Editors' Forum

INTRODUCTION

Student writing in law reviews is usually confined to legal scholarship hopefully supported by sufficient authority. The editors of the California Law Review have decided, however, to include another kind of student writing in the Review, beginning with this volume. By instituting an Editors' Forum we intend to provide a means by which the editors can express their opinions on current legal issues.

The Editors' Forum will consist of editorials written by individual editors. The ideas and opinions expressed in each contribution to the Forum will be those of the contributor, and will not necessarily represent the views of the other editors. We do not intend to provide readers with detailed legal analyses supported by numerous authorities. We intend rather to raise questions and provoke thought. It is hoped that succinct, incisive editorials will be of continuing interest to our readers.

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Editor-in-Chief

COMMITMENT REFORM

As many as 10,000 persons each year are found mentally ill and confined to state hospitals in California. The law which authorizes and provides for the involuntary commitment of these persons by means of civil court proceedings is sadly inadequate and in need of reform.¹

The aims of California's mental commitment law are three-fold: (1) to provide humane treatment and care for mentally ill persons; (2) to protect the public from the dangerously mentally ill person; and (3) to prevent the wrongful or unnecessary commitment of individuals. While these goals are meritorious, the administration of commitment in this state leaves much to be desired. It is subject to attack for failure to safeguard adequately the liberty of persons. Its working mandate to provide

¹ The provisions for involuntary commitment of the mentally ill are codified in Cal. Welfare & Inst'ns Code §§ 5550-77.
for the treatment of non-dangerous mentally ill persons by means of involuntary hospitalization is contrary to the current medical position that local, voluntary out-patient care is a preferable and more rewarding program for meeting the psychiatric needs of such persons. Many persons are unnecessarily confined in our state hospitals and receive inappropriate as well as inadequate therapeutic care.

The central problem with the California law is its overreaching therapeutic goals. By statute, persons may be involuntarily confined to a state hospital either because they are “in need of supervision, treatment, care or restraint” or because “they are dangerous to themselves or to the person or property of others . . . .”\(^2\) The latter standard reflects the state’s traditional police power to protect its citizens from threats to public health and safety. But the former criteria of committable mental illness give cause for concern. To provide therapeutic care for persons who need “supervision” or “treatment” may appear to be a humane and liberal public purpose. Yet, since commitment is an involuntary and therefore coercive deprivation of personal liberty, the subjection of non-dangerous persons to this legal process is not necessarily laudable.

From a legal point of view, the “need of treatment” standard presents two major problems. First, there is a legitimate doubt whether the state has the constitutional power to commit persons who only need treatment. A dangerous person may be a proper object of the police power and an incompetent person may require the state to invoke its *parens patriae* power to care for those who are unable to care for themselves. But a person who only needs treatment for mental illness is neither dangerous nor necessarily incompetent. Although mental health experts suggest that the mentally ill be treated no differently from other sick persons, the need of treatment standard puts the mentally ill in a special class. For with respect to other diseases, the law recognizes a right of the state to confine and treat persons only in emergencies, life-saving situations, or when the particular disease threatens the public safety; for example, a contagious case of smallpox. Otherwise, the consent of the person is required before he may be subjected to medical care. It is difficult to offer an adequate justification for a different requirement for the non-dangerous mentally ill. Where is the compelling state interest which allows the state to override the individual’s right to personal liberty, including his freedom from restraint and his right to choose or refuse treatment at will?

A second major problem with the need of treatment standard for

\(^2\) *Cal. Welfare & Inst’ns Code* § 5550 specifies both standards of committable mental illness.
committable mental illness is its excessive vagueness. A vague standard which is subject to possible arbitrary use not only accentuates the constitutional problem but creates a practical problem of administration. Who among us needs treatment? And how are these persons to be distinguished from the rest of the population? There is no easy answer to this question since no one is quite sure of the boundaries of mental illness. Freud believed everyone was sick. More modestly perhaps, mental health experts today indicate that anywhere from ten to forty per cent of our urban population needs some form of psychiatric care.

Given such a broad mandate, the reach of the commitment power depends a great deal upon the particular policy of the commitment court judge. As a consequence, the rate of commitment varies decidedly from county to county. One judge will decide not to apply the need of treatment standard because it is too vague to justify a deprivation of the individual's right to liberty. Another will take a different approach, probably the most prevalent, which results in the delegation of the decision-making function to the court medical examiners. Rather than stress the right to personal freedom, the judge adopts the point of view that commitment is a benign remedy for mental illness. The judge views himself as a layman who ought to defer to the expert judgment of the doctors. If they recommend treatment, he provides hospitalization by rubber-stamping their commitment recommendation. He disposes of the problem of arbitrariness by trusting the "objective" judgments of medical decision-makers.

By adopting this latter approach, the judge indulges in a fiction and ignores reality. First, the deprivation of personal liberty ought to be stressed. Commitment results in involuntary confinement and the individual's separation from family, job, and community. Commitment causes collateral legal disabilities such as loss of a driver's license or the right to vote, or suspension of a license to practice a profession. And a person labeled "mentally ill" suffers from what sociologists call stigma. Upon release, he discovers that he has lost social status and employment potential. Second, commitment is not always the best way to provide care for the mentally ill person. Hospitals are over-crowded and understaffed. For some, commitment will mean only custody in an institution. For others, local, out-patient and short-term supportive care would be far more beneficial. Third, deference to medical expertise does not automatically render commitment decisions objective. Some court examiners are only physicians, untrained in psychiatry. More important, to describe behavior as "mental illness" does not mean that an "objective" judgment has been made, even if the judgment is made by experts. The label of mental illness means only that a person deviates from some norm of behav-
ior, a norm which will vary among societies, historical periods, and even among those who do the labeling. After a decision has been made that a person is mentally ill, a value judgment must be made to determine whether he should be committed. This judgment must take into account the individual’s health, his interest in personal liberty, and the public’s interest in safety or health. To allow medical examiners to effectuate this decision may distort the judicial function of balancing these factors. A doctor may place treatment above all other interests. His professional training and commitment to health may cause him to begin his medical examination by “presuming illness” to protect his patient. This, of course, is contrary to the judicial imperative of presuming an individual to be innocent until his opponent has carried the requisite burden of proof, a concept which springs from a different set of interests protected by the legal process. After studying commitment and attending many commitment hearings, this author believes that a presumption of illness is the modus operandi of our commitment system.

It was Justice Brandeis who once admonished that “experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.” His warning seems appropriate to commitment practices in California. For in this state, where the therapeutic goals of commitment prevail over all others, the processes designed to protect the individual’s liberty have become mere formalities. Consider the following: (1) After a petition alleging that someone in the community is mentally ill has been filed (anyone in the community may file such a petition), the court must appoint two court medical examiners to examine the individual personally and make a recommendation to the court. If the individual is considered dangerous, a detention order (four days) may be issued and the individual can then be confined at a county or state psychiatric unit for examination pending a hearing. Otherwise, the individual is merely required to report for his examination. Despite this rule and court decisions which strictly construe the use of detention since it interferes with the individual's right to prepare a defense, the courts issue detention orders as a matter of course, apparently irrespective of whether the person is dangerous. (2) The examination of the individual, which produces the most crucial evidence in a commitment hearing, is often conducted in haste, averaging about five minutes in length. Moreover, it is frequently conducted by doctors who have no formal training in psychiatry. (3) The court hearing at which all the evidence is weighed to determine whether a person should be deprived of his liberty and hospitalized is usually completed in four or five minutes. (4) The hearing may be “waived” if the individual fails to request one within four days of receiving notice that he may be subject to commitment. The notice also
informs the person of his right to counsel but not of his right to appointed
counsel if he is indigent. Since the person who comes before the commit-
ment court is often poor, emotionally upset, and confused, mere written
notice seems inadequate. Hearings are often waived and counsel seldom
appears in behalf of a person faced with a commitment hearing. (5) For
the individual to defend against experts under a “need of treatment”
standard without the benefit of counsel destroys the effectiveness of this
procedural right. Not only is the defense difficult (many lawyers would
not know how to conduct such a defense) but it is doubtful that the court
trusts the credibility of the individual since he appears in court already
having been labeled mentally ill by the medical examiners.

Given these procedural handicaps and a broad standard of committable
mental illness, it is not surprising that a commitment petition usually
results in involuntary state hospitalization. Some of the consequences of
this assembly-line process are unjustifiable. Relatives may, for whatever
motive, dispose of unwanted members of the family. The police are
allowed to commit a social nuisance. Counties are permitted to forego the
improvement of local treatment facilities by shifting the burden of care
to the state hospitals. The state hospitals, in turn, remain overcrowded
and provide inadequate treatment. The individual is deprived of his
freedom, often unnecessarily, to his medical and social detriment.

Can a means be found to avoid this vicious circle of injustice? The
present law should first be amended to remove the need of treatment
standard. This policy decision would remove the non-dangerous person
from the reach of involuntary treatment. A savings in tax dollars now
spent to maintain large, crowded state hospitals might be reallocated to
local communities to develop the facilities and clinics needed to serve
the non-dangerous mentally ill. Commitment would continue, but it
would be limited to exercise of the police power to protect the community
from unreasonable risks to public safety. Hopefully, the judicial role
would shift from the delegation of decision-making to psychiatrists to the
enforcement of a standard which clearly calls for an independent value
judgment made by the judge. He would weigh the value of individual
liberty against society’s need for safety. Although an individual may need
some measure of psychiatric care, he should not be deprived of his
freedom involuntarily unless he presents a danger to society. He should
be encouraged, however, to seek voluntarily professional treatment for
his illness. Local facilities staffed with competent psychiatric personnel
should be developed to treat such a person on a voluntary basis. Finally,
in commitment proceedings the role of the psychiatrist would be to
screen the non-dangerous person and redirect him to voluntary facilities
and to bring the dangerous person to the attention of the court.
To ensure the protection of the individual against wrongful commitment, the due process requirements of notice and opportunity to be heard must be made meaningful and effective. Notice of a right to counsel and a right to a hearing should be verbal as well as written and should specify that counsel will be appointed if the individual is indigent. The waiver of hearing provision should be eliminated and a hearing, with the individual present, required in every case. Court examinations should be conducted by qualified psychiatrists and the quality of the examination should be scrutinized by counsel and judge. Since detention interferes with the individual's liberty and right to prepare a defense, an order of detention should only be issued if the individual is dangerous. If one of the reasons for the present common use of detention is to provide a more thorough examination of the person, an automatic detention provision should be provided by law. But if this were done, the individual should have appointed counsel to help him prepare a defense.

These considerations are highly significant. For from a broader perspective, the civil commitment problem has wide ramifications beyond its limited boundaries. Today, we are in a period of transition from older notions of social control which stress punishment and retribution to newer forms associated with rehabilitation and treatment. Someday, even the criminal law as we know it today may be absorbed by the therapeutic mode. The leading question, then, is whether by renaming the process civil or therapeutic rather than criminal and deterrent, we will forego the strict procedural safeguards which now surround the criminal defendant. Under both labels, we deprive persons of their civil liberties. Under both, we require proof of facts before we invoke sanctions or coercion. Yet the criminal process affords greater protection to the individual. Should labels make a difference?

Perhaps one day a commitment will not be considered a significant deprivation of liberty. But that will be when stigma and legal disability are not attached to civil commitment; when psychiatric judgment is “objective”; and when treatment of mental disease is systematized and effective. But I fear that such a day is still far in the future. Until then, our duty is not to confuse the future with present reality.

In February or March of this year, the Subcommittee on Mental Health of the Assembly Ways and Means Committee plans to submit a new mental commitment law for adoption by the California Legislature. Already, the subcommittee has released a report which offers extensive documentation for the views expressed in this editorial. The subcommittee hopes to enact a law which will remove the non-dangerous mentally ill person from the reach of involuntary commitment. A multitude of volun-
tary services will be provided to meet his health needs. At the same time, the new law will offer substantial legal protection for persons whose mental health is substantially impaired or who are considered dangerous to the safety of others. This major attempt at reform deserves the consideration and active support of the California Bar.

Jerry J. Berman
Note and Comment Editor

PROGRESSIVE TAXATION

Blum & Kalven, The Uneasy Case for Progressive Taxation (Phoenix ed. 1963), confirms the thought that most of the arguments with respect to the proper relation of man and state in general can be expressed in terms of arguments for and against the progressive income tax. Since I am opposed to the progressive income tax, it seems desirable to set forth some of the ideas gleaned from the book in the hope that thought will be generated concerning the proper relation of government to the individual.

An opinion survey conducted by Blum and Kalven concerning attitudes toward the progressive income tax in the United States discloses that the majority of the American voters not only fail to understand the arguments for and against such taxation, but also fail to understand the issue. The survey demonstrates that the average citizen is unable to comprehend that progressive taxation means more than “those who earn more pay more”; the notion that those who earn more pay disproportionately more under a system of progressive taxation is foreign to most Americans. This leads to the interesting possibility that were the American voters to think about progressive taxation, they might eliminate it.

The arguments against progressive taxation are fairly well-defined. Such taxation discourages both the production and accumulation of wealth and the utilization of wealth in risky enterprises, which in turn produces a decline in innovation. Progressive taxation effects a redistribution of income. Redistribution is antidemocratic in an economy based on allocation of resources through a free market: It imposes upon everyone the will of planners with regard to valuation of services, rather than that of society as a whole expressed in the market. To the extent that effort depends on material reward, progression reduces individual incentive to excel in the production of services valued by society. Progression greatly complicates the administration of the system of taxation, which may

For both study findings and tentative recommendations, see Subcommittee on Mental Health Services, The Dilemma of Mental Commitments in California: A Background Document (1966).
produce waste of otherwise productive effort by encouraging the search for means of tax avoidance. Progression is a politically irresponsible formula for taxation. One class of people is allowed to create burdens for another class which the former is not required to share; this system tends to encourage the creating class to acquiesce in governmental schemes of doubtful worth under the misimpression that the whole cost will be borne by others.

These arguments against progression are inconclusive: The facts are unclear and the alleged detriments may be outweighed by the affirmative good produced by progression. Numerous arguments have been made which seek to justify progressive taxation in terms of the social desirability of its effects. For example, it has been argued that progression contributes to economic stability by changing the level of revenue collections in a downward direction in times of deflation, when deficit spending is desirable, and in an upward direction in times of inflation, when a government surplus is desirable. As the current American experience proves, progression alone is an insubstantial force in this regard. Moreover, progression is clearly not indispensable for this purpose since variation in government expenditures or total tax collections, however derived, would serve as well. A related argument is that progression ensures continued economic activity by producing a more even distribution of income, which in turn leads to more constant rates of spending. This might be desirable if it could be proved, but there is apparently no factual substantiation for the argument.

Another argument is based on the belief that the benefits received by virtue of living under government increase more rapidly at a certain level of income than the income itself. It is difficult to demonstrate that people with greater incomes receive disproportionately greater benefits from government than those with lesser incomes. Moreover, many government services are incompatible with the idea of a benefit theory in the allocation of tax burdens; welfare programs are one example.

Still another argument is that taxation should properly be allocated so as to hurt all taxpayers equally. If this position is accepted, and if the utility of money declines at a certain rate as income increases, some measure of progression is desirable. However, while the idea of a declining utility for money is intuitively satisfactory, intuition seems a poor basis for instituting a system of taxation with the detrimental features of progression. Satisfaction is not easily reduced to quantities. Money is not easily translatable into hurt, or sacrifice. Consequently, it is virtually impossible to demonstrate the declining utility of money. In fact, many aspects of American life indicate that this theory of declining utility is false. For example, lower-income workers do not as a general rule work longer hours
than higher-income workers, as they arguably should were the utility of money to decline at a certain level of income.

Ability to pay arguments are the inverse of sacrifice arguments. To demonstrate that ability to pay—that is, the ability to withstand a particular quantum of sacrifice—increases more rapidly than income is just as difficult as to demonstrate that sacrifices involved in being forced to pay a particular sum decrease more rapidly than income increases.

These arguments cannot be verified; and this leads to the conclusion that the arguments conceal ideological preference, the normative judgment that people should value money in a certain way, and the judgment that the ultimate value of our society should be equality. In fact, the issue most closely related to the question of the desirability of progression is the desirability of equality.

Equality is said to promote the general welfare. But, in fact, forced equality simply increases the welfare of one group at the expense of another; it is impossible to establish any quantitative basis for measuring the net effect on the aggregate welfare of society. It has been argued that equality maximizes the general welfare because the presently less wealthy spend money in more desirable ways. Desirability of expenditures is again a value judgment, and this argument is contradicted by most government programs implementing the equalizing effect of progressive taxation. These programs typically limit the choices by the recipient of funds.

Equality is said to be synonymous with justice. The argument is as difficult to refute as to substantiate. Justice is not scientifically measurable. But since the argument that equality means justice directly clashes with many of the fundamental moral premises of our society, it is difficult to understand how progression can be supported in terms of justice without a concomitant re-examination of such values as personal responsibility. The market system of rewards is directly tied to concepts of justice based on personal responsibility; that system separates out the value to society of various component services in a manner which progression rejects. Thus society recognizes the justice of the claims of those earning higher incomes by retaining the market economy and rejects the justice of such claims through progressive taxation.

As is readily apparent, the arguments for and against progressive taxation are not susceptible of rational evaluation. Not only are the arguments, both pro and con, based on premises impossible to prove or disprove, they are to a large extent the product of emotion and ideology. All of the arguments eventually come down to the concept of fairness accepted by the proponent, and it is impossible to judge intellectually concepts of fairness. The striking thing about the arguments for progressive taxation,
however, is that they represent a particular concept of fairness which has never been tested in an election because the people have demonstrably failed to understand the issue. Thus, a government program based upon a concept of fairness possibly held by only a small minority of citizens is imposed upon all of the citizens for failure to examine the program in light of the concept of fairness perhaps shared by the majority.

It is important to examine arguments such as those presented to uncover contradictions in one's own value structure. While conflicting concepts of fairness are impossible to resolve logically, an intelligent person can and should attempt to resolve conflicts between his position on a particular issue and his own concept of fairness. I think that were the American voters to re-examine the progressive income tax in the light of concepts of fairness which they presently otherwise express, progressive taxation would be eliminated.

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