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The Right to Be Present: Should It Apply to the Involuntary Civil Commitment Hearing

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THE RIGHT TO BE PRESENT: SHOULD IT APPLY TO THE IN VOLUNTARY CIVIL COMMITMENT HEARING

I. INTRODUCTION

During the 1985 New Mexico legislative session, a bill was introduced to amend procedures by which minors are committed involuntarily for treatment of mental illness and developmental disabilities.1 The amendment would have limited the minor’s right to be present during his involuntary commitment hearing, a right which the current Mental Health and Developmental Disabilities Code grants to both minors and adults.2 The sponsor of the bill eventually withdrew the proposal from consideration by the legislature and, for the time being, both adults and minors will be permitted to attend their civil involuntary commitment hearings in New Mexico without statutory restrictions. Although the proposed amendment pertained to the minor’s right to be present, the issue has never been finally determined in the context of an adult’s attendance at his involuntary civil commitment hearing. Because neither the United States Supreme Court nor the New Mexico Supreme Court has ruled on the issue of whether due process requires an adult’s presence during these hearings, the issue is not fully resolved.3

The standard against which due process procedures in involuntary civil

1. HB143 was introduced by Representative Robert M. Hawk. A developmental disability is a disability attributable to mental retardation, cerebral palsy, autism or neurological dysfunction which requires treatment similar to that provided persons with mental retardation. N.M. STAT. ANN. § -1-3(H) (Repl. Pamp. 1984). A mental disorder or mental illness is a substantial disorder of an individual’s emotional processes, thought or cognition which grossly impairs judgment, behavior, or capacity to recognize reality. N.M. STAT. ANN. § 43-1-3(N) (Repl. Pamp. 1984).

2. N.M. STAT. ANN. § 43-1-16.1.F (Repl. Pamp. 1984) currently provides:
   - At the commitment hearing, the minor shall at all times be represented by counsel;
   - have the right to present evidence, including the testimony of a mental health and developmental disabilities professional of his own choosing; to cross examine witnesses; have the right to a complete record of the proceedings; and have the right to an expeditious appeal of an adverse ruling.

The proposal contained in HB143 would have added:
   - A minor shall have the right to be present at the commitment hearing unless the court finds that the minor has competently waived the right to be present, or upon a motion of any interested party, that the minor’s presence would be substantially detrimental to the minor’s mental condition or ongoing treatment or habilitation.

3. In Parham v. J.R., 442 U.S. 584 (1979), the United States Supreme Court determined the minimum due process required in the involuntary commitment of minors. The Court expressly left the States free to provide more than the minimum due process. Id. at 607.
commitment are measured is the sixth amendment. The sixth amendment guarantees criminal defendants the right to a speedy and public trial by jury, the right to be informed of the accusations, the right to confront witnesses, the right to assistance of counsel, and the right to present witnesses. These fundamental rights are obligatory on the states in criminal proceedings.

In the recent decades of mental health law reforms, the United States Supreme Court has recognized that the involuntary hospitalization of adults in psychiatric hospitals is a "massive curtailment of liberty" that "requires due process protection." The involuntary commitment of adults must be consistent with constitutional principles of liberty and due process. Involuntary commitment implicates procedural protections that are similar to those required in criminal proceedings.

The Supreme Court established in *O'Connor v. Donaldson* that a state may not confine, without more, an individual who is not dangerous and who is capable of living outside an institution with the help of family or friends. Regarding the procedures by which the state may commit adults

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4. The due process clauses of the fifth and fourteenth amendments essentially require that the procedures by which an individual is deprived of liberty must be fundamentally fair. J. NOWAK, R. ROTUNDA, & J. N. YOUNG, CONSTITUTIONAL LAW 558 (2d ed. 1983). Because virtually all types of commitment proceedings which are labeled "civil," including juvenile delinquency and incorrigibility hearings, commitment of the developmentally disabled or mentally ill, and conservatorships, result in the deprivation of liberty, due process scrutiny is warranted. The consequent loss of liberty which derives from involuntary institutionalization is considered by many to be analogous to incarceration. *See In re Gault*, 387 U.S. 1, 50 (1967) (the privilege against self-incrimination in a juvenile delinquency proceeding). Thus, legal commentators and the courts frequently look to the criminal justice model and due process standards set by the sixth amendment in developing involuntary civil commitment procedures. *See, e.g.*, Slovenko, *Criminal Justice Procedures in Civil Commitment*, 24 WAYNE L. REV. 1 (1977); Stromberg and Stone, *State: A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. ON LEGIS. 275 (1983); S. Brakel, J. Parry, and B. Weiner, *The Mentally Disabled and the Law* (3d ed. 1985); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974). The New Mexico Supreme Court has found that, "the civil commitment process, though technically a civil proceeding, has elements of both criminal and civil proceedings . . . with some of the rights guaranteed to criminal defendants applicable to the defendants in commitment hearings." *In re Valdez*, 88 N.M. 338, 540 P.2d 818, 821 (1975) (citing Gomes v. Gaughan, 471 F.2d. 794 (1st Cir. 1973)) (adopted clear and convincing evidence as standard of proof in involuntary adult civil commitment).


8. 422 U.S. 563, 576 (1975). The Court specifically declined to address the issue of whether the state may confine a nondangerous individual for the purpose of providing treatment. *Id.* at 573.
without their consent, the Court has ruled specifically only on the issue of burden of proof, requiring that states must prove dangerousness by clear and convincing evidence.\textsuperscript{9} Legislatures and courts have responded to \textit{O'Connor v. Donaldson} by according procedural protections to the loss of liberty in civil commitment cases similar to those protections accorded in criminal proceedings; rights that are constitutionally guaranteed for criminal proceedings, such as mandatory provision of counsel,\textsuperscript{10} have been established for adult commitment proceedings by state legislative action\textsuperscript{11} and through state and federal court interpretation of due process requirements.\textsuperscript{12}

Because the United States Supreme Court has not determined exactly what process is due in commitment proceedings, the states continue to wrestle with the task of developing commitment criteria and procedures that balance the government’s need to protect citizens from dangerous persons and to provide treatment to individuals against the individual’s constitutionally protected interest in liberty.\textsuperscript{13} Recommendations from

\textsuperscript{9} Addington v. Texas, 441 U.S. 418 (1979). “Dangerous” has subsequently been established by showing merely that the individual has been convicted of committing a criminal act. Jones v. United States, 463 U.S. 354, 364 (1983) (a finding of not guilty by reason of insanity was sufficient evidence of dangerousness to permit automatic commitment of a defendant accused of shoplifting, a nonviolent crime against property).


\textsuperscript{11} For example, forty-five states now require a hearing; fourteen states require a jury trial where the individual requests it. Brakel, \textit{supra} note 4, Table 2.7. The majority of states including New Mexico, now require notice, appointment of counsel, limitations on length of commitment, and include provisions regarding who may initiate commitment proceedings as well as requirements for periodic review of the commitment. Van Duizend, McGraw, Keitlitz, \textit{An Overview of State Involuntary Civil Commitment Statutes}, 8 MENTAL AND PHYSICAL DISABILITY LAW REP. 328.

The New Mexico Mental Health and Developmental Disabilities Code provides adults the following procedural safeguards: notice, mandatory representation by counsel, presentation of evidence (including testimony by an independent expert), cross-examination, the right to be present at the hearing, and the right to a jury trial. N.M. STAT. ANN. §43-1-11(B) (1984 Repl. Pamp.). New Mexico currently accords minors similar due process protections as it accords juveniles in criminal, delinquency, and incorrigibility proceedings. N.M. STAT. ANN. §§43-1-16 and -16.1 (Repl. Pamp. 1984); N.M. STAT. ANN. §§32-1-27 and -31 (Repl. Pamp. 1984) \textit{Compare} The Children’s Code, N.M. STAT. ANN. §§32-1-1 through 45. New Mexico does not provide minors a jury trial on the issue of commitment.

\textsuperscript{12} Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), \textit{remanded}, 414 U.S. 473 (1974), \textit{on remand}, 379 F. Supp. 1376 (1974), \textit{remanded}, 421 U.S. 957 (1975), 413 F. Supp. 1318 (E.D. Wis. 1976) (the court found that due process requires notice, right to counsel, a full hearing, time limitations on length of commitment, a statement of the basis of proposed commitment, standard of proof, jury trial, commitment only when commitment is the least drastic alternative, notice that statements made to a psychiatrist may be used in commitment proceedings, and application of the same standards of admissibility with regard to hearsay evidence as required in criminal proceedings); Tyars v. Finner, 709 F.2d 1274 (9th Cir. 1983) (the court extended the privilege against testifying against oneself to civil commitment proceedings); Heryford v. Parker, 396 F.2d 393 (10th Cir. Ct. App. 1968) (the court required separate counsel for minor where parent sought his commitment).

\textsuperscript{13} \textit{Compare} Legal Issues in State Mental Health Care: Proposals for Change, 2 MENTAL DISABILITY LAW REP. 73, 78-79 (1977) and S. BRAKEL, J. PARRY, & B. WEINER, \textit{supra} note 4 Table 2.7.
both the legal and mental health communities attempt to balance a range of competing societal values. On one end of the scale is the traditionally deep regard for fundamental liberty concepts—freedom from bodily restraint, confinement, invasion of privacy, and interference with private decisions affecting the way in which an individual chooses to live his life. On the other end of the scale are the doctrines of police power and parens patriae through which the government seeks to protect society from dangerous individuals, to provide custodial care for those incapable of caring for themselves, and to benefit the person who is the subject of commitment.14

Some observers believe that the parens patriae power should encompass the ability to confine and treat persons not only where they may be dangerous to themselves or others but also where commitment and treatment would be in their best interests.15 This “best interests” rationale factors heavily into discussions about the extent to which due process protections established to guard against the erroneous loss of liberty in criminal prosecutions should be applied to guard against the erroneous loss of liberty in civil commitment proceedings. Whether an individual should be given the right to be present at his commitment hearing raises “best interest” arguments which focus chiefly on the concern that hearing testimony about his psychological status will further debilitate his mental health and impair relationships which are vital to his recovery.

The focus of this Comment is limited primarily to exploring the nature of the right to be present at the involuntary civil commitment hearing in the context of due process rights of adults. However, because the dangers associated with erroneous commitment extend equally to children and may be even greater for children because commitment interrupts partic-

15. See generally Slovenko, Criminal Justice Procedures in Civil Commitment, 24 WAYNE LAW REVIEW 1, 12-19 (1977). Some would interpret “dangerous to others” to include not only physical risks such as suicide or the inability to obtain basic necessities that actually threatens survival, but almost any harm stemming from mental disability or mental illness. E.g., Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 AM. J. PSYCHIATRY 496, 500 (1976).
16. One view suggests that the attorney representing institutionalized clients should be skeptical of his client’s position and should assume a role of counselor or ombudsman rather than the traditional role of advocate and in this way seek to arrive at the “best solution” for the parties involved. Brakel, Legal Advocacy for Persons Confined in Mental Hospitals, 5 MENTAL DISABILITY LAW REP. 274 (1980).
17. Although the fourteenth amendment is not for adults alone, In re Gault, 387 U.S. 1, 13 (1967), and although a number of court decisions have recognized that children are entitled to the same categories of rights as adults, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (privacy); Goss v. Lopez, 419 U.S. 565 (1975) (access to benefits created by state law); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (speech); In re Gault, 387 U.S. 1 (1967) and Breed v. Jones 421 U.S. 519 (1975) (physical liberty; sixth amendment
ipation in the typical educational setting and program, concepts and information which may be equally useful in the development of procedures for the involuntary commitment of children are briefly presented in footnotes where appropriate. Part I of the Comment discusses the source, underlying purpose, and conditions of the defendant's presence during criminal proceedings. Part II discusses the role of presence during civil commitment proceedings in the context of the *Eldridge* balancing test and suggests criteria by which presence might be limited. The Comment concludes that because the consequences of a finding of mental disability are severe and because the risk of error is great, the individual who is the subject of an involuntary civil commitment proceeding must be accorded the right to be present so that he may pursue every opportunity to avoid erroneous commitment.

II. THE DUE PROCESS RIGHT TO BE PRESENT DURING CRIMINAL PROCEEDINGS

A. The Source and Purpose of the Right to be Present

The sixth amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Although the Constitution does not specifically address the defendant's presence, the Supreme Court has recognized since 1892 that the accused's presence in a criminal proceeding is inherent in principles of fairness and accuracy.18 The accused's presence at "every step of his trial . . . is . . . one of the most basic rights guaranteed by the Confrontation Clause"19 because a defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers. . . ."20 Thus, presence is viewed as an essential component of the sixth amendment rights which the United States Supreme Court has ruled the states must accord to criminal defendants: the


right to confrontation and cross-examination of witnesses,\textsuperscript{21} the right to have assistance of counsel appointed by the court,\textsuperscript{22} the defendant’s ability to assist his counsel at trial,\textsuperscript{23} and the ability to speak in one’s own defense.\textsuperscript{24} These rights, granted personally to the accused rather than to his counsel,\textsuperscript{25} are essential to the accused’s ability to present a fair and full defense.

The presence of the defendant during his criminal trial can affect the fairness of the proceedings and enhance the accuracy of the fact-finding in several ways. First, the defendant who is present during his trial can assist or even supercede his attorney and ensure that his attorney presents a vigorous defense.\textsuperscript{26} Second, the defendant may identify discrepancies or motive in the testimony of the witnesses and immediately bring these observations to the attention of his attorney.\textsuperscript{27} Third, the mere presence of the defendant may reach the conscience of witnesses and inhibit them from lying or test their recollection.\textsuperscript{28} Fourth, a defendant’s presence allows him to present himself and his demeanor to the jury so that they may assess the credibility of his testimony.\textsuperscript{29} Finally, the defendant’s presence may influence the outcome of the proceeding by giving the jury an opportunity to observe him with compassion.\textsuperscript{30}

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\textbf{B. The Right to be Present During Criminal Proceedings is not Absolute}
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The Court has ruled that the defendant’s right to be present during criminal prosecutions is not absolute and is limited under or waived by certain circumstances.\textsuperscript{31} Where the defendant is so disruptive during the

\begin{footnotesize}
\textsuperscript{21} Pointer v. Texas, 380 U.S. 400, 403 (1965).
\textsuperscript{24} Holden v. Hardin, 169 U.S. 366, 389 (1898).
\textsuperscript{25} Faretta v. California, 422 U.S. 806 (1975) (criminal defendant is guaranteed the right to self-representation under the sixth amendment provided that the decision to proceed without counsel is made voluntarily and intelligently):

\begin{quote}
\textit{The Sixth Amendment does not merely provide that a defense be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be . . . “confronted with the witnesses against him,” and who must be accorded “compulsory process for obtaining witnesses in his favor. . . .” The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. Id. at 819 (emphasis added).}
\end{quote}

\textsuperscript{26} The defendant’s ability to assist his counsel is “one of the primary advantages of the right to be present.” Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).
\textsuperscript{27} Pointer v. Texas, 380 U.S. 400, 404 (1965).
\textsuperscript{29} Id. (citing Mattox v. United States, 156 U.S. 237, 242-43 (1895)).
\textsuperscript{30} Lewis, 146 U.S. at 372 (citing Prine v. Commonwealth, 18 Pa. 103, 104 (1851); State v. Murphy, 56 Wash. 2d 761, 767-68, 355 P.2d 323, 327 (1960)).
\textsuperscript{31} Allen, 397 U.S. at 337. The historical development of the defendant’s right to be present during criminal proceedings and the Allen decision limiting that right are discussed in The Supreme Court, 1969 Term, 84 Harv. L. Rev. 90 (1970).
\end{footnotesize}
trial that it is impossible to continue, a trial may proceed in the absence of a defendant until he is ready to conduct himself in a manner appropriate to the dignity of the proceedings. 32 A defendant's presence is considered essential to enhance his opportunity to defend against erroneous fact-finding and conviction. 33 To the extent that the defendant's presence would not enhance his defense, his absence will not frustrate the fairness of the proceedings. 34 However, the accused's presence has been found unnecessary to his defense only where the jury viewed the scene of the crime in the presence of his attorney. 35 The Court has never held that the defendant's presence during testimony of witnesses or presentation of evidence might be useless.

The Court has recognized that an attorney acting in the absence of his client may not be able to present a complete defense; the defendant's life or liberty may depend on the assistance he may give to his attorney when he is present during voir dire of the jury, cross-examination, presentation of evidence, instructions to the jury and other stages of a trial. 36 A defendant may waive his right to be present either by his express consent or by his actions. 37 Thus, where a defendant who is not in the custody of the court voluntarily absents himself from the trial, his absence constitutes a waiver of the right to be present. 38

The defendant may lose his right to be present if his conduct is "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 39 Although the Court has recognized circumstances under which the defendant's right to be present in the courtroom may be limited or waived, the Court nevertheless considers the right to presence as one of "the most basic rights guaranteed by the Confrontation Clause" 40 and cautions that courts "must indulge every reasonable presumption against the loss of constitutional rights." 41 Further emphasizing the importance of the right to presence, the Court requires that 1) the judge first warn the disruptive defendant that he will

32. Allen, 397 U.S. at 343.
33. Snyder v. Massachusetts, 291 U.S. 97 (1934). Presence is required where it bears a substantial relationship to the fairness of the proceeding and the fullness of the opportunity to defend. Id. at 105.
34. Id. at 108.
35. See Snyder v. Massachusetts, 291 U.S. 97 (1934). The Court held that the defendant's right to a fair hearing was not denied where the jury, accompanied by defendant's counsel, viewed the scene of the crime in the absence of the defendant, with no statement of evidence during the viewing, and where the defendant had access to a stenographic record of the viewing.
40. Id. at 338.
41. Id. at 343 (citing, Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
be removed if he continues to conduct himself in a disorderly manner, and 2) the defendant must regain his right to be present in the courtroom "as soon as" he is willing to comport with the decorum and respect required. Justice Douglas suggests that there may be circumstances where due process might require solutions other than exclusion, citing the defendant who is mentally disabled as one example.

III. THE ROLE OF PRESENCE IN ADULT COMMITMENT PROCEEDINGS

"The function of legal process is to minimize the risk of erroneous decisions." In determining the adequacy with which the legal process performs its function, a court must consider the following Eldridge formula:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A. The Nature of the Deprivation

Applying the above formula to the individual's right to be present at his commitment hearing, a court must first consider the nature of the private interest. How the court views this private interest plays a significant role in the outcome of the balance; the importance of the interest will determine the weight assigned to it and will govern the accuracy of the procedure required. Commitment to a psychiatric facility is a "massive curtailment of liberty" that involves a loss of liberty, privacy, and freedom of association. Institutionalized persons are subjected to locks, inspection of personal possessions, and regulation of their activities, daily routines, meals, and hygiene.

In addition, there is reason to believe that a "person mistakenly placed

42. Allen, 397 U.S. at 343.
43. Id. at 351-57 (Douglas, J., concurring in part, dissenting in part).
44. See Addington v. Texas, 441 U.S. 418, 425 (1979) and In re Gault, 387 U.S. I (1967). "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom." Id. at 19-20.
46. Teitelbaum and Ellis, supra note 17 at 175.
47. Vitek, 445 U.S. at 490.
in a mental hospital might suffer severe emotional and psychic harm. 49 Various debilitating and lasting consequences flow from involuntary civil commitment: the loss of basic skills, deterioration of social skills, depression, and submissiveness. 50 Significant detrimental consequences also follow an individual beyond the term of involuntary civil commitment in the form of social stigma. 51 This stigma can be as debilitating as that flowing from criminal conviction 52 and occurs even where the commitment is brief. 53

Finally, the institutionalized person's right to withhold consent for medical treatment is limited. He may be subjected to straitjacketing, aversive conditioning, psychosurgery, psychopharmacological therapy, and electroshock therapy. 54

Given the confinement, the loss of freedom of association, the inherent stigma that attaches to the briefest commitment, the accompanying loss of social and personal skills, and the subjection of the individual to therapies that seek to modify his behavior, involuntary civil commitment to a psychiatric facility constitutes a substantial deprivation of liberty. Indeed, some have concluded that involuntary hospitalization in a psy-

51. Teitelbaum and Ellis, supra note 17, at nn. 127-134.
52. The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual."


chiatric facility is an even more substantial deprivation of liberty than is incarceration based on a criminal conviction.55

B. The Risk of Erroneous Commitment

1. The Risk of Error In Determination and Recommendation

Underlying any commitment policy is the "uncertainty of diagnosis... and the tentativeness of professional judgment" inherent in psychiatric diagnosis.56 The reliability and consistency with which professionals are able to diagnose mental illness are extremely low.57 Professionals examining the same individual may reach the same diagnosis only fifty percent of the time.58 The rate of error in predicting dangerousness or inability to function in the community upon release from an institution ranges from forty-four to ninety-five percent.59 Nevertheless, lay people,

57. The New Mexico Supreme Court has also recognized the difficulties inherent in psychiatric diagnosis. In re Valdez, 88 N.M. 338, 343, 540 P.2d 818, 823 (1975).

The pseudo-patients were instructed to immediately discontinue their symptoms once they were admitted; psychiatrists and other institution personnel failed to recognize their normalcy, even though observing on a daily basis. "Once the impression has been formed that the patient is schizophrenic, the expectation is that he will continue to be schizophrenic."

Rosenhan, On Being Sane In Insane Places, 179 SCIENCE 250, 253 (1973).

See also Special Articles Series: Civil Commitment, 2 MENTAL DISABILITY LAW REPORT 57, 87 (1977); Jones v. United States, 463 U.S. at 378 (Brennan, J., dissenting) (psychiatric predictions of dangerousness inaccurate two-thirds of the time).
legislatures, and judges give extraordinary weight to the judgment of psychiatrists and psychologists.\textsuperscript{60}

A number of factors affects the accuracy of the diagnosis and the recommendation for commitment. First, the diagnostic measures employed are unavoidably subjective; there is no objective measure of human behavior. Second, the diagnostician relies on reports of the individual’s conduct from parents, family members, teachers, other community members, and mental health workers and staff treating the patient. The day-to-day lives of these people have been affected by the conduct of a difficult family member or disruptive individual; their own attitudes, frustrations, embarrassment, and preferences are unavoidably woven into their descriptions of the individual’s behavior. Although their motives may not be malevolent, their interests may be quite different from those of the individual who will be committed.\textsuperscript{61}

A third distortion of the accuracy of the diagnosis and ultimate rec-


\textsuperscript{61} It has been suggested that some police officers or family members seeking commitment of an individual are motivated at least in part by a desire to “[rid] themselves of a troubling presence.” Andalman and Chambers, \textit{Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal}, 45 Miss. L.J. 43 (1974). An example of this dichotomy of interests arises where parents seek to commit their minor children. It is traditionally presumed that children’s best interests are adequately represented by their parents. Parham v. J.R., 442 U.S. 584 (1979). Yet, the Court has recognized that there are times when a child’s best interests may need special protection by the state and has overruled the traditional deference to family decisions in order to extend special protections in the areas of child labor, Prince v. Massachusetts, 321 U.S. 158 (1944); abortion, Bellotti v. Baird, 443 U.S. 622 (1979); and abuse and neglect, Santosky v. Kramer, 455 U.S. 745 (1981) (clear and convincing standard applied to parental rights termination proceedings). Courts allow the state to intervene over parental objections to provide medical treatment and to prevent parents from seeking off-beat treatment for their children. Jehovah’s Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. N.D. 1967), \textit{aff’d} 390 U.S. 598 (1968); see People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), \textit{cert. denied}, 344 U.S. 824 (1952); Muhlenberg Hosp. v. Patterson, 128 N.J. Super. 498, 320 A.2d 518 (1974); \textit{In Re Custody of a Minor}, 375 Mass. 733, 379 N.E.2d 1053 (1978), \textit{aff’d on rehearing}, 378 Mass. 732, 393 N.E.2d 836 (1979).

Federal and state courts recognize that the interests of parents and their children may diverge in cases of commitment and incorrigibility proceedings. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (the court recognized that the interests of the parent and child may be different and required separate counsel for a minor whose mother sought to have him committed); \textit{In re Sippy}, 97 A.2d 455 (D.C. 1953) (the court recognized the parent as an antagonistic party where the mother sought to have her daughter committed to a psychiatric facility and ruled that the mother could not waive the privilege of confidentiality with regard to her daughter’s physician’s testimony and that the daughter’s interests could not be adequately represented by the mother’s attorney); \textit{In re Henry G.}, 28 Cal. App. 3d 276, 104 Cal. Rep. 585 (1972) (the court recognized that a breakdown in the family
ommendation to commit may arise where a family member seeks commitment of the individual. This situation creates a conflict of interest for the psychiatrist where the family member is both the source of financial compensation, and the most available source of information. A similar conflict may arise where the state, seeking commitment of an individual, employs a mental health professional to evaluate the individual. The diagnostican may be assuming conflicting roles in his position as state’s witness and his relationship as a doctor to his patient.

A recent development in New Mexico that gives rise to other conflicts of interests is the proliferation of private mental hospitals which solicit patients through competitive television, radio, and newspaper advertising. The development of private profit and nonprofit institutions is of particular concern because the number of commitments, length of stay, and type of treatment will directly affect the facility’s solvency. The mental health community will have less incentive to oppose those who wish to have family members committed and greater incentive to find symptoms supporting commitment. Where the mental health professional who serves as a director or staff member or part owner of such a facility also makes diagnoses and treatment recommendations, he does so with the awareness

relationship could result from the parent’s conduct as well as from the child’s and found the mother’s testimony alone to be insufficient to support a finding of incorrigibility).

Recent data on the frequency of child abuse, neglect and sexual molestation within families who have a handicapped child clearly suggests that Purham reliance on parental judgment in committing children should be reconsidered. Diamond and Jaudes, Child Abuse in a Cerebral Palsied Population, 25 DEVELOPMENTAL MED. AND CHILD NEUROLOGY 169 (1983). “There is a relatively high frequency of children with developmental problems among populations of abused and neglected children.” Id. at 169. The authors also found that 20% of the 89 children studied who had cerebral palsy were abused by their families. See also Solomons, Child Abuse and Developmental Disability, 21 DEVELOPMENTAL MED. AND CHILD NEUROLOGY 101 (1979). The author reports that the estimates of abused children who have a mental or physical deviation range from 29% to 70%. It is not established whether the handicapping conditions preceded the occurrence of abuse or may have been a result of it. But see, Starr, The Contribution of Handicapping Conditions to Child Abuse, 4 TOPICS EARLY CHILDHOOD SPECIAL EDUC. 55 (1984).

Data on the increase in abuse during times of parental stress emphasizes that parents may not always be able to act in the best interests of their children. Madonia, The Trauma of Unemployment and its Consequences, 64 SOCIAL CASEWORK 482 (1983); Hensy, Intervention in Child Abuse, 25 DEVELOPMENTAL MED. AND CHILD NEUROLOGY 606 (1983); Solomons, supra, at 103. See also Comment, Voluntary Minor Mental Patients: A Realistic Balancing of the Competing Interests of Parents, Child, and State, 37 SW. L.J. 1179, 1188 (1984); Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CAL. L. REV. 840 (1974); Teitelbaum and Ellis, supra note 17; SCHETKEY & BENEDEK, CHILD PSYCHOLOGY AND THE LAW (1980).

62. SCHETKEY & BENEDEK, supra, note 61. There is no evidence documenting whether psychiatrists do, in fact, deny family members’ requests that individuals be committed. Mental Health Treatment for Minors, 2 MENTAL DISABILITY LAW REP. 460, 464 (1978). Indeed, since the passage of commitment statutes allowing parents to commit their minor children, the greatest increases of institutionalization have occurred in the population under 15 years of age. Comment, Voluntary Minor Mental Patients: A Realistic Balancing of the Competing Interests of Parents, Child, and State, 37 SW. L.J. 1179, 1188 (1984).
that the fiscal success of the facility may depend upon the recommenda-
dations he makes regarding treatment.

A more subtle conflict can arise between the treatment needs of the
individual and the philosophy of the institution with which the psychiatrist
is associated. Mental health professionals may be influenced by the
admissions policies of various institutions rather than by the need for hos-

pitalization or availability of indicated treatment programs. Psychiatric
diagnoses may also reflect personal and social values.

Finally, even though mental health researchers have recognized that
great harm has been done to families and patients by the use of unsub-
stantiated diagnoses and models, developments in tort liability have
placed the psychological community in a situation which encourages
overprediction, overconfinement, and overtreatment. The mental health
professional is more likely to incur liability for failing to predict dan-
gerousness than for prescribing institutionalization for a nondangerous
individual. This situation is particularly troubling when one considers
the consequences for an individual erroneously committed: confinement,
subjection to various invasive therapies, possible loss of personal and
social skills, and the

terrifying possibility that . . . he will be exposed to physical, emo-
tional and general mental agony. Confined with those who are insane,
told repeatedly that he is insane and indeed treated as insane, it does
not take much for a man to question his own sanity and in the end
to succumb to some mental aberration.

The mental health profession's own studies reveal the risk of error and
harm inherent in any involuntary commitment. The subjectivity of the
diagnostic evaluation, the reliance of the diagnosis on reports from in-

64. Marcus, Reality and Psychiatric Reality in Litigation, 4 AM. J. OF FORENSIC PSYCHIATRY 167 (1983); Dershowitz, supra, note 57. C. Warren, THE COURT OF LAST RESORT, MENTAL ILLNESS AND THE LAW 42 (1982). One example is the intelligence tests used in diagnosis of developmental disabilities. The tasks required are related to experiences familiar to members of the dominant culture so that the performance of members of minority cultures may not reflect their true capabilities. Teitelbaum and Ellis, supra, note 17, at 189.
66. Dershowitz, supra note 57, at 33. One psychiatrist has written that "the profession's over-
67. United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) (considering procedures by which prisoners were placed in mental hospitals).
68. See supra notes 57-59 and accompanying text.
interested parties, the opportunities giving rise to conflicts of interests, the
tendency toward unnecessary commitment, and the deference accorded
the mental health community increase the likelihood of error in some
component of the commitment decision. The error may occur in diagnosis,
in the type of commitment ordered (institutionalization rather than out-
patient treatment), or in the treatment prescribed (psychotropic drug ther-
apy rather than behavior modification programs). 69

2. The Value of The Presence of The Individual

Under the Eldridge formulation, procedures are not considered inade-
quate merely because a high risk of error has been established. It is
necessary to show that a given procedure will modify that risk. The Model
Law developed and approved by the American Psychiatric Association
extends the right to presence to the civil commitment proceeding, 70 rec-
ognizing that “presence at the hearing is a[n] historically valued safeguard
against arbitrary decisions.” 71 The presence of the individual who is the
subject of the proceedings is a component of the ability to fully exercise
the rights of confrontation, cross-examination of witnesses, representation
by counsel, and the ability to speak in one’s own defense. 72 The value
of cross-examination lies in “exposing falsehood and bringing out the
truth.” 73 The individual’s presence may be useful in “bringing out the
truth” in the involuntary civil commitment proceeding in several ways.
First, the individual can assist his attorney in exposing motive and pointing
out discrepancies in the testimony of family members. Second, the in-
dividual can present his own version of the circumstances leading to the
commitment proceeding. Third, the individual’s presence during the pro-
ceedings affords the judge or jury 74 the opportunity to personally observe
him and may influence the weight given other testimony in determining
the disposition of his commitment. Fourth, the individual who is present

69. The foregoing discussion of the consequences of institutionalization and the difficulties of
diagnosis, prediction, and treatment should not be taken as an argument that all treatment is ineffective
or abused or that all residential commitments are inappropriate. However it is not necessary to
dismiss the very real needs, dangers, and problems presented by the mentally disordered to conclude
that every measure should be taken to avoid the substantial risk of harm that erroneous commitment
presents to adults and minors alike.

70. Stromberg and Stone, Statute: A Model State Law On Civil Commitment of the Mentally Ill,

71. Id.

72. See supra, text accompanying notes 18-26.

73. Pointer, 380 U.S. at 404.

74. Fourteen states provide a jury trial if requested in commitment proceedings. Brakel, supra
note 4, Table 2.7. New Mexico Provides a jury trial if the patient requests it in proceedings for
extended commitment. N.M. STAT. ANN. § 43-1-12(B) (Repl. Pamp. 1984).
may personally object to the type of commitment.\textsuperscript{75} Fifth, the New Mexico Code requires a written plan prescribing the services and treatment that comprise an appropriate treatment program.\textsuperscript{76} Where the state seeks to extend the commitment of one already confined, the individual can verify whether he is receiving the services prescribed.

Finally, fundamental fairness and "respect for the individual which is the lifeblood of the law"\textsuperscript{77} require his presence because an individual who "has been denied the opportunity to be heard in his own defense has lost something indispensible, however convincing the ex parte showing."\textsuperscript{78} The individual has an interest in simply being able to witness a proceeding which is of such enormous personal consequence.

Some observers believe that the presence of a person who is the subject of a commitment proceeding is equally if not more critical to the prevention of error than is the presence of the defendant in a criminal trial.\textsuperscript{79} Many jurisdictions permit evidence in civil commitment hearings which would normally be inadmissible in other court proceedings.\textsuperscript{80} Consequently, the recommendation to institutionalize may be founded largely on out of court statements.\textsuperscript{81} The diagnosis is based not only on the subject's performance on diagnostic instruments outside of the hearing, but also, for example, on information the diagnostician has received from family members, caretakers if he is already institutionalized, and prior psychiatric records. The information given by a relative may be tainted by motive or skewed by faulty memory or colored by the relative's personal frustrations and concerns with the individual.\textsuperscript{82} Thus, the psychiatrist may base the diagnosis and recommendation on disputed facts never presented to the fact-finder. Medical or institution reports may introduce the additional problem of ambiguity of terms when the original

\textsuperscript{75} The New Mexico Code requires that commitment be consistent with the least drastic means. N.M. Stat. Ann. §43-1-11(C)(3) (Repl. Pamp. 1984). An individual may not be able to live completely independently but may function well in a half-way house or group home, or he may be able to function independently so long as he takes medication to control his symptoms or behaviors. There is also some evidence that individuals are committed or their commitments extended merely because they are without financial resources or families. Warren, The Court of Last Resort, Mental Illness and the Law (1982). If the patient is present at the commitment hearing during the psychiatrist's recommendations, he may present his own perception of his needs, capabilities, and preferences.

\textsuperscript{76} N.M. Stat. Ann. §§43-1-9, 43-1-11(C)(2) and (3) (Repl. Pamp. 1984).

\textsuperscript{77} Allen, 397 U.S. at 351 (Brennan, J., dissenting).

\textsuperscript{78} Snyder, 291 U.S. at 116 (1934).


\textsuperscript{81} See Civil Commitment, supra note 79.

\textsuperscript{82} See supra note 61 and accompanying text.
author is not present during the hearing to interpret and clarify. Unless the person who is the subject of the commitment proceeding is present, the content and basis of such testimony cannot be fully challenged. Counsel alone cannot know whether the psychiatrist’s testimony is based on disputed fact. The individual who is to be committed must be present to assist his attorney in cross-examination.

Further, the psychological evaluation itself takes place outside the hearing. The individual typically does not have counsel present during the testing or the observation period. While the criminal process requires the presence of counsel and cross-examination during interviews which may later be admitted as evidence during trial in the form of depositions, the civil commitment process has no comparable safeguard.

The commitment proceeding differs from the criminal proceeding in other ways. First, the involuntary commitment, unlike the criminal sentence, may extend for an indeterminate period of time. Second, the Federal Rules of Evidence limit the circumstances under which a previous criminal conviction may be admitted into evidence. Previous commitment, however, is a part of the individual’s case history on which the diagnosis is based. Moreover, although the criminal defendant may not be tried twice for the same criminal act, the individual who is the subject of an involuntary civil commitment proceeding may well find that conduct which was insufficient to sustain a finding of dangerousness in a previous commitment hearing will again be considered in a later proceeding in the form of the individual’s case history. Indeed, a single act may constitute the basis for renewed commitment orders extending well beyond the term for which a defendant might have been incarcerated.

Finally, there is a history of pro forma legal representation in the involuntary civil commitment process compared to the traditionally vigorous adversarial advocacy associated with the criminal process. The

83. Although the majority of states now place limitations on the length of initial commitment, commitment codes also provide procedures whereby commitments may be extended. New Mexico requires that where the state seeks to extend the commitment, the state must again prove the likelihood of harm by clear and convincing evidence. N.M. STAT. ANN. § 43-1-12(C) (Repl. Pamp. 1984). But cf. the District of Columbia Code which requires the patient to request a new hearing where he must prove by a preponderance of the evidence that he is no longer mentally ill or dangerous. Jones v. United States, 463 U.S. at 357, 359 (1983) (citing D.C. Code Ann. §§ 21-546, 21-547(1981)).

84. FED. R. EVID. 404(b) and 609.

85. Where an individual was found not guilty of shoplifting by reason of insanity, the criminal act was sufficient to sustain an automatic civil commitment and maintain the commitment until the patient could establish that he was no longer mentally ill. Jones v. United States, 463 U.S. 354 (1983).

civil commitment client often receives legal representation from a court appointed attorney ad litem who is paid a flat fee by the state. Operating under a heavy caseload, it is possible that these advocates will never meet their client prior to the hearing and may not even gain access to their client’s records until the day of the hearing. In these situations the attorney ad litem tends to defer to the judgment of the mental health professionals seeking commitment; thus, the hearing may function only to validate the psychiatrist’s decision. The individual must be in attendance to present his perceptions regarding testimony, preferences, and objections regarding alternatives to prescribed commitment and treatment, to have a full opportunity to see that his attorney presents vigorous representation of his liberty interests, and to ensure that the state meets its burden of proof and presents all alternatives to institutionalization.

The value of the presence of the individual during his commitment hearing is that by personally hearing the evidence and exercising the tools of confrontation, assisting counsel, and speaking on his own behalf, the individual can help to ensure that all the necessary evidence and information are before the court which must ultimately make an informed determination and an appropriate disposition.

C. The State’s Interest in Civil Commitment

Ordinarily, the state is interested in avoiding a requested procedure because the procedure will involve time and/or expense. However, a state’s interest in excluding an individual from his commitment hearing cannot be one of expense or administrative encumbrance. First, a vast majority of the states, including New Mexico, require a hearing to determine commitment criteria. No additional expense or procedure is off. The attorney must determine the client’s wishes in the matter of hospitalization and advocate that position. The attorney must explain what the state, parent, or mental health professional is seeking and what the impact will be on the client. The client should be helped to understand the nature of institutionalization, alternatives and the process by which the client might object. The attorney also has a role as a negotiator between the patient and mental health professional in which the attorney can represent the patient’s preferences and perceptions of his needs. The attorney can also present alternatives to full commitment to both the patient and the therapist and help to ensure that the patient is committed because of his mental condition rather than his financial condition. More generally, counsel can ensure that mental health professionals are themselves better prepared for the commitment hearing and that they have thoroughly considered commitment and its alternatives. Counsel can also reduce the length and adversarial character of the hearing by working with the patient and the mental health professionals prior to the hearing to determine an appropriate commitment. The role of counsel for the patient is discussed by Andalman and Chambers, supra Cohen, supra Luckasson and Ellis, Representing Institutionalized Mentally Retarded Persons, 7 MENTAL DISABILITY LAW REP. 49 (1983), and in Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CALIF. L. REV. 840, 888-890(1974).

87. Cohen, supra note 86 at 430, n. 30.
88. Id. at 428.
89. Id. at 450.
90. Brakel, supra note 4, Tables 2.7 and 2.9.
required when the individual is present. Second, a state has no interest in committing persons who are not dangerous to themselves or others. To the extent that the individual may contribute to the accuracy of the fact-finding, it is in the better interests of the state to have the individual in attendance.

Thus, were a state to exclude an individual from his commitment hearing, its justification in doing so would have to lie in a "best interests" rationale. Some would argue that the presence of an individual at his commitment hearing would result in trauma to the emotional well-being of the individual, and would have a detrimental impact both on relationships with family members who might testify and on the patient-therapist relationship where the psychologist who appears at the commitment proceeding will also provide treatment after commitment. To date, no empirical data have been presented to support these contentions. It is not inconceivable that substantial detriment might result to some individuals. However, there is no indication that it would result for all or even many

91. In New Mexico, the exclusion of the adult or minor would add to the administrative and economic burden because an additional hearing would be required on the need for exclusion. To exclude the individual from this additional and crucial proceeding would thwart principles of fairness by suggesting a presumption that the individual is mentally disabled. If the hearing on a motion to exclude determined that exclusion was proper, provisions for the supervision of the excluded individual would be required, creating yet another expense.

92. Addington, 441 U.S. at 426. It is expensive to provide residential care and treatment. New Mexico has a further interest in avoiding erroneous commitment where minors are the subject of the proceedings. Although involuntary commitment of adults is limited by the notion of dangerousness, New Mexico does not limit commitment of minors to those who are dangerous but seeks to assist any child in need of services for mental disorders or developmental disabilities (N.M. STAT. ANN. § 43-1-16.1 (B) and (G) (Repl. Pamp. 1984)). Considerable expense is incurring in the provision of services to such a potentially large population.

93. Forman, Measures for Evaluating Total Family Functioning. 11 FAM. THERAPY 1 (1984). Further, there is evidence that where a family is seeking commitment of a minor child, the family relationships may already be in distress and the family may be seeking relief via commitment. SCHEITKEY & BENEDEK, CHILD PSYCHIATRY AND THE LAW (1980). The elevated incidence of divorce among parents of children with special needs and the evidence of increased stress in families which have a mentally ill or developmentally disabled member, suggests that families who have troubled youngsters are in distress well before they enter the legal system. LOVE, THE MENTALLY RETARDED CHILD AND HIS FAMILY (1973). (Love reports that the divorce rate among couples who have a mentally retarded child is three times as high as among couples who have children of normal intelligence.) Anderson and Lynch, A Family Impact Analysis: The Deinstitutionalization of the Mentally Ill, 33 J. FAM. RELATIONS 41 (1984) (the more contact with a mentally ill family member, the greater the feelings of lack of support, disintegration of family, and missed opportunities); Longo and Band, Families of Handicapped Children: Research and Practice, 33 FAM. RELATIONS 57 (1984) (increased signs and effects of stress with the presence of a handicapped child); Crnis, Adaptation of Families with Mentally Retarded Children: A Model of Stress, Coping, and Family Ecology, 88 AM. J. OF MENTAL DEFICIENCY 125 (1983) (parents of mentally retarded children are more depressed and have greater problems in impulse control and control of aggressive feelings than parents of children of normal intelligence); Schilling, Coping and Social Support in Families of Developmentally Disabled Children, 33 J. FAM. RELATIONS 47 (1984) (more frequent occurrence of poor health, exhaustion, quarreling, adjustment failure, desertion, and divorce among families who have a mentally retarded child).
of the persons who are the subjects of commitment proceedings. Indeed, the sixth amendment guarantees are so vital to the prevention of erroneous convictions that the Supreme Court applied them to quasi-criminal proceedings involving the liberty and liability of minors as well, rejecting the notion that procedural safeguards inhibit the ability of the court to act in the best interests of children. Some members of the mental health community believe greater harm would result from deceiving mentally ill patients about the nature and purpose of the psychiatric examination in commitment proceedings than from the application of procedural safeguards of patient rights. There is also support for the premise that a hearing is of therapeutic benefit to the patient.

D. Limitations on the Right to be Present During the Commitment Hearing

Given the potentially extreme consequences of commitment to an institution and the potential for erroneous commitment, the individual who is the subject of an involuntary civil commitment proceeding should be accorded every tool to protect his liberty interest, including the right to be present to assist his counsel and fully confront the evidence against his interests. Just as there are circumstances where the right to be present during a criminal proceeding is limited, there are instances when presence should be limited in the civil commitment proceeding. Limitations on presence are appropriate where the patient voluntarily waives the right

94. No empirical data are available to show that the patient-therapist relationship will be impaired. The situation might be compared to the suspicions that arose surrounding the concept of informed consent for medical procedures. Physicians were concerned that by informing patients of risks involved in various treatment that the patient’s anxieties would increase and their confidence in their physician’s competence would plummet, resulting in patients foregoing necessary treatment. Letter to the editor, 296 NEW ENG. J. MED. 517 (1977). Follow-up studies have shown these fears did not materialize. Kaufman, 17 SOC. SCI. AND MED., 1657 (1983).

When the Supreme Court considered the procedures which were constitutionally adequate in juvenile quasi-criminal proceedings, similar fears were voiced; but the detrimental consequences did not occur. SCHETKEY & BENEDEK, CHILD PSYCHIATRY AND THE LAW (1980).


97. The airing of differences and conflicts may well have a therapeutic benefit which aids in the development of a stronger family unit. SCHETKEY & BENEDEK, CHILD PSYCHIATRY AND THE LAW (1980). A hearing may be therapeutic for the minor patient as well. A hearing gives the child an opportunity to express his objection in a meaningful manner, it may help to crystallize the need for treatment in the eyes of the child; it can help the child to feel he has been treated fairly and that he has some input over his destiny; it helps the child become involved in planning for his care and it establishes in the mind of the child that his behaviors and their required therapy are serious concerns. Meisel & Roth, The Child’s Right to Object to Hospitalization: Some Empirical Data. 4 J. PSYCHIATRY AND LAW 377 (1976); Ensminger and Ligouri, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential. 6 J. PSYCHIATRY AND LAW 37 (1979); 2 MENTAL DISABILITY LAW REP. 99 n. 166.

98. See supra notes 38-55 and accompanying text.

99. See supra notes 56-60 and accompanying text.
or where his behavior is so disruptive that the proceeding cannot continue.

The state has an interest in conducting any hearing with decorum and in a manner conducive to fully exploring the facts. To the extent that an individual's conduct interferes with that interest, the individual may be excluded from the hearing. This would require that the individual be permitted to attend the hearing initially. To do otherwise would be equivalent to prejudging the finding of mental disability. Furthermore, the court must distinguish behavior which is so disruptive that the proceeding cannot continue from behavior which is merely bizarre or eccentric and which evokes a visceral reaction in others.

The state also has an interest in protecting the individual's right to voluntarily absent himself from the proceeding. His reasons might include the belief that to attend would be harmful to his condition and the belief that his presence might prejudice the outcome. Under these circumstances, the individual should be permitted to waive his right to be present. However, the waiver of a constitutionally protected right must be "an intentional relinquishment . . . of a known right or privilege" judged by the circumstances surrounding the waiver, including the "background, experience, and conduct of the accused." While there is no single standard for determining the sufficiency of a waiver, courts consider age, mental competence at the time of the waiver, intelligence, presence of counsel at time of waiver, and duress when determining the voluntariness of waivers in the criminal context.

Courts should carefully scrutinize the voluntariness of any waiver in the context of civil commitment as well for several reasons. First, the issue which brings the parties into the commitment proceeding may be the individual's ability to make decisions and manage his life competently;

101. Stromberg and Stone, supra note 70 at 337.
102. Some conditions result in a physical appearance which does not reflect an individual's competence. An example is dysarthria, a condition affecting the control of muscles involved in speech, eating, and facial expression. BANNISTER, BRAIN'S CLINICAL NEUROLOGY 105-6 (1973). An observer might be influenced more by the appearance of the individual who may drool or display no facial affect in response to the proceedings, than by the facts of the individual's ability to function independently.
where competence is the reason for which commitment is sought, a court should carefully review the voluntariness and competence of any waiver. Second, the individual whose competency is in question may be especially vulnerable to suggestions offered by family or mental health professionals whose interests may differ from those of the individual and who may be in positions to influence his decisions. One commentator suggests that the court might rely on the individual’s attorney to determine whether the waiver ought to be permitted. However, the court should consider the extent of the attorney’s familiarity with the individual and his case prior to accepting counsel’s recommendation regarding sufficiency of the waiver.

Other occasions for proceeding in the absence of the individual demand careful scrutiny. Respect for the individual requires rejection of a cursory conclusion that an individual who is incapable of understanding the proceedings or of assisting his counsel may be excluded because his presence would be useless. Rather than excluding an individual whose disability may result in difficulty in understanding the proceedings or assisting his counsel, fairness requires that courts and counsel attempt to increase the

106. Some attorneys may believe that persons with mental disorders are generally unable to decide what is best for themselves; such attorneys may be tempted to represent to the court their own judgment about what would be in the client’s best interests. C. Warren, The Court of Last Resort, Mental Illness and the Law 140 (1982). The authority to make decisions regarding the merits of a case belong to the client and the lawyer is ethically bound to exert his best efforts to ensure that the client has been informed of all considerations. The lawyer must be careful to determine the client’s real preferences. The client may be especially vulnerable to suggestions offered by family or mental health professionals who may be in positions of power; the lawyer should make every effort to determine that the client’s will has not been usurped. See Luckasson and Ellis, Representing Institutionalized Mentally Retarded Persons, 7 Mental Disability Law Rep. 49 (1983).
107. It may be tempting to apply a test of competency similar to the Dusky test of competency to stand trial to the right to attend one’s commitment hearing. The test applied to competency to stand trial is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402 (1960) (per curiam). The application of the Dusky criteria to the involuntary commitment proceeding would undermine the notion of fairness on which both attendance and the concept of competence to stand trial are founded. Competency to stand trial is determined in a hearing separate from the trial at which the judge considers all relevant evidence including the judge’s perception of the defendant as he observes him during the competency hearing.

See generally, Boyle and Baughman, The Mental State of the Accused: Through a Glass Darkly, 65 Mich. B.J. 78 (1986). Where competency is restored within the statutory requirements, the defendant will stand trial. Id. A determination of competency to stand trial does not affect the defendant’s sixth amendment right to be present when he is tried. Moreover, because the competency hearing derives from the criminal proceeding, the individual may have a constitutionally protected right to attend the competency hearing as well. The concept of competency to stand trial is rooted in notions of fairness and was developed to protect the defendant’s right to a fair trial, not to limit that right. To apply the Dusky test of competency or a standard similar to it to the determination of whether an individual should attend a proceeding in which the State seeks to restrict liberty would have the effect of limiting rather than protecting the exercise of a right.
meaningfulness of attendance at the civil commitment proceeding. To that end, every effort should be made to determine the extent to which the individual’s ability to understand and to assist might be enhanced by such aids as an interpreter for the deaf, the attendance of a friend or staff member familiar with the individual’s speech patterns, or devices such as language boards. Appropriate assistance would enhance both the meaningfulness of the proceedings and the accuracy of the determination.

The court should also scrutinize any recommendation that exclusion is in the individual’s best interests. The problems inherent in the accuracy of the diagnosis suggest that it will be difficult to establish that exclusion would be in the individual’s best interests or that these considerations would outweigh the notions of fairness inherent in attendance, particularly where it is the initial commitment proceeding. In a proceeding to extend the commitment of an individual who is already confined, a recommendation that the patient be excluded should be considered equally carefully. Once the impression has been formed that a patient is mentally ill, the expectation arises that he will continue to be mentally ill. The court, then, should closely review any recommendation that it would be in an individual’s best interests to be excluded from the involuntary civil commitment hearing or that it would be useless for an individual to attend a proceeding that so profoundly affects his interests.

IV. CONCLUSION

The determination of the need to commit an individual is fact-intensive and relies on subjective opinion and information obtained from persons

108. A language board is a device which enables persons who are unable to speak or write to communicate through visual representations. This device is one of many mechanical and electronic devices currently available to facilitate communication for persons with various handicapping conditions. In some cases it might be necessary to move the hearing to the institution or some other place to accommodate the individual. Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974); In re Watson, 91 Cal. App. 3d 455, 154 Cal. Rptr. 151 (1979). A number of state codes grant the judge discretion as to the place of the hearing. Brakel, supra note 4, Table 2.7.

109. See supra notes 56-67 and accompanying text.

110. Rosenhan, On Being Sane In Insane Places, 179 SCIENCE 250 (1973): “Once a person is designated abnormal, all of his other behaviors and characteristics are colored by that label. Indeed, the label is so powerful that many of the pseudo-patients’ normal behaviors were overlooked entirely or profoundly misinterpreted.” Id. at 253. See also Szasz, The Child As Involuntary Mental Patient: The Threat of Child Therapy to a Child’s Dignity, Privacy, and Self-Esteem, 14 SAN DIEGO L. REV. 1005, 1012 (1977).

111. Minors have the same interests in avoiding erroneous confinement as adults have. The value of the minor’s presence in enhancing the accuracy and fairness of the proceeding may be as great as the adult’s presence is. It should not be presumed that all children are incapable of assisting their attorneys, nor that all children will be affected detrimentally by attending the hearing. Where the client is a minor, a number of approaches might be considered as alternatives to excluding any minor upon the motion of any interested party as the amendment proposed would have provided. See supra
whose interests both diverge from those of the individual who is facing commitment and are directly affected by his commitment. The risk of erroneous findings is substantial. Given the consequent loss of liberty, potential debilitation, social stigma, and expense of involuntary civil commitment both societal and individual interests are served by procedures which facilitate a fair and accurate determination of the appropriateness of commitment. The right to be present is as fundamental to the due process goals of fairness and accuracy in the context of involuntary civil commitment proceedings as it is in the context of criminal proceedings. By personally hearing the evidence and assisting counsel to expose motive and conflicts of interests and to challenge disputed facts, the individual can help to ensure that all the evidence which is necessary to an appropriate disposition is before the court. Notions of fairness inherent in due process surely require procedures which permit an individual to witness a proceeding of such enormous personal consequence.

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note 2, HB143. At least two courts have found that where there is a statutory provision for a minor to seek treatment voluntarily, then the age at which that power attaches is the age at which statutory safeguards accorded adults attaches. Melville v. Sabbatino, 30 Conn. Supp. 320, 313 A.2d. 886 (1973) (where a minor between the ages of 16 and 18 has the statutory right to admit himself for treatment, he also has the right to be released upon his independent petition even though he was admitted by his parents pursuant to the voluntary admissions procedures prior to age 16); In re Smith, 16 Md. App. 209, 295 A.2d. 238 (1972) (where a minor has the statutory right to seek and consent to medical treatment, such as abortion, she cannot be compelled by her parent to accept treatment). The U.S. Supreme Court has recognized this “mature minor” doctrine in Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52 (1976) and Bellotti v. Baird, 443 U.S. 622 (1979). Many states also recognize that the preference of a minor of a certain age should be considered in awarding custody. Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CALIF. L. REV. 840, 881 (1974).

The New Mexico Code provides that children who are 12 years of age or older may seek voluntary commitment without the consent of a parent or guardian. N.M. STAT. ANN. § 43-1-16(B) (Repl. Pamp. 1984). Thus, New Mexico applies the mature minor doctrine to civil commitment, acknowledging that at age 12 some youngsters have sufficient competence and maturity to recognize the need for and to seek treatment. That application of the mature minor doctrine should encompass the concept that he is also competent to object to commitment and able to assist counsel in presenting the issues such as whether he should be in residential treatment, the accuracy of the testimony of those seeking his commitment, whether the treatment plan is adequate, and whether he is actually receiving the prescribed services.