*[1] has indeed underscored the observation of its author, Judge Bazelon, that "[a]ny court decision which even smacks of novelty can be counted upon to spawn a rash of commentary."[2] Considerable, continuing reaction in forum and in print has ensued in the relatively short lifetime of this decision. Unfortunately, any decision which touches several areas—law, medicine, politics, and sociology—and is capable of provoking strong affective responses in each, also runs the risk of poorly defined, uncoordinated, and perhaps unproductive examination. When a psychiatrist reacts to the "right to treatment," for instance, it is not always clear whether the treatment standard to which he refers is that of the actual holding in *Rouse*, the weaker standard suggested in *Tribby v. Cameron*[3] and *Dobson v. Cameron*,[4] or the dream envisioned by Judge Bazelon that mental health, the most basic of life's necessities, is owed to every man.[5] On the other hand, legal scholars may differ considerably in their operational concepts of the term "mentally ill."

A thorough and meaningful study of a potentially far-reaching decision such as *Rouse* should include coordinated, interdisciplinary efforts by individuals who address their attention to identical, definitive issues. One early effort in this direction yielded a collection of papers published in 1969.[6] More recently, a symposium organized by Grant Morris has led to publication of *The Mentally Ill and the Right to Treatment.* In this rather concise book, most of the relevant issues first dramatically raised by *Rouse* are at least touched. Other issues of less obvious relevance and perhaps less deserving emphasis are also included, but do not seriously detract from the book.

Working on the premise that involuntarily institutionalized individuals, while constituting large numbers, are among the most

1. 373 F.2d 451 (D.C. Cir. 1966).

2. Bazelon, *Implementing the Right to Treatment,* in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 95 (G. Morris ed. 1970) [this book hereinafter cited as MORRIS].

3. 379 F.2d 104 (D.C. Cir. 1967).

4. 383 F.2d 519 (D.C. Cir. 1967).

5. Bazelon, *Implementing the Right to Treatment,* in MORRIS 108.

6. *Symposium—The Right to Treatment,* 57 GEO. L.J. 673 (1969).

disadvantaged legally, medically, and socially in our country, the editor assigns to the book as its primary focus a concern with the legal right recognized in *Rouse*—the right of mentally ill patients in public mental institutions to receive adequate treatment for mental conditions. Problems identified at the outset and directed to the various authors include: what constitutes adequate treatment of an institutionalized mental patient; what procedures can and should be devised to insure that a patient receives adequate treatment; what legal remedies should be available to the patient who is not receiving adequate treatment; and how should the patient's access to these legal remedies be safeguarded?[7]

The book is composed of six essays, each written by a different author. The authors, who all have background interests in mental health and law, include the editor of the book, Grant Morris, and Mrs. Patricia Marschall, both lawyers; the author of the *Rouse* opinion, Judge Bazelon; a sociologist, August Hollingshead; and two psychiatrists, Jay Katz and Harold Visotsky. Four essays—chapters 1, 2, 3, and 5—appear to have special relevance to the title of the book, and any one of them might have provided a suitable introduction to the published symposium. The two additional essays—chapters 4 and 6—while interesting and fairly well-written, are less directly related to the title. Each essay merits some individual consideration.

In exploring the ramifications of "right to treatment" as a legal concept, Katz[8] reflects a knowledge of principles and problems central in existing psychiatric practice in the light of important legal considerations. For instance, he suggests that motivation, the role of the unconscious, and the contrast between psychiatric treatment models which require the collaboration of the patient and those which do not, have important implications where possible waiver of the right to treatment, a refusal of treatment, and the relationship of rights and duties are concerned. The author questions whether the right to treatment in *Rouse* conflicts with certain fundamental, although often disregarded, assumptions of law and psychiatry and proceeds to examine how a duty to be treated and to treat may distort certain objectives of the right to treatment doctrine. These objectives include safeguarding the legal process, protecting the individual's need for

7. MORRIS ix.

8. Katz, *The Right to Treatment—An Enchanting Legal Fiction*, in MORRIS 3.

adequate treatment, preventing community neglect, and encouraging the mental health profession to promulgate standards of care.

In the remainder of his essay, Katz examines various aspects of treatment coercion. For the most part he invites the community and the law to play a significantly greater role in determining guidelines in areas where psychiatrists have previously acted alone. He suggests, for example, that when initial restraints are used for the purpose of eventually increasing a patient's intrapsychic freedom, a value preference is expressed which should reflect a societal judgment. Also, to the extent that intolerable external behavior becomes the criteria for invoking coercion, the law should assume the role of defining the authority of psychiatrists to administer treatment. The author indicates that use of coercion could serve to prepare the patient to exercise the right to treatment or to treat the patient over his conscious objection. In the first instance, without pressure to treat immediately, the psychiatrist and the patient would have an opportunity to reach a consensus regarding treatment or to respectfully differ, and setting time limits would preclude indefinite postponement of the issue of treatability and would likely contribute to a lessening of the burden on both parties to treat or be treated when treatment is neither welcome nor sensible. If treatment is carried out over the patient's conscious objection, it should be to facilitate a quick return to the community.

Reflecting other novel, progressive views is the call for increased participation by the patient in the selection of treatment, perhaps an all too infrequent practice in medicine where implied consent often substitutes for informed consent. The importance is apparent where treatment is state-imposed. A plea is also made for the establishment of rules to facilitate the therapeutic process, such as transition from inpatient to outpatient services. In this regard, an outspoken physician-lawyer has recently called for a concept of a right to treatment which would embody the requirement of available halfway houses or other full-time post-hospitalization facilities, claiming that a lack of such facilities hinders the planning of inpatient care as well as discharge.[9] Katz suggests the duration of treatment should depend on willingness to continue treatment, rather than upon mental

9. Address by Morton Birnbaum, Association of Medical Superintendents of Mental Hospitals Annual Meeting, Jan. 15, 1971 (summarized in FRONTIERS OF PSYCHIATRY, Jan. 15, 1971 at 3, col. 3).

condition or dangerousness, and that the patient's reaction to treatment should be stressed in assessing adequacy of treatment.

Katz identifies as a primary task of law and psychiatry the limitation of the duty to be treated to those who wish to exercise the right or come to appreciate it. He suggests that for all others treatment becomes a delusion—an unwarranted denial of constitutional rights. This position is attractive, particularly where preventive detention with carefully spelled-out procedural safeguards is a realistic alternative for certain cases. Psychiatrists would probably welcome the relief implied from the shifting of emphasis from "anyone is treatable" to "anyone may be treatable." Likewise, psychiatric hospitals and the profession generally would appear only to benefit from pressures which lead to promulgation of standards for and a philosophy of treatment. Somewhat stronger language than the author uses might suggest a frequent, silent, unrecognized, and unwitting conspiracy between psychiatrists and lawyers to obtain a result, when uncertainties in psychological existence and psychiatric knowledge as well as unclear legal questions are not squarely accepted and confronted.

While considerably longer than other essays in the book, Katz' paper is quite thorough and serves as a good introduction, especially for mental health personnel, to complex, troublesome issues which must be encountered. If the past performance of psychiatry does not glitter in the commentary and exposure by Katz, neither is it unduly chastised considering the present lack of judicial, legal, and societal participation which *Rouse* forecasts. If fault is to be found with the author's rather forthright discussion of issues, it is in the organization of his material, which does not encourage cursory review.

In the second chapter, Marschall,[10] looking to the past as well as the future, constructs a legal setting for the *Rouse* decision which effectively complements the other essays. After noting the basic issues touched upon in *Rouse* and the possible constitutional underpinning of the decision absent a statutory right, she gives considerable attention to the right to treatment as it relates to the reason for confinement. The author reviews various current practices prior to concluding that a constitutional right to treatment should exist if benefit can be derived and that the reason for confinement should have no bearing on the right. In most jurisdictions dangerousness and

10. Marschall, *A Critique of the "Right to Treatment" Approach*, in MORRIS 37.

the need for treatment are used as alternate criteria for commitment, or a standard is employed which mixes the two. Correctly, she asks if one criterion or the other can be clearly appreciated where treatment is at issue: Does dangerousness imply a need for treatment? Is a firm distinction possible at the time of commitment? Although deprivation of freedom is the same regardless of criteria used, vagueness of criteria permits a wide latitude of reliance on the judgment of individuals, particularly psychiatrists and court officials. Whether this latitude is necessary or desirable is not clear. A California statute is cited which permits detention to protect the public even if one is not amenable to treatment, in effect limiting the right to treatment to those who are treatable.[11]

In considering remedies for lack of adequate treatment, the author discusses release but repeatedly refers to the practice and rationale of detention where dangerousness is evident. Possibilities such as contempt proceedings and transfer of patients are raised, but a strong plea for statutory remedies is made. An excellent presentation of the judicial considerations which might be used in the formulation of a standard of treatment permits the imaginative reader to make a comparison with corresponding psychiatric considerations outlined in the previous chapter.

In the latter part of the essay, the author shifts from a more informational and documentary style to a reflection upon a variety of related considerations in right to treatment issues. Going beyond basic concerns of a right to refuse treatment and society's need to detain dangerous persons, Marschall cites views suggesting that hospitalization may be damaging, that medical treatment may be overvalued in uncertain circumstances, and that social nonconformity may often be labeled as mental illness.[12] In considering further the concept of preventive detention, reference to very real difficulties in predicting dangerousness is respectfully made. Finally, she suggests that abolition of the insanity defense may be a useful step in eliminating the confusion between mental illness and criminality which presently plagues criminal law. In this essay the author explores in a very readable and informative fashion the major legal concerns embodied in the *Rouse* decision.

After introducing his essay by declaring that adequate treatment should be a right guaranteed to all who come to a mental hospital,

11. CAL. WELF. & INST'NS CODE § 6300 et seq. (West Supp. 1970).

12. Marschall, *A Critique of the "Right to Treatment" Approach*, in MORRIS 55-57.

Visotsky[13] traces the history of institutional psychiatric treatment in this country as a saga of fluctuating emphasis between healing and custody, culminating more recently in the largely inadequate "aide culture." In the latter setting, safety, protection, and institutional adjustment are more valued than treatment: programs are designed for benefit of the aide; patients perform at the level expected and do what is expected for release; and administrators frequently substitute ease for responsibility. Such a development is perhaps not unlike occurrences in our penal institutions, which are naively viewed as "correctional."

Around a number of rather insightful observations, the author constructs what might be regarded as an ideal rather than adequate treatment standard, ignoring many of the realities—emphasized elsewhere in the book—surrounding the *Rouse* decision. He suggests that adequacy might be gauged by the operational measure of effectiveness of treatment in view of the goal of returning the patient to the community and into functional roles—independence and employability. The regressive nature of any illness necessarily restricts the freedom of the patient and accordingly must be considered in any system charged with treatment. Ideally, size of hospital, quality of staff-patient contact, community mental health services, integration of public and private sectors in mental health activities, new funding sources, and education of the public would be among important factors in setting up treatment programs. The author suggests that involuntary commitments should require more than the mere presence of mental illness, for example, proof of potential violence, protesting that these procedures have too long permitted "dumping grounds" for obscure reasons. Finally, he cites a "Bill of Rights for the Mentally Ill" which embraces many of the reforms advocated.[14]

The call to excellence and the perspective of Visotsky undoubtedly add depth to any examination of treatment practices and potentials in psychiatry. The extensive scope of his comments may be more relevant to the ultimate refinement of concepts first legitimatized in *Rouse* than contributory to the more elementary and practical considerations now commanded. This essay does serve as a transition between the disciplined approaches of Katz and Marschall, and the

13. Visotsky, *Adequacy of Treatment and Provisions for Methods of Assuring Adequacy of Treatment*, in MORRIS 63.

14. *Id.* at 74-75.

more expansive, anticipatory, and even visionary commentaries which follow them.

Hollingshead's[15] description of his efforts to inauguarate a reliable system of gathering data of epidemiological[16] significance offers an interesting, informative, and readable account; however, one struggles to find the degree of relevance to the stated purposes of the book as shown by other contributors.

Certainly, the conflict between the advancement of science and the privacy of individuals is a timely concern in the law, and Hollingshead has made extremely valuable contributions in this area. As government interest in mental health continues to increase, the need for the kind of information obtained in individual biographical studies and the myriad problems encountered in gathering it will become increasingly crucial concerns. However, the problems posed in the right to treatment in *Rouse* appear largely of a different quality and are more directly addressed in other chapters of the published symposium.

As author of the *Rouse* opinion, Judge Bazelon,[17] might have restricted his comments to any one of several innovative aspects of the case. Fortunately for the overall value of the book, he identifies the primary controversy over *Rouse* as the questioned competence of the courts to protect the right to treatment, and addresses the bulk of his comments to this issue. Only secondarily does he treat his claim that the rationale for the right is clear.

In taking to task those in the law who "accept the accustomed and fear the new," Judge Bazelon assails "diffidence in the face of scientific expertise" and offers judicial review of administrative decisions as the model to counter criticism of *Rouse*. In this instance, the reviewing court, rather than substituting its own uninformed judgment from a study of the record, insures that an administrator performs with care and reaches a reasonable result. Only the scope of the review varies. He correctly notes that psychiatrists, as do other experts, disagree, a reality with which the courts are familiar. Highly preferable, he indicates, would be legislative commitment to the

15. Hollingshead, *Mental Illness: The Rights of the Individual versus Community Needs*, in MORRIS 78.

16. "The epidemiologist tries to determine who develops a disease, when, and under what conditions. He is as interested in members of a population who are 'well' as those who are 'sick.'" *Id.* at 81.

17. Bazelon, *Implementing the Right to Treatment*, in MORRIS 95.

establishment of guidelines and machinery which would insure a right to treatment. Such guidelines might be patterned after those of the Social Security Administration[18] or forged from legislative, agency, and judicial interaction. Without such guidelines, hospital administrators must both provide treatment and review its adequacy. Advantages as well as disadvantages inherent in this approach are obvious.

Judge Bazelon takes the position that the courts should expose the inadequacy where it exists and provide the community, particularly the psychiatric profession and the legislature, with a chance to respond. Judicial review of administrative processes would nevertheless remain available to the courts. The position is also taken that preventive detention, if practiced, demands due process standards as high as those of the criminal law. Judge Bazelon views the likely turmoil of enforcing a right to treatment as intermediate to a re-examination of other practices relating to mental illness, especially those surrounding involuntary hospitalization. Also cited are the problems involving adequacy of psychiatric testimony and quality of legal representation in his experience in administration of the *Durham* rule.[19]

A spirited optimism pervades the words of Judge Bazelon as he challenges lawyers, psychiatrists, judges, legislators, and indeed the entire community to insure the viability of *Rouse*. Beyond this, a prophetic, crusading tone reaches zenith in his declaration that "we owe [mental health] to every man."[20] Without doubt, Bazelon has championed the cause of the mentally ill in law and in psychiatry but risks unnecessary alarm and resistance where the realities of problems surrounding *Rouse* are not fully respected.

In the concluding essay[21] the editor of the book brings his publication to a somewhat disappointing close. Few would strongly disagree with his statements which suggest that applying the criminal label to individuals should not exclude them from treatment. The "mentally ill criminals"[22] and "mentally ill noncriminal criminals"[23]

18. 20 C.F.R. §§ 405.1036-38 (1970).

19. "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

20. Bazelon, *Implementing the Right to Treatment*, in MORRIS 108.

21. Morris, *"Criminality" and the Right to Treatment*, in MORRIS 109.

22. A convicted criminal who becomes mentally ill subsequent to imprisonment. *Id.* at 113.

23. A criminal defendant either determined too incompetent to stand trial or found innocent by reason of insanity. *Id.* at 113-14.

as a class are no more dangerous than ordinary mental patients; proper treatment for mental illness depends on diagnosis and pathology, not criminal status, and dangerousness is not dependent on when the illness developed. On the other hand, there seems to be an overemphasis on criminality in view of the right to treatment orientation of the book. It is not always clear who the author is holding responsible for unequal treatment of criminals who are mentally ill and "noncriminal criminals" who are mentally ill. A position that all criminals are mentally ill would be open to serious challenge, and other authors have stressed that procedural safeguards are often available to those deprived of freedom via criminal conviction in contrast to those deprived of freedom through civil commitment for mental illness. The lesson of "Operation Baxstrom,"[24] suggesting a rather effectime pathway of administrative remedy insofar as equal treatment of the mentally ill in these groups is concerned, speaks for itself. Little attention is given to what may be a more basic issue—current sentencing philosophies and purposes of criminal sanctions. The overemphasis of some rather self-evident statements, as well as a somewhat naive treatment of other observations, do not appear in keeping with the announced intent of the book.

A service for the many students of *Rouse* has obviously been performed in bringing together the focused commentaries of several distinguished authors in this book. Considering the minimal editing claimed· the lack of repetition is all the more remarkable. The book is compact, and the essays for the most part are comprehensible and well documented. Such discordance that exists suggests disparity in approach to and emphasis upon proposed solutions rather than a failure to recognize certain problems.

The public advocacy of the right to treatment began over a decade ago.[25] Those individuals "out of sight, out of mind"[26] have awaited a champion. A very recent study offers evidence that for at least a decade the public has accepted mental illness as illness, looks to the medical profession for treatment of this illness, and is optimistic

24. Derived from the decision in Baxstrom v. Herold, 383 U.S. 107 (1966), requiring mentally ill criminals be treated as ordinary mental patients at the expiration of their prison sentences. *See* Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974 (1968).

25. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

26. THE RIGHT TO TREATMENT: A SYMPOSIUM 8 (D. Burris, ed. 1969).

about the outcome of such treatment.[27] It concludes that mental health professionals must move away from assumptions based on studies of two decades ago. The future development of ideas expressed in *Rouse* is uncertain, but there seems to be little doubt that both law and psychiatry have benefited appreciabily from the discussion surrounding the case, and are likely to continue to do so.

Johnnie L. Gallemore, Jr., M.D.*

27. Crocetti, *Are the Ranks Closed? Attitudinal Social Distance and Mental Illness*, 127 AM. J. PSYCHIATRY 1121 (1971).

* Assistant Professor of Psychiatry, Duke University. B.A. 1960, M.D. 1964, Emory University.