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THE RIGHT TO COUNSEL, WAIVER THEREOF, AND EFFECTIVE ASSISTANCE OF COUNSEL IN CIVIL COMMITMENT PROCEEDINGS

by

John J. Brunetti*

CONSIDERATION of the rights of mental patients has become an area of increasing concern to the legal community. Establishing a constitutional right to treatment for committed persons has been the paramount concern of mental health advocates and commentators during this period, and that concern was focused in O'Connor v. Donaldson, recently decided by the United States Supreme Court. With regard to legal representation at the commitment stage, however, the emphasis has been on defining counsel's role rather than on considering the more fundamental question of whether a constitutional right to appointed counsel exists in such proceedings. One might properly construe this preoccupation with counsel's role prior to establishing the right to counsel's presence as a philosophical placing of the cart before the horse. This Article seeks to explore the right to counsel in civil commitment proceedings.

Three issues regarding counsel in civil commitment proceedings will be examined: whether the constitution provides for a right to appointed counsel for indigent persons facing commitment, under what circumstances the right may be waived, and what constitutes effective assistance of counsel in this context. In each of these areas, an analysis of the applicable statutory provisions of the fifty states and the District of Columbia will be set forth. Case law and constitutional principles will then be considered so that the statutory picture in the United States may be evaluated and so that the various proposals may be critically analyzed.

I. THE CIVIL COMMITMENT PROCESS

Essential to an understanding of the various aspects of the right to counsel in civil commitment proceedings is a minimal familiarity with the process

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1. 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). The final Donaldson case, as decided by the Court, was a disappointment when compared to the circuit court's opinion, 493 F.2d 507 (5th Cir. 1974), which expressly recognized a constitutional right to treatment for nondangerous, involuntarily committed patients. The Supreme Court held only that confinement of the harmless mentally ill was not warranted, and expressly reserved judgment on the right to treatment issue.


3. The author of the most recent casebook in the area of psychiatry and mental health has noted that this is an area which has received little consideration from the commentators. A. Brooks, Law, Psychiatry and the Mental Health System 801 (1974).
itself. A brief description of "how the system works" is, therefore, an appropriate starting point.

A. Initiation

Not unlike the procedure in the criminal justice system, commitment proceedings are triggered by one citizen's abnormal or antisocial act or course of conduct, which causes another person to initiate commitment proceedings, or to refer the proposed patient to an agency which will do so. Whether it be a relative, a police officer, or a stranger whom the allegedly ill person has annoyed or harmed, one citizen is requesting that the sovereign exercise its authority over the person of another.

The invocation of the state's power may be supported by one or both of two concepts. The parens patriae power of the state may be employed to confine the individual so that he does not harm himself, and so that his malady may be treated. The police power of the state, on the other hand, may be exercised to confine the individual so as to prevent him from harming other members of society. In effect, this two-pronged analysis of the sovereign's authority has been codified into the most common statutory standard which must be met before a court will civilly commit a person: likelihood of doing harm to self or others. That standard, and the others used in a minority of American jurisdictions, share two common characteristics: lack of precision and ambiguity. The presence of those two factors graphically demonstrates the necessity for an attorney in commitment cases, for only a trained advocate could protect the person against whom commitment is sought by insuring that the substantive standard for commitability in the particular jurisdiction is met, and if necessary, by challenging the statute as unconstitutional on grounds of vagueness and overbreadth. This Article is concerned with the procedure by which that standard is sought to be met, and with the need for effective legal representation, provided at the state's expense, within such a process.

B. Notice and Hearing

The procedural steps leading to commitment are similar among the American jurisdictions. The patient, usually in some form of custody pur-
suant to an emergency detention order, is examined by one or two physicians. If the physician(s) certify that commitment is warranted under the applicable statute, the patient is notified orally and/or in writing of the nature of the proceedings and a hearing date is set. The issue to be determined at the hearing is whether the patient requires involuntary hospitalization under the applicable statutory standard. The period of confinement may be temporary, that is, for a stated number of days; or it may be final, for an indefinite time. This Article will focus on right to counsel problems within the context of an indefinite commitment wherein the individual is deprived of his liberty until such time as the state's physician certifies that the patient no longer requires hospitalization.

**C. Is a Hearing Constitutionally Required?**

This Article seeks to consider various aspects of the right to counsel in the civil commitment process. Great emphasis will be placed on the hearing stage of these proceedings in the pages that follow. It would, therefore, be analytically unsound to summarily presume that a hearing is a constitutionally required element of these proceedings.

The fourteenth amendment of the United States Constitution provides that no state shall deprive a person of his liberty without due process of law. Two questions must be answered in the affirmative in order to find in this mandate a constitutional right to a hearing in civil commitment proceedings. First, is commitment for one's own good or the good of society a deprivation of liberty within the due process clause? Second, is a hearing required before such a commitment, or is an available post-commitment remedy such as a writ of habeas corpus constitutionally sufficient?

As early as 1896 a Kansas court recognized that involuntary hospitalization is a deprivation of liberty, so that notice and the opportunity to be heard are constitutionally required elements of due process. As Justice Brandeis cautioned us, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." The Supreme Court adopted such reasoning in *In re Gault* when it character-
ized the commitment of juvenile delinquents for care and rehabilitation as a deprivation of liberty within the protection of the due process clause. The Court restated the fundamental view that due process is the "basic and essential term in the social compact which defines the rights of the individual and delimits the power which the state may exercise."\(^{13}\)

Since \textit{Gault} held that the exercise of the state's \textit{parens patriae} power must conform to due process when the commitment of a juvenile is sought, this reasoning logically should apply to involuntary hospitalization of alleged mentally ill adults with equal force.

Having concluded that civil commitment is a deprivation of liberty so as to call for the application of procedural due process as a jurisdictional prerequisite, we must next determine if the Constitution mandates a pre-commitment hearing as an essential element of due process. In other words, if the due process clause applies, what sort of process is due the proposed patient?

It has been suggested that the availability of habeas corpus to a committed person satisfies the due process requirement of "an opportunity to be heard."\(^{14}\) It has even been argued that the possible civil liability for conspiring to commit a person that may be imposed upon the committing physician is a cognizable element of protection.\(^{15}\) I would urge, however, that neither habeas nor any other available remedy provides an adequate constitutional protection for the committed individual. These are after-the-fact forms of relief which place an unfair burden of acting upon an individual who, at the point in time where the remedy becomes available, has already been adjudged mentally ill. Assuming that the individual is ill, though he may not be properly hospitalized under the applicable statutory standard, it is apparent that the availability of these remedies does not constitute adequate protection.\(^{16}\)

Much of the case law and commentary discussing habeas corpus as an adequate remedy for judicial scrutiny of involuntary commitment came prior to 1970, when the Supreme Court decided \textit{Goldberg v. Kelly}.\(^{17}\) In \textit{Goldberg} the Court denounced as unconstitutional a procedure by which a hearing to determine if welfare benefits should be terminated was held subsequent to the termination. At first blush, \textit{Goldberg} may seem tangential to a discussion

\(^{13}\) Id. at 20.
\(^{14}\) See, e.g., \textit{Hammon v. Hill}, 228 F. 999 (W.D. Pa. 1915); R. Farmer, \textit{The Rights of the Mentally Ill} 6 (1967). See also Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), \textit{aff'd mem. sub nom. Briggs v. Arafeh}, 411 U.S. 911 (1973), which upheld the Connecticut emergency commitment statute although such did not require a prior judicial hearing, when the court stated that the availability of habeas corpus protected the patient's rights although no statute required that the patient be specifically informed of his right to file the writ. In \textit{Logan} the court also drew the interesting distinction between mental illness sufficient for hospitalization, and incompetency, under which the patient would be presumed incapable of comprehending his legal rights. A mere finding of the former would not be presumptive of the latter.


\(^{17}\) 377 U.S. 254 (1970). Despite what this author sees as its great ramifications for judicial hearings in commitment cases, the \textit{Goldberg} case has not received detailed treatment by other commentators in the mental health field. See S. Brakel & R. Rock, \textit{supra} note 6, at 52, where \textit{Goldberg} was not even mentioned in a multi-paragraph discussion of habeas corpus as a constitutionally sufficient substitute for a hearing.
of the right to a hearing in civil commitment proceedings, but in-depth consideration yields a common principle.

In Goldberg the Court initially had to determine if welfare benefits were property within the meaning of the fourteenth amendment. Having answered that question in the affirmative, the Court next had to decide if due process was satisfied by a post-termination hearing. The Court held the post-termination procedure to be unconstitutional. In analyzing this issue, the Court engaged in a balancing process in which it weighed the threatened harm to the public and consequent governmental interest in speedy, summary adjudication against the nature of the individual's right of which a deprivation was sought. Because the Court deemed welfare to be the "means for daily subsistence" for qualified applicants,\(^{18}\) and its deprivation to constitute a withdrawal of the essentials of existence, it concluded that countervailing governmental interests in conserving fiscal and administrative resources were not sufficient to justify the delay of a hearing until after the discontinuance of welfare. Transformed to the civil commitment context, the Goldberg reasoning would mandate a pre-commitment hearing. Surely the deprivation of liberty which is inherent in commitment is at least as important as is the deprivation of property rights in welfare assistance.

Although such a pre-commitment hearing may be required, however, it should be pointed out that the Court in Goldberg stressed that the hearing need not be a "judicial or quasi-judicial trial,"\(^{19}\) but simply must serve to determine the validity of the intended deprivation before it occurs. Therefore, although Goldberg stands for the proposition that the opportunity to be heard is required by the due process clause, the Court did not reach the issue of how formal the hearing must be, and what aspects of normal trial procedure are applicable therein. It is those questions with which we will now deal, in the particular areas of right to counsel, waiver, and effective assistance of counsel in commitment proceedings.

II. The Right to Counsel in Civil Commitment Proceedings

Proceeding from the proposition that a pre-commitment hearing is constitutionally required in civil commitment proceedings, a consideration of the right to counsel at such a hearing is the next step in this inquiry. It will be a two-step analysis. First, a study of the nature of the statutory right to counsel in fifty-one American jurisdictions will be offered. A discussion of practical considerations and constitutional implications will follow.

A. The Statutory Right to Counsel

The statutory right in the United States jurisdictions to counsel at the hearing stage may be broken down into several classifications. Some states which statutorily mandate that the proposed patient be represented by counsel at the hearing place a burden on the patient to affirmatively request

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18. 397 U.S. at 264.
19. Id. at 266.
that hearing. For purposes of this grouping, it will be presumed that a hearing is mandatory, or, if mandatory only on request of the person sought to be committed, that he has made such a request.

Counsel Mandatory. Thirty-six jurisdictions mandate the appointment of counsel for indigent persons facing an involuntary civil commitment hearing. The language contained in these statutes is similar in whole or in part to that suggested by the Draft Act: "An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel." Whatever language is used in the statutes in this group, the noted provisions contain forceful terminology such as "must" or "shall appoint," leaving the presiding judge with no discretion in the matter of appointing counsel for the indigent subject in a pre-commitment hearing.

Counsel Discretionary. Nevada, New York, and Ohio statutorily provide that the presiding judge "may" appoint counsel to represent the indigent person at the commitment hearing. If the patient appears acquiescent during the proceedings, the judge may erroneously deduce that there is no

20. See, e.g., ILL. REV. STAT. ch. 91½, § 6-4 (Supp. 1975). These statutes will also be discussed in the waiver context. See note 90 infra and accompanying text.

21. See ALASKA STAT. § 47.30.070(h) (1971); ARIZ. REV. STAT. ANN. § 36-536 (1974); CAL. WELF. & INST'NS CODE § 5302 (West 1972) (appears discretionary by requiring appointment "if need be" but later states that the court shall appoint where the person is unable to obtain counsel); COLO. REV. STAT. ANN. § 27-10-107(5) (1974); CONN. GEN. STAT. REV. § 17-178 (1975); DEL. CODE ANN. tit. 16, § 5125(e)(1) (Supp. 1974); D.C. CODE ANN. § 21-543 (1967); FLA. STAT. ANN. § 394.467(3)(a) (Supp. 1975); GA. CODE ANN. § 88-505.3(a) (1971); IDAHO CODE § 66-329(e) (Supp. 1975); ILL. REV. STAT. ch. 91½, § 6-4 (1975); IND. CODE § 16-14-9-16 (1973) (requires the appointment of the county prosecuting attorney to represent the proposed patient eligible for commitment to a federally maintained institution and otherwise unrepresented by counsel); IOWA CODE § 229.5 (1969); KAN. STAT. ANN. § 59-2914(C) (Supp. 1974); KY. REV. STAT. § 202.156 (1972); LA. REV. STAT. § 28:53(A) (Supp. 1975); ME. REV. STAT. ANN. tit. 34, § 2334 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 123, § 5 (Supp. 1974); MICH. COMP. LAWS §§ 330.1450(3), 1454 (1975); MINN. STAT. § 253A.07(15) (1971); MONT. REV. CODES ANN. § 38-1309(1) (Interim Supp. 1975); MO. REV. STAT. § 202.807(4) (1972); N.H. REV. STAT. ANN. §§ 135-B:5, :7 (Supp. 1973); N.M. STAT. ANN. § 34-2-5(F) (Interim Supp. 1975); N.C. GEN. STAT. § 122-58.7(c) (Supp. 1974); ORE. REV. STAT. §§ 426.100(1)-(3) (1974); R.I. GEN. LAWS ANN. § 26-2-13 (1968); S.C. CODE ANN. § 32-961 (Supp. 1974); S.D. CODE § 27-7-2.6 (Interim Supp. 1975); TENN. CODE ANN. § 33-604(c) (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 5547-43 (1958); UTAH CODE ANN. § 64-7-36(5) (Supp. 1975); VA. CODE ANN. §§ 37.1-67.1 (Supp. 1975); VT. STAT. ANN. tit. 18, § 7111 (1968); W. VA. CODE ANN. § 27-5-4(c) (Supp. 1975); WYO. STAT. ANN. § 25-60(g) (Supp. 1975). Admittedly, the categorization of these statutes is somewhat speculative because most have not yet been judicially interpreted. Delaware and Michigan, for example, require that the proposed patient be informed of his right to counsel, and might, therefore, be interpreted as making appointment mandatory only upon request. See note 27 infra and accompanying text.

22. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (Public Service Pub. No. 51, 1952) [hereinafter cited as DRAFT ACT]. This Act was intended to serve as an aid for states in revising their mental health laws. While it may have set a fine example for establishing a right to counsel, the Act has fallen short in the areas of waiver and effective assistance of counsel.

23. DRAFT ACT § 9(f). Presumably indigency would be the usual, though not exclusive, reason why the proposed patient fails to provide counsel.

need for counsel. Such are the problems inherent in discretionary statutes.

**Counsel Mandatory on Request.** Five states authorize their presiding judges to appoint counsel for indigent patients upon their request. Considering the nature of the proceeding, the merit of this approach must be seriously questioned. If the state is claiming that a person is incapable of caring for his person or that he is so mentally unbalanced as to be considered potentially dangerous, how can the state presume that he will be capable of protecting a legal right?

**Guardian Ad Litem (Attorney Mentioned).** This type of statute provides that a guardian ad litem be appointed to represent the proposed patient and refers to attorneys only as members of the class from which a guardian may be selected or as those who may appear under other circumstances (e.g., as retained counsel). Hawaii and Wisconsin vest the judge with the discretion to appoint a guardian ad litem who may be an attorney or any other responsible person. This discretionary scheme should be contrasted with that in Alabama, where the court is required to appoint a guardian whose statutory duty is to employ counsel at the expense of the party for whom commitment is sought. No provision is made for impoverished persons. New Jersey offers another type of statute which mentions counsel only in stating that a patient confined in an institution prior to a judicial hearing should be afforded every opportunity to appear personally or by an attorney if such a hearing is to occur.

Again, no provision for the appointment of counsel in the case of indigent persons is statutorily mentioned.

**Guardian Ad Litem (No Mention of Attorney).** The three remaining jurisdictions make no reference to the presence of a legally trained representative of the proposed patient at the commitment hearing, but all provide for the appointment of a guardian ad litem. The Arkansas statute is especially objectionable. Indigents facing civil commitment have no statutory right to counsel, but there has been statutory authorization for the appoint-

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25. *See* Partridge, *Constitutional Requirements in Involuntary Civil Commitment*, 2 Md. L.F. 89, 92 (1972), wherein the author notes that patients are often under sedation during their hearings.

26. *Cf.* Cal. Welf. & Inst'ns Code § 5302 (West 1972), which is here considered mandatory, but which contains language which may cause it to be interpreted as discretionary. *See* note 21 supra.


28. *But see* Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd mem. sub nom.* Briggs v. Arafeh, 411 U.S. 911 (1973), where the court stated that mental illness for purposes of hospitalization and incompetency to stand trial or to comprehend legal rights are separate and independent concepts.


ment of counsel for indigents in ordinary civil law suits in Arkansas since 1931.\textsuperscript{33}

The failure to provide for counsel in the Pennsylvania statute was held constitutional by a state court in 1968 on the theory that civil commitment is not criminal in nature since its purpose is to protect the mentally ill person and society.\textsuperscript{34} That holding was strongly criticized three years later by a federal court sitting in Pennsylvania, which held the provision unconstitutional on its face and ordered that counsel be appointed in all commitment proceedings.\textsuperscript{35} The Pennsylvania statute has remained conspicuously unchanged.

In summary, thirty-six jurisdictions provide for the mandatory appointment of counsel for the civil commitment hearing, five condition this imperative upon the patient's request and three leave the appointment of counsel within the "sound" discretion of the presiding judge. The remaining seven states rely on guardians \textit{ad litem} to protect the interests of proposed patients, and make little or no reference to the presence of attorneys. Though this statutory picture is not bleak, certain critical observations must be made.

A mere statutory right to counsel for indigent persons facing involuntary commitment is an inadequate procedural protection. As has often been demonstrated, whatever protection the legislature might give, it might also take away.\textsuperscript{36} The differing methods by which the various states provide for the legal representation of indigent subjects of hospitalization proceedings demonstrate the need for recognition of a constitutional imperative to create uniformity and to insure that psychiatric justice is administered fairly throughout the United States. The task is to find specific constitutional bases for that imperative.

In \textit{Argersinger v. Hamlin}\textsuperscript{37} the Supreme Court fashioned a rule to further implement the constitutional right to counsel in criminal cases. The Court ruled that no person could be sentenced to a prison term for any offense unless he was represented by counsel, or unless after being advised of his right to have counsel appointed, he knowingly waived that right. There are three aspects to such a rule: the pure existence of the right, the manner in which it is to be articulated to the person whom it is intended to protect, and, once articulated, the circumstances under which it may be waived. These factors take on great significance in the civil commitment context where, assuming some validity to the claim of mental illness, the individual's ability to understand may be severely impaired.

\section*{B. Developing a Constitutional Right to Counsel in Commitment Proceedings}

We must now shift our inquiry to a discussion of whether counsel at the

\begin{itemize}
\item \textsuperscript{33} \textit{ARK. STAT. ANN.} § 27-401 (1962).
\item \textsuperscript{34} Commonwealth v. Anderson, 211 Pa. Super. 349, 236 A.2d 558 (1967).
\item \textsuperscript{36} See \textit{CAL. WELF. & INST'NS CODE} § 5302 (West 1972), which prior to a 1967 amendment was much more direct and less ambiguous in requiring the judge to appoint counsel.
\item \textsuperscript{37} 407 U.S. 25 (1972).
\end{itemize}
constitutionally required pre-commitment hearing is also constitutionally mandated. I would submit that the constitutional right to counsel therein has its source in two independent concepts—in the sixth amendment as it is made binding on the states by the fourteenth amendment, and in the fourteenth amendment’s general due process clause.

The Sixth Amendment. The sixth amendment to the Constitution provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Despite this express limitation to criminal prosecutions, a number of courts have found in the sixth amendment a constitutional right to appointed counsel for indigent persons facing involuntary commitment. It is not surprising that all but one of these cases were decided subsequent to the Supreme Court’s sweeping reform of the juvenile justice system in In re Gault. Though Gault dealt with the right to counsel and other procedural safeguards in the juvenile system, much of its rationale may be applied to the civil commitment process with equal authority.

The Criminal-Civil Dichotomy. The involuntary hospitalization of an individual is a deprivation of liberty pursuant to an exercise of the parens patriae and/or police powers of the state. Social stigma is a common consequence. These are precisely the considerations with which the Supreme Court was concerned in considering Gault’s case and the juvenile court process in general. In both commitment and delinquency proceedings, the process is denominated “civil” and is usually presided over by a judge of the probate, family, or domestic relations courts. In both systems, the state’s purpose in seeking confinement of the individual is generally rehabilitative and often paternalistic. In considering the concept of parens patriae in the juvenile context, the Gault Court commented that “its meaning is murky and its historic credentials are of dubious relevance.” Surely, parens patriae may not be a basis for denying constitutional safeguards by attributing such denials to a noble purpose. When specifically considering the right to counsel, the Court noted that adults enjoyed a constitutional right to counsel in felony cases and reasoned that “[a] proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his

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39. U.S. Const. amend. VI.
41. 387 U.S. 1 (1967).
42. See text accompanying note 13 supra.
43. 387 U.S. at 16.
44. Id. at 36. The Court cited Gideon v. Wainwright, 372 U.S. 335 (1963). Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that the right to counsel must be afforded every criminal defendant before a prison sentence may be imposed, had not yet been decided.
liberty for years is comparable in seriousness to a felony prosecution." Having recognized the substantive similarity between the loss of liberty to adults and juveniles, the Court refused to allow the sixth amendment "criminal" label to result in a triumph of form over substance.

In its oft-cited opinion in *Heryford v. Parker* the Tenth Circuit applied this reasoning to the loss of liberty as a consequence of civil commitment:

[We have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.]

In directly analogizing *Gault* to the civil commitment process, the Tenth Circuit further stated that when acting in *parens patriae*, the state must safeguard due process by insuring "that a subject of an involuntary commitment proceedings [sic] is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf."

This form of post-*Gault* reasoning is typical of that expressed in other decisions which have recognized a due process right to appointed counsel in civil commitment proceedings. In *Lessard v. Schmidt*, for example, the court matter-of-factly stated: "There seems to be little doubt that a person detained on grounds of mental illness has a right to counsel, and to be appointed counsel if the individual is indigent." In fact, the *Gault* rationale has even been extended to peace bond and civil arrest proceedings.

Chief Justice Burger's concurring opinion in *Donaldson* is particularly germane to a discussion of the disappearance of the civil-criminal dichotomy. While the Chief Justice emphasized the distinction between the state's *parens patriae* power and its police power, he expressed "little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . . ." Certainly the incarceration of these potentially dangerous citizens is penal in nature and tantamount to a criminal sentence in substance.

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45. 387 U.S. at 36.
46. 396 F.2d 393 (10th Cir. 1968).
47. Id. at 396.
48. Id.
51. 349 F. Supp. at 1097.
53. See, e.g., In re Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).
In light of *Gault* and subsequent decisions in the hospitalization area, it
would appear that the criminal-civil distinction is dying a rapid death. It
should no longer present a serious impediment to the application of the sixth
amendment right to counsel to civil commitment proceedings.

*Adversary Proceedings and the Presence of a Prosecutor.* The criminal-
civil distinction discussed above has often been associated with the notion
that those proceedings denominated "criminal" are adversary in nature while
those labeled "non-criminal" or "civil" are not. From that contention, it
might follow that the assistance of counsel is required only in adversary
proceedings. It is the author's view, however, that the latter argument may
be attacked on two grounds. First, the commitment proceeding may be aptly
characterized as an adversary one. Second, the right to counsel, as was
demonstrated above, is not limited to purely criminal cases.

The presence of a prosecutor has been a major factor in those cases in
which the right to counsel has been judicially established. The underlying
and unifying theme has been the belief that it is fundamentally unfair for an
individual to stand alone against the state. Inextricably tied to this notion is
the presumption that a lawyer is representing the state, therefore making the
proceedings adversary in nature. In 1945 the United States Supreme Court,
in considering the right to counsel in a criminal case, noted that a layman is
usually no match for a prosecutor, and, therefore, needs the aid of counsel
"lest he be the victim of overzealous prosecutors." The major Supreme
Court case on the right to counsel, *Gideon v. Wainwright*, is particularly
noteworthy for its preoccupation with the amount of time, money, and legal
expertise which the state expends on a criminal prosecution. More recently,
the Court has taken note of the absence of a prosecutor in refusing to find a
constitutional right to counsel at a hearing in which a suspended sentence
was executed.

Since the Court unfortunately might weigh the presence-of-a-prosecutor
factor in the commitment area, an examination of the present statutory
picture in the United States with regard to this issue is warranted. Only eight
of fifty-one jurisdictions statutorily require that a lawyer represent the state
at the commitment hearing. Seven states incorporate statutory language to
the effect that an attorney for the state may become involved in the proceed-

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55. See, e.g., *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963), where parole revoca-
tion proceedings were labeled non-criminal and non-adversary, hence certain procedural
protections such as the right to counsel were held not to be constitutionally mandated.
56. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the Supreme Court
refused to find a constitutional right to appointed counsel at a hearing where a suspended
sentence was executed, and *Morrissey v. Brewer*, 408 U.S. 471 (1972), where the Court
refused to find a right to counsel at a parole revocation hearing. In both cases, the Court
noted the absence of a prosecutor.
57. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*,
Ann.* § 25-60(c) (1967).
ings upon his own initiative, or must do so upon the request of the presiding judge or the party seeking the patient's commitment.62 The remaining thirty-six jurisdictions make no explicit statutory reference to the presence of an attorney for the state in the commitment process. This does not necessarily mean, however, that an attorney for the state is never involved in the proceedings in this great majority of the American jurisdictions. It may often happen that attorneys from offices of the county or district attorney, or the attorney general will become involved in contested proceedings in an informal manner, when the judge or clerk feels somewhat uneasy in the absence of a representative of the state.

The decision in Heryford v. Parker,63 in which the Tenth Circuit recognized a constitutional right to counsel in civil commitment, demonstrates that presence of a prosecutor may be an important factor. The Wyoming statute governing hospitalization procedures which was contested in Heryford at that time specifically required the presence of a prosecuting attorney, but merely granted the proposed patient the right to appear with his own counsel. The Tenth Circuit stressed this factor in holding that the patient was denied due process "when, as here, the prosecuting attorney undertakes to 'prosecute the application [for commitment] on behalf of the state' and the proposed patient is not otherwise represented by counsel."64 The question remains whether the absence of a prosecutor relegates the civil commitment process to the category of "non-adversary" proceedings. I would submit that the Heryford emphasis on the prosecutor's presence is not necessary in order to find a constitutional right to counsel. In Gault, where the Court discussed the juvenile's right to counsel, it made no mention of the presence or absence of a prosecutor.65 Instead, the Court took a unilateral view of the proceedings from the perspective of the individual whose liberty was threatened and emphasized the potential impact of the proceedings upon that individual.

It has sometimes been suggested that a lawyer is not necessary in commitment cases because the petitioner, the doctors and the judge all have the proposed patient's interests at heart.66 However, similar reasoning was rejected out-of-hand by the Court in Gault.67 After finding that a juvenile probation officer and the judge, though ostensibly looking out for the juvenile's best interest, were insufficient substitutes for a lawyer to act on the juvenile's behalf, the Court recognized the juvenile's need for the assistance of an attorney to engage in skilled examination of the facts, to assure that required formalities and procedures were observed, and to assist him in preparing and presenting any defense that he might have.68 By stating that

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63. 396 F.2d 393 (10th Cir. 1968).
64. Id. at 396.
67. 387 U.S. at 36.
68. Id.
the juvenile's non-legal representative was not competent to fill a necessary legal role, the Court implied that statutes in the juvenile or commitment area which require the appointment of only a guardian ad litem are constitutionally deficient. 70

The absence of a prosecutor was recently advanced by the State of Ohio in trying to distinguish the Heryford decision. In rejecting this argument, the court in In re Fischer noted that the portion of the Gault opinion dealing with right to counsel centered upon the inadequacy of the purported representatives of the juvenile (probation officer and judge) and not upon the presence or absence of a prosecutor.

What is particularly disturbing about the presence-of-a-prosecutor factor is a repeated assertion by the commentators writing on counsel's role. They lament that the absence of a prosecutor with which the defense attorney may compete causes "role-lessness," thereby reducing the effectiveness of the attorney. One recent article has suggested that prosecutors be statutorily required so that attorneys will be able to discover their proper roles more easily. 73 This proposal is objectionable because it may lead some courts to believe that an appointed lawyer will not be an effective advocate unless he has a prosecutor with whom he may compete. Those who publish on counsel's role in the future should do so with a broad perspective, taking into account all aspects of the commitment process. This will prevent a situation wherein arguments proposed in one area (counsel's role) have the potential to detract from those presented in another (the constitutional right to counsel).

In summary, Gault placed great emphasis on the potential for loss of liberty in finding the need for the assistance of counsel. Gault recognized the right to counsel as essential to the determination of delinquency which carries the significant possible consequence of imprisonment. The loss of liberty is a result so serious that the assistance of counsel is required, as it is in a criminal prosecution. Be it juvenile or hospitalization proceedings, the consequence is equally awesome, and the constitutional guarantees equally applicable.

In developing a constitutional right to appointed counsel in commitment proceedings under a sixth amendment theory, we need place no special emphasis upon the particular circumstances of the case. The fact that the subject of the proceedings may be suffering from a mental disability can be ignored. 74 This type of analysis was employed in the Gault decision. In Gault the Court centered upon the loss of liberty impact, giving no special emphasis to the immaturity factor. Thus, an analysis of the sixth amendment

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69. See notes 29-32 supra and accompanying text.
70. This is a logical conclusion because the guardian and attorney fill different roles. See Lessard v. Schmidt, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974).
71. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).
74. This would not be the case under the general due process argument, as will be seen below. See notes 75-85 infra and accompanying text.
right to counsel in commitment proceedings need not place any special emphasis on the mental disability factor.

General Due Process. It has been said that due process is a vague concept whose “exact boundaries are undefinable, and its content varies according to specific factual contexts.”

Exclusive of sixth amendment considerations, I would argue that the special disabilities of the proposed mental patient are such that representation by an attorney is required by the due process clause to insure that the patient truly enjoys a full and fair opportunity to be heard. It has been observed that the number of cases on a commitment docket for any given day presumes that few procedural rights will be asserted by the patients. Perhaps counsel is the key to due process in the commitment context, especially because a person’s mental state may be such that absent a legally trained advocate the proposed patient’s right to be heard will not be exercised.

The Supreme Court has expressed a concern that procedural safeguards in proceedings dealing with mental stability should be stringently protected. In considering Minnesota’s sexual psychopath commitment procedures, the Court stated:

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though ‘fair on its face and impartial in appearances’ may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

Argersinger v. Hamlin, although a sixth amendment right-to-counsel case, held that counsel was constitutionally required in cases involving misdemeanor or petty offenses before a jail sentence could be imposed. The Supreme Court expressed serious concern that the integrity of the adjudicatory process could be impaired by a greater concern with speedily disposing of a heavy petty offense calendar than with insuring a full and fair opportunity to be heard. This same concern is particularly relevant in civil commitment proceedings where often, for reasons of security or convenience, the

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76. No opinion has specifically relied on this theory, but see Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974), where the Court seems to be relying on a fundamental fairness rationale, and McCorkle v. Smith, 100 N.J. Super. 595, 242 A.2d 861 (1968) (dictum), where fundamental fairness, not the sixth amendment or the Gault decision, was relied upon to find a constitutional right to counsel in commitment proceedings.
77. See Litwack, supra note 2, at 829-30.
81. Id. at 34.
judge may travel only periodically to a mental hospital to preside over commitment cases.\(^8\)

There is an additional component to the general due process argument. It is that the commitment standards are so ambiguous that an advocate, trained in the art of cross-examination, is required in order that the physician's expert opinion might be clarified and crystallized for the trier of fact. No layman, no guardian \textit{ad litem}, and surely no patient could be expected to discharge this responsibility. The method by which the doctor has deduced that a person is "in need of treatment" or "may be harmful to self or others" must be scrutinized by competent counsel. In addition, Chief Justice Burger, concurring in\textit{ Donaldson}, implied that it is permissible to confine a potentially dangerous person.\(^9\) Surely, the basis upon which the expert witness makes a prediction of such serious consequence must be subject to the intricate probings and search for truth which are characteristic of an "adversary" proceeding.

General due process issues often are resolved by determining whether the particular procedure involved is in keeping with or repugnant to our traditions of fundamental fairness.\(^4\) Interestingly, the Supreme Court has expressly recognized that the quantity of states which observe a certain procedure, though not determinative, is indicative that the practice is "so rooted in the tradition and conscience of our people to be ranked as fundamental."\(^5\) Thus, since thirty-six jurisdictions mandatorily require the appointment of counsel for persons facing involuntary commitment, the Court might well consider this in considering whether there is a fundamental need for counsel in commitment proceedings.

C. The Statutes Reconsidered: The Future

Through commitment, the state's authority, be it based on the concept of\textit{ parens patriae} or police power, is visited upon the prospective patient for the purpose of depriving him of his liberty. This "awesome prospect"\(^6\) is the basis for a constitutional mandate that the assistance of an attorney for the person sought to be committed is required. Whether the proceedings are labeled "criminal" or "civil," adversary or non-adversary, retributive or rehabilitative, due process requires that an individual be entitled to the assistance of counsel before the state may take away his freedom.

Were the Supreme Court to decide this issue today, it could rely on either a sixth amendment or a general due process theory in finding a constitutional right to counsel. The Court would most likely choose the former since it is a logical extension of the\textit{ Gault} decision and would be firmly supported by precedent. In addition, the Court would probably prefer to deal with a pure "serious loss of liberty" theory under the sixth amendment rather than to

\(^{82}\) See Cohen, \textit{supra} note 2, at 428.
\(^{84}\) See, e.g., Rochin v. California, 342 U.S. 165 (1952).
\(^{86}\) See \textit{In re Gault}, 387 U.S. 1, 37 (1967).
delve into the specific factual considerations of the commitment process necessary in a general due process inquiry. The rule would probably take the following form: Before any person may be involuntarily committed, he must be represented by counsel, unless, upon being advised of his right to have counsel appointed, he knowingly waives that right.

Returning to the statutory classification previously discussed, those thirty-six jurisdictions which require the appointment of counsel probably go further than the Constitution demands. This extra protection evidences the legislatures' solicitous attitude toward the individual facing commitment. Those states which require the appointment of counsel after the patient has been advised of and requests the services of counsel embody the constitutional minimum. The ten remaining state statutes which make counsel discretionary or make no provision for counsel are constitutionally deficient.

III. WAIVER OF THE RIGHT TO COUNSEL IN CIVIL COMMITMENT PROCEEDINGS

Although it has been concluded that there is a right to counsel in commitment cases, it is possible that the right may not be exercised. The notion of waiver takes on serious implications in a context where allegedly mentally ill persons are involved. Is the concept of waiver antithetical to the purpose of involuntary hospitalization of the mentally ill? Is more protection than that granted the mentally stable citizen required? In dealing with these questions, I will first consider the problem as perceived, if at all, by legislatures, and will then analyze the problem from a judicial perspective.

A. Waiver and the State Statutes

In considering whether the statutory right to counsel may be waived in the various American jurisdictions surveyed, I shall consider only those states which make some affirmative statutory provision for the appointment of counsel. These states may be grouped into several categories.

Waiver by Failing To Request Counsel. Five states condition the statutory right to appointed counsel upon an affirmative request by the patient, be it prompted by the proposed patient's original perception of the need for a lawyer or by the presiding judge's statement as to the availability of free legal assistance. As was stated previously, this statutory scheme would seemingly comport with the minimum requirements of due process. The following statutes, which will not be discussed, either grant the judge total discretion in making appointments or totally fail to mention attorneys: Ala. Code tit. 21, §§ 11, 15 (1958); Ark. Stat. Ann. § 59-419 (1971); Haw. Rev. Stat. § 334-82 (1968); Miss. Code Ann. § 41-21-3 (1972); Nev. Rev. Stat. § 433.693(1) (1973); N.J. Rev. Stat. § 30:4-41 (Supp. 1975); N.Y. Mental Hygiene Law § 88(c) (McKinney 1971); Ohio Rev. Code Ann. § 5122.15 (Page 1970); Pa. Stat. Ann. tit. 50, § 4406 (1969); Wis. Stat. § 51.02(4) (1957).


89. See note 27 supra and accompanying text. See also Argersinger v. Hamlin, 407 U.S. 25 (1972).
question remains, however, whether such a procedural mechanism should be acceptable in a proceeding where the mental health of the individual is in question. That issue will be discussed after this brief statutory summary is concluded.

Counsel Mandatory, but Waiver Possible by Failing To Request Hearing. This variety of statute guarantees a patient an absolute right to appointed counsel at the commitment hearing, but requires the patient to affirmatively request that hearing or permits him to waive the right to a hearing. Thus, the uncounseled patient who fails to request a hearing in effect waives the statutory right to counsel. In these states, the failure to act has a double-faced consequence. By failing to request a hearing, the patient is not only deprived of the right to communicate with a legally trained advocate provided by the state about the nature of the proceedings, but he is also deprived of his liberty without a judicial determination that the commitment standard has been met.

In Virginia the patient is not appointed counsel unless he refuses to sign a voluntary commitment document. A hearing is required before the court will allow the patient to execute such a document. This proceeding is not labeled the commitment hearing, but rather is termed one to determine competency to execute a voluntary commitment instrument. Counsel is not present at such a proceeding. However, in substance, this is a hearing which may result in the patient’s indefinite confinement. Similar waiver consequences are possible in the other statutes in this group.

Counsel Mandatory, Waiver Not Mentioned. Twenty-six jurisdictions employ mandatory language in their right to counsel statutes, and in each of these states a commitment hearing is also mandatory. These provisions make no reference to the possibility of waiver nor to the circumstances under which one might be allowed.

Counsel Mandatory, Waiver Mentioned. Six states make specific reference to the possibility and efficacy of waiver of the statutory right to appointed counsel in commitment cases. New Hampshire provides an absolute right to

90. FLA. STAT. ANN. § 394.467(2) (1974); GA. CODE ANN. § 88-505.3(a) (1971); ILL. REV. STAT. ch. 91½, § 6-4 (Supp. 1975); VA. CODE ANN. §§ 37.1-67.1 (Supp. 1975); cf. N.Y. MENTAL HYGIENE LAW §§ 72(3), 88(c) (McKinney 1971) (hearing must be affirmatively requested, but counsel not mandatory).


counsel unless it is waived by "an informed decision,"93 but what constitutes an informed decision is not articulated. Massachusetts requires the court to appoint counsel for an indigent proposed patient unless such appointment is refused.94 A waiver determination is obviously practical, since it is based upon the external conduct of the patient,95 but the problem of "guessing" at what in fact constitutes a refusal is still present. Oregon requires the presiding judge to appoint counsel for the indigent person facing commitment unless he "expressly, knowingly and intelligently" refuses counsel.96 Michigan requires the appointment of counsel, but allows the proposed patient, after consultation with appointed counsel, to waive counsel in writing.97 Montana specifically prohibits waiver of the right to counsel in commitment hearings.98 South Dakota does not use the word "waiver," but states that a person charged with being mentally ill shall in no case be without legal representation.99

B. Cases and Theory on Waiver

Should waiver of the right to counsel ever be allowed in commitment proceedings? If the state claims that the patient is so mentally ill as to be unable to care for himself and/or is potentially dangerous to others, it is difficult to comprehend how the state can allow that same person to make his own decision about being represented by counsel.

I see two distinct aspects to the waiver issue in the civil commitment context. The first is the problem of whether the patient fully understands his legal right to counsel under the applicable statute and the second is whether he perceives the practical need for legal representation. The latter consideration is usually taken for granted in other contexts, such as in ordinary criminal prosecutions. The person accused of a crime generally has no problem perceiving the need for a lawyer. For a proposed mental patient, however, the ability to perceive the need for an attorney and the consequences of failure to consult one is not as clear.

Waiver in Criminal Cases. Johnson v. Zerbst100 established the test for evaluating waiver of the right to counsel in criminal cases as the voluntary, knowing, and intelligent relinquishment of a fully known right. In Johnson the Supreme Court listed factors such as background, experience, and conduct of the accused which should be considered in determining waiver. In later cases, the Court has applied a strong presumption against waiver and has imposed a "heavy burden" upon the party asserting its validity.101 Even

95. Of course, the case may arise where the proposed patient's mental condition is such that his external conduct does not deserve any credence. This is precisely the problem that waiver presents. Do we force a lawyer upon him or accept his waiver?
96. ORE. REV. STAT. § 426.100(2) (1974).
100. 304 U.S. 458 (1938).
the fact that a criminal defendant is an attorney is not determinative in deciding whether a legally valid waiver has occurred. Rather, it must be shown that the accused was acquainted with his right to counsel, that an offer to provide counsel was made, and that such offer was voluntarily and intelligently declined.

**Waiver in Juvenile Cases.** I have tapped the *Gault* case as a fruitful source for the development of a constitutional right to counsel in the commitment sphere, but the case is, regrettably, of minimal help in examining the problem of waiver of counsel at the hearing stage. In a mere passing reference to the concept, the *Gault* Court did no more than reiterate the “knowing-voluntary relinquishment” rule of *Johnson v. Zerbst*. The Court ignored the factor of immaturity which is inherent in the juvenile system and which may impair the ability to understand and to make meaningful choices. In discussing the interrogation of juveniles in other cases, however, the Court has expressed doubt as to the validity of waivers by juveniles. A totality of circumstances test nevertheless persists for determining the validity of a juvenile’s alleged waiver of counsel at both the interrogation and adjudication stages. Age, education, background, and knowledge of the charge have been mentioned as factors to be considered. Despite countless statutes which refuse to grant enforceable effect to contractual obligations incurred by persons below a certain age, the aversion to establishing a per se rule prohibiting waiver of constitutional rights by juveniles continues to prevail.

**Applying Waiver Theories Where Mental Capacity is in Issue.** Lack of judicial scrutiny over the waiver of counsel by a proposed patient can lead to serious abuses. In a study of 756 commitments over a five-year period in one Florida county, it was discovered that only two hearings were held. The researchers attributed this to a hearing waiver clause which was incorporated in the notice receipt and which the patient was asked to sign at the time notice of the initiation of commitment proceedings was served.

The Supreme Court has not ruled directly upon the issue of waiver of procedural rights in civil commitment, but the Court has indicated its disposition in analogous areas. *Pate v. Robinson,* for example, involved a

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102. See Glasser v. United States, 315 U.S. 60 (1942).
104. *In re Gault*, 387 U.S. 1, 44 (1967).
106. See, e.g., West v. United States, 399 F.2d 467 (5th Cir. 1968); Shlioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); McClintock v. State, 253 N.E.2d 233 (Ind. 1969); *In re McDaniel*, 302 P.2d 496 (Okla. Crim. 1956).
108. See, e.g., West v. United States, 399 F.2d 467 (5th Cir. 1968) (discussing waiver of counsel at the interrogation stage); *In re R.M.*, 105 N.J. Super. 372, 252 A.2d 237 (1969) (discussing waiver of counsel at the adjudication stage).
109. See, e.g., CAL. CIV. CODE § 1556 (West 1954), which provides that minors do not have the capacity to contract; N.Y. GEN. OBLIG. LAW § 3-101 (McKinney Supp. 1974), which provides the exceptions to the rule that a minor may disaffirm a contract.
criminal defendant who allegedly waived his right to have the trial court
determine his competency to stand trial. In reversing the conviction on due
process grounds, the Court stated that "it is contradictory to argue that a
defendant may be incompetent and yet knowingly or intelligently 'waive' his
right to have the court determine his capacity to stand trial." Thus, the
Court recognized that although one may be legally competent to understand
the nature of the criminal prosecution against him and to cooperate in his
defense, it does not necessarily follow that he possesses the capacity to
perceive the need for procedural protections such as the assistance of
counsel.

Waiver of Counsel in Civil Commitment Proceedings. The literature on the
right to counsel in commitment cases is sparse, but there is even less material
concerning the waiver of that right. It has been suggested by one commenta-
tor that waiver of counsel be permissible so long as it is knowing and
voluntary, but no means to determine what constitutes voluntariness in
this context is proposed. Another author recommends that the individual
sought to be committed must manifest a desire that counsel be appointed
before the right to counsel arises. Again, the questions of the individual's
mental capacity to manifest that desire, and his inability to comprehend the
consequences if he fails to do so, are ignored. Lastly, it has been proposed
that procedural rights be absolute, but only on request, thereby assuming
the capacity to request and to perceive the need for and significance of such
action.

Due to minimal consideration of waiver by other writers, no suggestions
for analyzing the waiver of counsel problems in this context have yet been
offered. I would suggest that a two-pronged approach be employed. First, it
must be determined whether the Johnson v. Zerbst voluntary, knowing, and
intelligent waiver standard should be applied in commitment proceedings or
whether a more strict test specifically guaged for persons whose mental
stability is in question should be fashioned. Second, however strict the waiver
standard may be, it must be decided what procedural mechanism should be
employed to determine whether the standard has in fact been met.

I would submit that a special standard for waiver in civil commitment is
unnecessary. Furthermore, as a practical matter, it is unlikely that the
Supreme Court would develop such a special standard. The voluntary,
knowing, and intelligent relinquishment of a fully known right is a substan-
tive test which will protect the proposed patient. What is required is a more
realistic and meaningful application of this test by the judiciary.

The inherently coercive character of custodial surroundings which has

112. Id. at 384. In Virgin Islands v. Niles, 295 F. Supp. 266 (D.V.I. 1969), the court
similarly concluded that one subject to paranoid delusions, although competent to stand
trial, is incompetent to waive the right to counsel and to represent himself. But see Logan v.
Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd mem. sub nom. Briggs v. Arafeh,

113. Elliott, Procedures For Involuntary Commitment on the Basis of Alleged Mental


been recognized to exist in police interrogation in the criminal area\textsuperscript{116} is inversely analogous to the atmosphere in commitment proceedings. Instead of producing a coercive atmosphere, custodial confinement prior to the commitment hearing may produce an inhibitive or repressive environment. Consequently, the assertion of procedural rights, regardless of any advise-ment as to their availability, may rarely occur. The integrity of a waiver under these circumstances is thus subject to serious question. Furthermore, patients may be under sedation prior to or even during their appearance in court. In this connection, it has been observed that drugs such as thorazine, stellazine, and mellaril may diminish initiative, sap the individual's will to act, and reduce his resistance to erroneous incarceration.\textsuperscript{117}

Given the factual need for an attorney in a commitment case, the problem of what should be done where the allegedly ill person protests the appointment of counsel is a troublesome one. May we constitutionally force a lawyer upon every proposed patient in order to avoid the difficulties of the waiver concept as applied in this context? Most recently, the Supreme Court has passed on this issue in relation to criminal prosecutions by holding that a state may not impose an attorney upon a criminal defendant against his will.\textsuperscript{118} The Court found that to prohibit a voluntary and intelligent waiver, would be to violate the sixth amendment. Thus, the Court seems to be very solicitous toward a person's choice as to whether to accept legal representation provided by the state. Therefore, one writer's suggestion that waiver of counsel never be allowed in commitment cases\textsuperscript{119} might meet with constitutional objection. In addition, to completely prohibit waiver of counsel is to prejudge the very issue which is sought to be determined in the proceeding itself,\textsuperscript{120} that is, the individual's mental health and capacity. Some procedure short of forced counsel must be formulated to protect against improvident waivers. Unfortunately, cases in this area recognize the problem, but offer no solutions to it.\textsuperscript{121}

Fortunately, the majority of cases considering waiver of the right to counsel in hospitalization proceedings exhibit a protective attitude.\textsuperscript{122} The

\textsuperscript{117} See Partridge, supra note 25, at 92.
\textsuperscript{118} Faretta v. California, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
\textsuperscript{120} Cf. In re Lambert, 134 Cal. 626, 66 P. 851 (1901), where the court held that to say notice to the patient is useless because he is insane is to beg the very question which is the subject of the proceeding.
\textsuperscript{121} Judicial insensitivity burdens the waiver concept. Judicial ignorance of the proposed patient's mental disabilities is evidenced by the following passage:

\begin{quote}
In re People, 190 Cal. App. 2d 253, 12 Cal. Rptr. 60, 63 (1961).
\end{quote}

\textsuperscript{122} See, e.g., Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); Thorn v. Superior Court, 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600 (1970); In re Hnat, 250 So. 2d 890 (Fla. 1971); People v. Breese, 34 Ill. 2d 61, 213 N.E.2d 500 (1966); People v. Couvion, 33 Ill. 2d 408, 211 N.E.2d 746 (1965).
underlying theme common to all such decisions was best expressed by the United States Court of Appeals for the District of Columbia in *Dooling v. Overholser*: 123 "No case arises to question the validity of a commitment under our statute unless in the very proceeding to which the right of representation applies the person alleged to be insane has been found in fact to be insane. Such a person cannot be deemed to have intelligently waived the statutory right to be represented by counsel." 124 Furthermore, it is apparent that absent a determination that the proposed patient fully understands his situation, he cannot knowingly assert or waive his rights. 125

In contrast to the courts' protective attitude regarding waiver in commitment proceedings, there is some sentiment in the medical community that standards and procedures for determining waivers by proposed mental patients should be the same as those applied to other persons. 126 The main contention is that it is possible for a person to have the capacity to waive, yet still to be properly committed. 127 In other words, it is argued that there is not a necessary medical relationship between competency to waive and commitability. Even if this distinction is valid, however, a hearing to determine competency to waive procedural rights would then be necessary before the court could consider the commitability issue. Such a bifurcated system seems overly cumbersome and subject to the same objections as that applicable to the Virginia statute heretofore discussed. 128

A series of recent decisions concerning waiver of counsel in commitment cases reveals the crucial problem in waiver to be articulating the right so that the patient fully understands it. The Illinois Supreme Court in *People v. Breese* 129 and *People v. Couvion* 130 held that written notice of the availability of legal assistance was insufficient to support an allegation of a knowing waiver. Similarly, an Oregon appellate court ruled that a judge's failure to specify a right to "court appointed" counsel made a knowing waiver impossible. 131 In order for a reviewing court to even consider the possibility of a waiver, it must be shown that the right to appointed counsel was fully articulated to the patient so that he fully understood its practical and legal implications.

C. Proposals for Dealing with the Waiver Problem

It would seem that a balance must be struck between the extremes of forced counsel and counsel only upon affirmative request. The appropriate

123. 243 F.2d 825 (D.C. Cir. 1957).
124. Id. at 829.
128. See note 91 supra and accompanying text.
129. 34 Ill. 2d 61, 213 N.E.2d 500 (1966).
130. 33 Ill. 2d 408, 211 N.E.2d 746 (1965).
solution is to strictly interpret and apply the *Johnson v. Zerbst* test. The proposed patient must fully understand that he has an absolute right to the assistance of appointed counsel. And, he must be made aware of the practical advantages of having an attorney appear in court as an advocate on his behalf. There can be no valid waiver unless these two aspects of the situation are fully comprehended by the patient. A choice not to be represented by appointed counsel without regard to these two considerations might be deemed voluntary, but it could never be considered intelligent. Thus, the crucial problem is the method by which a court is to evaluate a proposed patient's decision to proceed without the assistance of court appointed or retained counsel and to determine if it is truly intelligent.

External conduct by the proposed patient in refusing to accept legal representation after an initial attorney-client interview is one way by which waiver by a proposed mental patient might be evaluated.\textsuperscript{132} This first consultation should be statutorily required of the appointed attorney, and should consist of an explanation of the proceedings, the advantages of being represented by legal counsel, and the fact that the court has appointed the attorney to represent the patient free of charge.\textsuperscript{133} After this consultation, the patient's objective refusal\textsuperscript{134} to allow the attorney to continue as his counsel might properly be deemed a valid waiver. But in order for a person to comprehend the legal right to be represented by counsel and to perceive the practical advantages of legal representation, statutes should require an initial attorney-client interview. The physical presence of the attorney will be the personification of the nebulous "right to counsel," and his explanation of his duties and obligations as the proposed patient's advocate should contribute to the person's understanding of the advantages of legal representation and the consequences of declining it. After this has been accomplished, the judge presiding at the commitment hearing will be provided with a more concrete foundation upon which to base the acceptance of a waiver. As a practical matter, however, judges at commitment proceedings may presume the invalidity of all waivers by those alleged to be mentally ill. Should the judge force counsel on the protesting, proposed patient, however, he runs the risk of jeopardizing decorum in his courtroom.

IV. EFFECTIVE ASSISTANCE OF COUNSEL IN CIVIL COMMITMENT PROCEEDINGS

A discussion urging the express recognition of a constitutional right to counsel for indigents facing involuntary hospitalization and proposing strong

\textsuperscript{132} See Litwack, *supra* note 2, at 823.

\textsuperscript{133} In California, the non-legal staff of the treatment facility is required to explain the right to counsel to the patient. Cal. Welf. & Inst'ns Code § 5252.1 (West 1971); see Litwack, *supra* note 2, at 823. It was under this framework that serious waiver problems arose in Thorn v. Superior Court, 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600 (1970).

\textsuperscript{134} See Mass. Gen. Laws Ann. ch. 123, § 5 (Supp. 1974) which requires the court to appoint counsel for the person facing commitment unless he "refuses." This statute does not explicitly require an initial attorney-client interview, but the use of the words "unless such person refuses" seems to indicate a presumption against waiver. Thus, this statute is more protective than most.
protection against incompetent waiver thereof would be incomplete without a reference to the relevancy of the notion of effective assistance of counsel. Though countless articles have been published about counsel's role in the commitment process, few have concentrated on the fundamental question of what, in this context, constitutes effective assistance of counsel as a matter of constitutional principle. Relevant issues include a discussion of the merits of the full-time mental health advocate system, the number and nature of statutory duties, if any, that should be required of attorneys, and whether more strict judicial scrutiny should be given to ineffective assistance of counsel claims in commitment proceedings.

A. Summary of Counsel's Role

A decade has passed since the publication of Professor Cohen's comprehensive study of appointed counsel's role in the commitment process, in which it was concluded that such attorneys were relatively ineffective. The last decade has not seen much progress, for a 1974 survey revealed that many mental patients are still not receiving adequate representation, as appointed counsel expend little effort on behalf of their clients who are facing commitment. The belief that appointed lawyers in commitment cases are generally ineffective has two effects. First, the argument that counsel is constitutionally required so as to insure due process is weakened. Second, there is a danger that the appointment of counsel may, or actually has, become a mere procedural ritual which helps to sanctify the judgment of commitment without injecting any substantive protection.

The various suggestions by the commentators as to counsel's role may be summarized as follows: (1) explain the nature of the proceedings to the client and interview him to ascertain what action he wishes to take; undertake a factual investigation of the client's background and the circumstances of the case, including interviews with the person seeking the client's commitment, the examining physician(s) and family members, and the examination of hospital records; (3) demand a jury trial, if available, after consultation with the client; (4) speak on behalf of the client who

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135. See, e.g., R. Rock, M. Jacobson & R. Janopaul, Hospitalization and Discharge of the Mentally Ill 157 (1968); Andalman & Chambers, supra note 73; Blecher, Compulsory Care for the Mentally Ill, 16 CLEV. MAR. L. REV. 93 (1967); Blinick, Mental Disability, Legal Ethics and Professional Responsibility, 33 ALBANY L. REV. 92 (1968); Cohen, supra note 2; Cole, supra note 78; Ennis, supra note 115; Litwack, supra note 2; Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190 (1974); Comment, The Expanding Role of the Lawyer and the Court in Securing Psychiatric Treatment for Patients Confinement Pursuant to Civil Commitment, 6 Hous. L. REV. 519 (1968); Note, Civil Commitment: Should There Be a Constitutional Right to Counsel, 2 Capital U.L. REV. 126 (1973); Note, The New York Mental Health Information Service: A New Approach to the Hospitalization of the Mentally Ill, 67 COLUM. L. REV. 672 (1967); Note, The Right to Counsel at Civil Competency Proceedings, 40 Temp. L.Q. 381 (1967).


137. Andalman & Chambers, supra note 73.

138. Id. at 51.

139. Id.; Cohen, supra note 2, at 452.

140. Andalman & Chambers, supra note 73, at 51.

may be illiterate, inarticulate, or timid; 142 (5) employ ordinary advocacy skills such as producing evidence, cross-examining witnesses, and guarding procedural rights; (6) investigate alternatives to commitment; 143 (7) prepare the client for commitment if no other disposition can be agreed upon. 144

The legal community may agree that these suggestions are admirable, but the continuing sentiment is that in many localities they are still theory, not practice. 145 There must be a cause for the failure to realize these goals. Once the cause is discovered, perhaps a lasting solution can be found.

B. The Problem Exposed

There is not a great body of case law dealing with ineffective counsel in the commitment process. The decision of the Iowa Supreme Court in Prochaska v. Brinegar 146 demonstrates the unfortunate lack of meaningful judicial concern for the practical difficulties in this area. Prochaska involved an attorney who failed to consult with his client prior to the hearing which resulted in a judgment of commitment. In refusing to find a violation of due process on the ineffective counsel claim, the court found that “[t]here was at least a technical compliance with the statute” which required the appointment of counsel, 147 thereby concluding that the mere appointment of counsel constituted sufficient substantive protection for the proposed patient. Similarly, the District of Columbia Circuit refused to find ineffective assistance of counsel in a commitment case where the attorney advocated hospitalization since he was convinced that it was proper. 148 It should be obvious that this type of reasoning converts a substantive guarantee into a meaningless formality.

Fortunately, more recent decisions evidence a reluctance to allow mere technical compliance with the statutory right to counsel to thwart an inquiry into the effectiveness of the appointed attorney. In Quesnell v. State, 149 for example, the appointed lawyer neither discussed the case with his client nor did he call any witnesses during the hearing which led to the client's involuntary hospitalization. The patient appealed on an ineffective assistance of counsel claim and won a new commitment hearing. At this second hearing both retained counsel and an appointed attorney ad litem were present. 150 The attorney ad litem waived a jury trial over the protest of retained counsel. The trial court nevertheless accepted the waiver. In reversing the trial court, the Washington Supreme Court held that the patient was again

143. Cohen, supra note 2, at 451-52. Even if the client is technically commitable, a more desirable placement may be arranged.
144. Andalman & Chambers, supra note 73, at 51.
145. Id.
146. 251 Iowa 1214, 102 N.W.2d 870 (1960).
147. 102 N.W.2d at 871.
149. 83 Wash. 2d 224, 517 P.2d 568 (1973).
150. This situation illustrates some of the rather irregular procedures which occur in a “mental illness court” even when the patient is represented by counsel.
denied effective assistance of counsel when the attorney ad litem waived a procedural right without first consulting his client.

In *Hawks v. Lazaro* the appointed attorney assumed the role of a guardian rather than an advocate. He waived his client's physical presence at the hearing, failed to discuss the case with the proposed patient, and did not oppose commitment. The court reversed the judgment, finding counsel so ineffective as to constitute a violation of due process.

Cases such as *Hawks* and *Quesnell* illustrate the defects of the so-called attorney-for-the-day system often employed in both the civil commitment and juvenile processes. This is a method by which one lawyer represents every patient who appears for his commitment hearing on a particular day. The attorney is paid a scheduled fee for each case which he handles.

I would submit that this system is the primary cause of ineffective legal representation in the civil commitment process. The attorney is theoretically present to render competent legal assistance to each of his clients, but in practice the sheer number of cases on the calendar combined with the limited time allotted for hearing them often prohibits the attorney from even approaching the goals suggested by the commentators. Some courts considering timeliness of appointment of counsel in criminal cases have fashioned a presumption that an untimely appointment constitutes a prima facie case of ineffective assistance of counsel. There is no reason why this doctrine should not be applied in the civil commitment sphere. The attorney-for-the-day system effectively creates a situation whereby each appointment of counsel is untimely.

A judicial presumption may cure some of the minor problems of the system, but not its basic unfairness and inadequacy. Possible means to rectify the problem must be formulated so that the mental patient is guaranteed a minimally effective counsel.

**C. Possible Remedies**

*The Full-Time Advocate.* The abundance of articles on counsel's role in the commitment process impliedly questions the competence and professional integrity of the private practitioner. This is made apparent by continued praise for the full-time mental health advocate systems.

The decade since Professor Cohen's study highlighting the inadequacies of our present system of providing legal representation of indigent persons facing commitment has not led to many well received suggestions for cures.
A recent comprehensive article, in fact, regards the full-time mental health advocate as the only adequate system which will provide proposed mental patients with competent counsel. The elimination of time pressures, development of expertise, and dedication to clients have been recognized as particularly attractive aspects of the system. The praise for this system has been amplified by the success of the New York Mental Health Information Service, where a staff of full-time attorneys and social workers is assigned to represent indigent patients in commitment proceedings conducted in New York's first and second judicial departments.

Although the full-time advocate might be the “best” system, the practicing bar should not be so quickly rejected as a source from which to draw appointed attorneys. A 1969 study of commitment at a mid-western hospital revealed that a higher percentage of patients were discharged when counsel was present than when the patient was unrepresented, so it is obvious that, from the proposed patient's perspective, some counsel is better than none. The underlying assumption of the proponents of the full-time advocate is that, although there may be a causal connection between the presence of an attorney and the outcome of the proceeding, the full-time advocate system is the optimum method for achieving the most beneficial effect. As a practical matter, however, even if the full-time advocate is the most effective method for affording competent counsel to proposed mental patients, it is unrealistic to hope for the establishment of such a system in all areas of the United States. Most areas have neither the volume nor the funds nor the qualified personnel to set up a program such as that in New York. Even that program is fully operative as a patient advocate's office only in the populous areas in and around New York City which comprise a major portion of the first and second judicial departments. A “next best” alternative to the full-time advocate must, therefore, be examined.

Statutorily Imposed Duties. A disturbing aspect of the ineffective assistance of counsel concept is the reluctance of the courts to establish a meaningful standard by which to determine such post-judgment claims. In criminal cases most jurisdictions apply a “mockery of justice” test, which is of little

157. See Andalman & Chambers, supra note 73, at 80-82.
158. See Litwack, supra note 2, at 839.
161. New York and other big cities would seem to be the only areas which have a sufficient volume of cases to justify the expenditure of taxpayers' money for a full-time staff of attorneys, psychiatric social workers, and secretarial support. See Note, The New York Mental Health Information Service: A New Approach to the Hospitalization of the Mentally Ill, 67 COLUM. L. REV. 672 (1967), for a comprehensive, though somewhat outdated, discussion of the New York program. For a more recent article, see Rosenzweig, Mental Health Information Service: A Review of Rules and Regulations, N.Y.L.J., Apr. 18, 1975, at 1.
162. Note, supra note 161, at 675, 690.
163. See Bell v. Alabama, 367 F.2d 243 (5th Cir. 1966); Williams v. Beto, 354 F.2d 698 (5th Cir. 1966); People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968). The Fifth Circuit employs a somewhat more protective standard by inquiring if counsel's per-
protection for the convict who claims that he was prejudiced. The paucity of
case law in the civil commitment context leaves us with no formalized rule.
Statutorily imposed duties might provide a solution.

The Draft Act, upon which many states relied in revising their commit-
ment procedures, makes no mention of counsel's duties, so neither do
most of the state statutes. Further, of the fifty-one jurisdictions studied, forty-
five make no provision for timeliness or appointment of counsel, preparation
time, or suggested duties. All that these statutes provide for is counsel at the
hearing, a provision which obviously sanctions the inadequate attorney-for-
the-day system.

Four states and the District of Columbia employ some statutory directive
in this area. Minnesota provides for a mandatory hearing, mandatory
appointment of counsel, and requires that counsel consult with the patient
prior to the hearing. The statute further grants the attorney adequate
preparation time and subpoena power. Though in substance these are
minimal mandates, they are exceptional compared to the statutes of most
American jurisdictions. This type of provision may help to improve the
quality of representation in a small way, but it is lacking in that it does not
contain specified time periods within which the duties must be performed.
Therefore, the attorney-for-the-day system may be allowed to thrive thereun-
der.

The new Arizona statute is the most innovative in the United States, for
it not only imposes statutory duties on attorneys, but it also sets forth
time periods within which they must be performed. The adoption of this
scheme in other jurisdictions could do much to cure the ills of the attorney-
for-the-day system.

The statute first provides that counsel be appointed for an indigent patient
at least three days prior to the date of the hearing. Discovery is automatic
in that all medical reports and legal documents must be furnished to the
attorney by the medical director of the agency which conducted the evalua-
tion, at least seventy-two hours prior to the hearing. The attorney must then
fulfill the following minimal duties within the specified time limits:
(1) interview the client within twenty-four hours of his appointment; (2)
review all reports and records at least twenty-four hours prior to the hearing;
(3) interview the party who initiated the proceedings and, as well, his
supporting witness, if known and available, at least twenty-four hours prior
to the hearing; (4) interview the physician who will testify at least twenty-
four hours before the hearing, if available; (5) submit a written report to the
formance was "reasonably effective." See, e.g., West v. Louisiana, 478 F.2d 1026 (5th
Cir. 1973); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).

164. See note 22 supra.
165. DRAFT ACT § 9(f).
166. ARIZ. REV. STAT. ANN. § 36-536 (1974); COLO. REV. STAT. ANN. §§ 27-9-105
(3), -109 (1974); D.C. CODE ANN. § 21-543 (1967); KAN. STAT. ANN. § 59-2914
(D) (Supp. 1974); MINN. STAT. § 253A.07(15) (1971); N.Y. MENTAL HYGIENE LAW
§ 88 (McKinney 1971) (standards for Mental Health Information Service).
169. Id. § 36-536(A).
court at the time of the hearing with dispositional alternatives for placement. Failure to discharge these duties may lead to a conviction for contempt.\textsuperscript{170}

It should be kept in mind that the enumerated duties represent a legislative determination of the bare minimum which an attorney, either appointed or retained, should do when representing a client facing commitment. Seemingly, not only may failure to discharge these duties be punishable as contumacious conduct, but it may also create a rebuttable, if not an irrebuttable, presumption of ineffective assistance of counsel. The only aspect of effective assistance which the Arizona legislature ignored, and it properly did so, is that involving ordinary advocacy skills such as the ability to present evidence, to cross-examine expert witnesses, and to speak on behalf of the client. Recognizing the need for advocates, the legislature apparently recognized that the imposition of such standards would make the pool of qualified counsel small, and further recognized that it would be extremely difficult to test for such skills.

At this writing it is too soon to tell how effectively Arizona's statutory scheme for providing effective assistance of counsel is working. Specifically, it would be interesting to learn how often, if at all, the judges are exercising their contempt authority. Whatever the factual impact may be, the Arizona Legislature has certainly taken great steps toward insuring that persons facing commitment in Arizona will receive some semblance of effective assistance of counsel.

In \textit{Lynch v. Baxley},\textsuperscript{171} after finding that proposed patients enjoyed a right to appointed counsel prior to commitment, the court further reasoned that such attorney must assume an adversarial role, be appointed in advance to allow for adequate preparation, and be granted wide discovery rights. Thus, one federal judge has perceived that certain minimal duties must be required of appointed attorneys in the commitment context. However, the real burden is on the legislatures to make the right to counsel truly meaningful in this area of practice where few attorneys are experts. The full-time advocate system may be the most effective method for providing competent counsel, but it is not feasible for many states and localities. Statutorily imposed duties may serve as a suitable alternative. Academic research and suggestions helped to initiate legislative reform in Arizona;\textsuperscript{172} therefore, all concerned practitioners and academicians should be encouraged to make similar recommendations in their home jurisdictions.

\section*{V. Conclusion}

In this Article I have dealt with the right to counsel, waiver thereof, and effective assistance of counsel in the civil commitment process. What can be concluded from this inquiry is that neither judicial decisions nor statutory

\textsuperscript{170} Id. § 36-537(B).
\textsuperscript{171} 386 F. Supp. 378 (M.D. Ala. 1974).
provisions alone can cure the ills of the system as it presently operates in many jurisdictions and localities. We must look to both the courts and the legislatures for needed reforms.

First, a Supreme Court decision establishing a constitutional right to appointed counsel for indigent persons facing involuntary civil commitment is needed, and it can be readily based upon either a sixth amendment or general due process theory. Only in this way can equity and uniformity in the administration of psychiatric justice be fostered throughout all areas of the United States.

Second, we need a procedural mechanism devised by the legislatures and implemented by the courts which will insure that any alleged waiver of this right is truly voluntary, knowing, and intelligent. In order for the proposed patient to understand the legal nature of his right to counsel and to perceive the advantages of legal representation, the appointed attorney should be statutorily required to meet with his client initially to explain these things. If waiver is then to be allowed, it should be only after the proposed patient’s refusal to allow counsel to continue in his representative capacity and the presiding judge’s inquiry as to the reasons for such a refusal.

Lastly, in those areas where volume, funds, and personnel are insufficient to institute a full-time advocate system, statutorily imposed duties can serve as an alternative for insuring that effective assistance of counsel will be rendered to the proposed patient facing commitment. Admittedly, the need for statutorily specifying such duties is an affront to the competency and conscientiousness of the legal profession, but the results of research studies belie the contention that appointed attorneys are, on the whole, competently representing their clients in the civil commitment process. Thus, statutorily required duties, and courts which will be vigilant over their faithful discharge by the attorneys who appear therein, would seem to be a feasible and necessary means of rectifying the situation.