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NOTES

The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards

I. INTRODUCTION

The civil commitment of mentally ill individuals presents the legal system with an intractable question: When should the law deprive someone of the fundamental right to liberty based on a prediction of future dangerousness? Advocates of both increased and decreased levels of civil commitment offer compelling case studies to help resolve the question. The former point to high profile events like the Virginia Tech shooting, in which mandatory incapacitation of the perpetrator at the first sign of mental illness could have prevented a senseless tragedy.[1] The latter highlight the lives of individuals like Kenneth Donaldson, whose father had him committed on scanty evidence of "delusions." He was held in a mental institution for fifteen years despite the absence of proof that he posed a threat to himself or society.[2] Cases like these demonstrate that civil commitment statutes must strike a balance that not only protects the populace from dangerous individuals but also allows harmless individuals to retain their civil rights.

Civil commitments cause "massive curtailment[s] of liberty."[3] Hospitalized patients must remain within the institution, often with limited freedom inside the building.[4] Even patients receiving outpatient treatment must report to the hospital regularly, severely restricting their liberty.[5] Further, these patients may not have the option to refuse unwanted examinations or treatment,[6] and their commitment period can last indefinitely.[7] In addition to these immediate concerns, individuals who have been committed bear the social and legal stigma of past hospitalization after their release.[8] Because involuntary civil commitment results in such a significant deprivation of liberty, its use invokes constitutional due process protections.[9]

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1. E. Fuller Torrey, *Commitment Phobia*, WALL ST. J., Apr. 27, 2007, at A17.

2. O'Connor v. Donaldson, 422 U.S. 563, 565-66 (1975).

3. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

4. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193-1201 (1974).

5. *Id.* at 1193 n.1.

6. *Id.* at 1194.

7. Addington v. Texas, 441 U.S. 418, 419 (1979) (noting mother's petition for the "indefinite" civil commitment of her son under Texas law).

8. *Developments in the Law*, *supra* note 4, at 1198-1201.

9. *Addington*, 441 U.S. at 425. The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that no person shall "be deprived of life, liberty, or property without due process of law." U.S. CONST. amends. V, XIV. The Supreme Court has interpreted due process as protecting individuals against two types of government actions. United States v. Salerno, 481

A number of Supreme Court cases have delineated the substantive due process requirements for civil commitment. Notably, *O'Connor v. Donaldson* established that an individual must be both mentally ill and dangerous before a state can involuntarily hospitalize him.[10] More specifically, he must pose a danger either to himself or to others.[11] While courts cite this proposition as the *O'Connor* holding, it does not adequately summarize the constitutional requirement of the dangerousness standard, which, on further examination, requires a due process balancing of the state interest against individual liberty in every case. Also, there is no consensus among jurisdictions about what constitutes dangerousness, though commitment statutes often refer to three criteria: the type of danger, the immediacy of the danger, and the likelihood of the danger.[12] However, not all of these criteria appear in every civil commitment statute,[13] and the *O'Connor* Court offered little guidance about how to define "dangerous."[14]

The Court later addressed the level of procedural due process necessary for civil commitment in *Addington v. Texas*, holding that the government must prove both of the substantive due process requirements—mental illness and dangerousness—by "clear and convincing evidence."[15] In mandating a heightened standard of proof,[16] the Court acknowledged that civil commitments require a formal hearing to satisfy procedural due process.[17] Though the Court did not specify the exact parameters of such proceedings, almost all states mandate assistance of counsel as a basic due process requirement of civil commitment hearings.[18]

U.S. 739, 746 (1987). First, "substantive due process" limits the government's ability to engage in conduct that infringes upon certain fundamental rights or "shocks the conscience." *Id.*; Rochin v. California, 342 U.S. 165, 172 (1952). Second, "procedural due process" prohibits the government from depriving an individual of life, liberty, or property without adequate procedural safeguards. *Cf. Rochin*, 342 U.S. at 172 (holding that forcible extraction of stomach contents violates due process).

10. 422 U.S. 563, 575 (1975).

11. *Id.*

12. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 61-64 (2005).

13. *Id.*

14. Reed Groethe, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 568-69 (1977).

15. 441 U.S. 418, 433 (1979).

16. *Id.*

17. RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 699, 781-86 (4th ed. 2004).

18. SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 69-71 (3d ed. 1985); MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY 53-113 (1994).

Regrettably, courts have failed to provide patients' attorneys with guidance on how to protect their clients' due process rights.[19] Consequently, two models of patient representation have emerged—the "adversarial" approach and the "best interests" approach.[20] The adversarial attorney acts as a zealous advocate for his client's wishes, which usually are against hospitalization, regardless whether he believes that the client needs treatment.[21] The best interests attorney acts as more of an advisor than a traditional advocate.[22] An attorney following this approach will not work toward his client's release if he believes that his client will benefit from treatment.[23] As a result, hearings undertaken by best interests attorneys tend to be more informal than traditional adversarial hearings.[24] In practice, the best interests model currently dominates mental health courts,[25] having been adopted by attorneys and also by judges, psychiatrists, the families of respondents, and others, creating a largely non-adversarial framework for civil commitment hearings.[26]

This Note argues that the representation style used by an attorney in a civil commitment hearing can subvert the substantive standards mandated by due process. Part II identifies the parameters of due process in the civil commitment context and examines the two approaches to civil commitment representation. Part III revisits *O'Connor*, illustrating how that case applies a more stringent due process balancing test than its distilled holding indicates. It then evaluates the two approaches to patient representation based on the ways in which each preserves the dangerousness standard, concluding that the best interests approach violates *O'Connor* by allowing the

19. Joshua Cook, Note, *Good Lawyering and Bad Role Models: The Role of Respondent's Counsel in a Civil Commitment Hearing*, 14 GEO. J. LEGAL ETHICS 179, 182 (2000).

20. *Id.* at 179; *see also* Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context*, 1 PSYCH. PUB. POL. & L. 120, 120 (1995) (advocating a model that incorporates the therapeutic aspects of adversarial and best interests representation); Henry Chen, *The Mediation Approach: Representing Clients with Mental Illness in Civil Commitment Proceedings*, 19 GEO. J. LEGAL ETHICS 599, 610-12 (2006) (advocating a mediation approach to respondent representation); Donald H. Stone, *Giving a Voice to the Silent Mentally Ill Client: An Empirical Study of the Role of Counsel in the Civil Commitment Hearing*, 70 UMKC L. REV. 603, 605-09 (2002) (examining the results of an attorney survey showing that respondents' counsel are generally non-adversarial).

21. Cook, *supra* note 19, at 179-80.

22. Abisch, *supra* note 20, at 129.

23. WINICK, *supra* note 12, at 142.

24. Parham v. J.R., 442 U.S. 584, 609 n.17 (1979); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 41-44 (1999).

25. WINICK, *supra* note 12, at 142.

26. Winick, *supra* note 24, at 41-44.

state to commit the mentally ill without sufficient proof of dangerousness. Finally, Part IV proposes a two-part solution in which (1) the Supreme Court modifies the dangerousness standard by requiring a due process balancing test in all civil commitment cases; and (2) courts require that attorneys provide adversarial representation so they do not dilute the substance of the dangerousness standard.

II. BACKGROUND: THE CURRENT STATE OF DUE PROCESS IN CIVIL COMMITMENT HEARINGS

The Supreme Court's interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments limits states' abilities to commit the mentally ill by requiring both substantive and procedural safeguards. This Part explores due process as it applies to civil commitment hearings and investigates the practical effect that these constitutional limitations have inside mental health courtrooms.

A. The Emergence of a Constitutional Model of Civil Commitment

Prior to the 1970s, civil commitment operated as a medical model in which courts exercised little influence and physicians' opinions about a patient's need for treatment were determinative.[27] Because the law provided no clear standard for commitment, its imposition was arbitrary and often unnecessary.[28] In many states, commitment procedures required only findings from two physicians that the patient was "ill and a proper subject for treatment in a psychiatric hospital."[29] Patients in these cases often did not appear before a judge.[30] A majority of states did not provide counsel to indigent respondents,[31] and when counsel was present, the hearings were "characterized by mutual expectations of perfunctory performance."[32] As a result, hospitals became overcrowded with patients held on questionable grounds.[33]

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27. *Id.* at 4.

28. *Id.*

29. CHEN, *supra* note 20, at 601.

30. *Id.*

31. *See* Fred Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 461-66 app. A (1966) (listing various state laws regarding indigent representation).

32. *Id.* at 448.

33. CHEN, *supra* note 20, at 602.

The civil rights movement of the 1960s led to significant mental health law reforms with a new emphasis on patients' rights and deinstitutionalization.[34] Eventually, the medical model gave way to a constitutional model that focused on the government's ability to deprive a patient of liberty.[35] Many states replaced rules authorizing indefinite commitment with time limit requirements and periodic review.[36] They also passed laws imposing stricter legal standards, including formal hearings, thereby shifting power from physicians to judges.[37] This shift increased the consistency of hearings, decreased the number of patients in state mental hospitals,[38] and prevented unneeded hospitalizations. However, it put final commitment authority into the hands of legal professionals who often failed to understand the clinical aspects of mental illness,[39] and it led to the release of many patients who could not care for themselves, some of whom became indigent or homeless.[40] Though the constitutional model persists, doctors have resumed a more prominent role in civil commitment hearings. As will be discussed later in this Note, courts regularly defer to doctors' opinions with little or no challenge.[41]

In addition to the state law reforms, the constitutional boundaries of civil commitment were addressed by the Supreme Court, which established minimum substantive due process requirements for these hearings. The first requirement, established in *Foucha v. Louisiana*, is that the patient suffer from a treatable mental illness.[42] The second, this Note's focus, is the dangerousness standard adopted by the Court in *O'Connor v. Donaldson*.[43]

B. O'Connor *and the Dangerousness Standard*

The oft-cited "danger to self or others" standard that has persisted for over thirty years in the civil commitment context earned constitutional legitimacy in *O'Connor v. Donaldson*.[44] As discussed in

34. *Id.*

35. WINICK, *supra* note 12, at 4.

36. *Id.* at 4-5.

37. *Id.*

38. CHEN, *supra* note 20, at 602.

39. WINICK, *supra* note 12, at 5.

40. *Id.*

41. *See infra* Section II.D.3.

42. 504 U.S. 71, 86 (1992). In this case, the petitioner suffered from antisocial personality disorder, which is not characterized as a mental illness and is untreatable. *Id.* at 85. The court ruled that, without a treatable mental illness, the state had no basis for holding him. *Id.*

43. 422 U.S. 563, 576 (1975).

44. For relevant facts of this case, see *id.* at 564-68, 576.

the Introduction, Kenneth Donaldson was committed as a mental patient in a Florida state hospital after a county judge found that he suffered from paranoid schizophrenia. During fifteen years of confinement, the superintendent of the hospital denied Donaldson's persistent requests for release. The testimony before the district court showed that Donaldson did not pose a threat to others and had never displayed suicidal tendencies. Further, pledges from responsible people willing to care for him accompanied his petitions for release. The Supreme Court held that a finding of mental illness alone was insufficient to sustain confinement, declaring that "a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[45]

Under *O'Connor*, then, to confine a person against his will, the state must prove at least one of the "generally advanced" justifications for civil commitment: a risk of harm to self or others, the inability to care for oneself, or the need for treatment to cure a mental illness.[46] Based on the Court's language, some theorists have suggested that dangerousness is not required in every instance; a state may be able to commit someone if it can prove the third prong—a "need for treatment."[47] Courts have not determined conclusively whether this prong constitutes an independent ground for commitment. Indeed, they, along with legislatures, have ignored it, demanding proof of dangerousness prior to civil commitment.[48] In *Jones v. United States*, the Supreme Court collapsed the *O'Connor* standard, declaring that "the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous."[49] In the years following *O'Connor*, every state modified its civil commitment statute to reflect the changes or interpreted its then-existing statute to include a dangerousness component.[50]

The *O'Connor* Court's holding stemmed from the "compelling government interest" test, which allows the government to infringe on a fundamental right to the extent that it furthers a compelling state

45. *Id.* at 576.

46. *Id.* at 573-74; *see also* Groethe, *supra* note 14, at 581 (discussing whether or not courts are justified in making overt dangerous behavior a prerequisite for involuntary civil confinement).

47. Groethe, *supra* note 14, at 581.

48. *Id.*

49. 463 U.S. 354, 362 (1983).

50. PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 28 (1994).

interest.[51] Two interests that traditionally justify intrusive state action are the state's police power and its *parens patriae* interest.[52] The police power permits the government to advance the general welfare of society, even at the expense of individual liberty.[53] The *parens patriae* interest allows the state to protect those individuals who are incapable of protecting themselves,[54] and it turns on a finding of the patient's incompetency. [55] Because incompetency is difficult to define, and even more difficult to measure, many commentators support a presumption of competency, with the burden on the state to prove otherwise.[56] The dangerousness standard encompasses both of these justifications, invoking the police power rationale when the state commits an individual who is dangerous to others, and the *parens patriae* interest when the state commits an individual who is dangerous to himself.[57]

Although there is no consensus among the states as to what constitutes a danger, legislators generally consider three criteria: the type of danger, the immediacy of the danger, and the likelihood of the danger.[58] The type of danger refers to the category of the harm. Examples include bodily harm, threat of bodily harm, and property damage. [59] Immediacy accounts for when the danger will occur. Some statutes, for example, require "imminent" danger[60] or danger in the "near future."[61] As these forecasts project further into the future, uncertainty and the risk of error increase. The likelihood of the danger refers to the accuracy of the dangerousness prediction.[62] Because studies have found that such predictions are more accurate when

51. Reno v. Flores, 507 U.S. 292, 302 (1993).

52. Mills v. Rogers, 457 U.S. 291, 296 (1982). *Parens patriae* is Latin for "parent of his or her country." BLACK'S LAW DICTIONARY (8th ed. 2004).

53. Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905).

54. Hawaii v. Standard Oil, 405 U.S. 251, 257 (1972).

55. WINICK, *supra* note 12, at 66.

56. *Id.* at 67.

57. *Id.* at 99.

58. *Id.* at 61-64.

59. *Id.* at 61.

60. *Id. See, e.g.*, GA. CODE ANN. § 37-3-1 (2003) ("substantial risk of imminent harm to . . . [the patient] or others"); HAW. REV. STAT. § 334-60.2 (2002) ("imminently dangerous to self or others"); MONT. CODE ANN. § 53-21-126 (2002) ("imminent threat of injury to the respondent or to others").

61. WINICK, *supra* note 12, at 62. *See, e.g.*, ALASKA STAT. § 47.30.915 (2002) ("likely in the near future to cause physical injury, physical abuse or substantial property damage"); FLA. STAT. ANN. § 394.467 (2003) ("substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person").

62. WINICK, *supra* note 12, at 63.

based on prior overt acts,[63] some states require evidence of similar dangerous behavior in the respondent's recent past.[64] Using these three criteria, the most extreme form of danger is "serious, imminent, and certain,"[65] but states' laws require varying levels of each descriptor and may not even incorporate all three components.[66]

Also, danger-to-self encompasses more than self-inflicted physical harm.[67] The *O'Connor* Court noted that "even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom."[68] Therefore, some states allow involuntary commitment for passive dangerousness based on either an inability to take care of oneself[69] or a "grave disability."[70]

Finally, the compelling interest test requires that the danger, whether rooted in police power or *parens patriae*, bear a reasonable relationship to the deprivation of liberty.[71] The Court has stated that "even [when] the government purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved."[72] More than half of the states have incorporated this principle into their civil commitment statutes with a "least restrictive alternative" requirement, insisting that courts consider whether less restrictive community treatment options, such as outpatient facilities, would satisfy the government's interest.[73]

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63. Groethe, *supra* note 14, at 584.

64. *Id.* at 562-63.

65. WINICK, *supra* note 12, at 61.

66. *Id.* at 61-64.

67. O'Connor v. Donaldson, 422 U.S. 563, 573-74 (1975).

68. *Id.* at 574 n.9.

69. WINICK, *supra* note 12, at 100. *See, e.g.*, 405 ILL. COMP. STAT. ANN. § 5/1-119 (West 2003) ("a person with a mental illness and who because of his or her illness is unable to provide for his or her basic physical needs so as to guard himself or herself from serious harm").

70. WINICK, *supra* note 12, at 100. *See, e.g.*, IND. CODE § 12-26-1-1 (2003) ("an individual who is mentally ill and either dangerous or gravely disabled may be involuntarily detained or committed").

71. Jackson v. Indiana, 406 U.S. 715, 731-39 (1972).

72. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

73. WINICK, *supra* note 12, at 71. *See, e.g.*, MISS. CODE ANN. § 41-21-73(4) (2003) ("in the least restrictive treatment facility which can meet the patient's treatment needs"); CAL. WELF. & INST. CODE § 5151 (2003) ("If . . . the person can be properly served without being detained, he or she shall be provided evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis").

C. Addington *and Procedural Due Process Requirements*

In *Addington v. Texas*, the Supreme Court mandated a "clear and convincing" burden of proof in civil commitment hearings.[74] In that case, Addington's mother filed for his indefinite commitment after a threatened assault. After a full trial, the judge submitted the case to the jury with the instruction that it could commit him only if the state had proved its case with "clear, unequivocal and convincing" evidence. Addington argued that this standard violated his due process rights. The Supreme Court reasoned that the standard used in criminal trials—"beyond a reasonable doubt"—would place too great a burden on the state because "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." The "preponderance of the evidence" standard used in most civil litigation would have the opposite result, however, by permitting too many unnecessary commitments. The Court therefore mandated an intermediate standard of proof in civil commitment hearings that "strikes a fair balance between the rights of the individual and the legitimate concerns of the state."

The clear and convincing evidence standard required by *Addington* presupposes that more basic procedural requirements apply in the civil commitment context;[75] indeed, for an evidentiary standard to exist, it must be applied in an adjudication. While procedural due process elements in civil commitment hearings vary from state to state, respondents generally are entitled to a hearing presided over by a fair and impartial judge, at which the respondent can be present, offer evidence, and cross-examine witnesses.[76] Most states also grant the right to counsel, who will be appointed if the respondent is indigent,[77] and some states have established the right to a court-appointed clinical evaluator.[78] Though these standards are well established in theory, the next Part examines the ways in which courts have become complacent about these procedures in practice.

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74. For the relevant facts and quotations of this case, see 441 U.S. 418, 420-33 (1979).

75. WINICK, *supra* note 12, at 141. Notice may not be required prior to commitment, however, if the commitment is sought on an emergency basis. *Id.*

76. Winick, *supra* note 24, at 40.

77. WINICK, *supra* note 12, at 141.

78. PERLIN, *supra* note 18, at 88-89.

D. Approaches to Civil Commitment Representation

The Supreme Court has mandated limited procedural guarantees, but it has not offered attorneys guidance as to how they should represent candidates for civil commitment.[79] The ABA's Model Rules of Professional Conduct also provide minimal assistance, advising lawyers who represent diminished capacity clients to "as far as reasonably possible, maintain a normal lawyer-client relationship."[80] The Rules allow the lawyer to take "protective action" when he "reasonably believes that the client has diminished capacity."[81] However, the attorney must unilaterally determine when their patient has "diminished capacity."[82] As a result, two models of patient representation have evolved—the adversarial approach and the best interests approach.[83] For more than two decades, jurists and academics have debated the relative merits of these competing models,[84] and some commentators have developed hybrid models, such as the "mediational" or the therapeutic approach.[85] The crux of the debate, however, remains between the adversarial and best interests approaches.

1. Adversarial Approach

The typical trial lawyer adopts the adversarial model of representation. This model is premised on the theory that the correct outcome in any dispute will be revealed when the opposing sides confront one another in the courtroom, each exposing the weaknesses of the other's position.[86] Ideally, this approach prevents the attorney's individual biases or presumptions from interfering with the outcome of the case, because the attorney must serve as a zealous advocate regardless of his personal beliefs.[87] The adversarial model in the civil commitment context, however, differs from the criminal trial version.[88] For example, mentally ill patients may not be able to express their desires cogently; in that case, the adversarial attorney will presume

79. Cook, *supra* note 19, at 182.

80. MODEL RULES OF PROF'L CONDUCT R. 1.14 (1983).

81. *Id.*

82. Cook, *supra* note 19, at 190.

83. *Id.* at 179-80.

84. Abisch, *supra* note 20, at 120.

85. *See, e.g., id.* at 122 (advocating a model that incorporates the therapeutic aspects of adversarial and best interests representation); Winick, *supra* note 24, at 53 (same).

86. Abisch, *supra* note 20, at 123.

87. *Id.* at 120.

88. Cook, *supra* note 19, at 183-85.

that the client favors liberty over commitment.[89] This approach respects the autonomy of the patient by assuming that he can make his own decisions regarding his care and that he deserves freedom unless it can be proven otherwise.

The adversarial approach is not without its drawbacks. In some cases, the attorney must advocate for the release of a patient who needs treatment,[90] which could result in harm to the patient, the patient's family, or to the larger community. Also, adversarial attorneys must adhere to their client's wishes even though the expressed desires may be clouded by mental illness; thus, the adversarial attorney may have to fight for a result that even the patient would oppose if he were healthy.[91] Additionally, adversarial attorneys tend to project a competitive attitude that can negatively affect the patient's own disposition toward treatment.[92]

2. Best Interests Approach

The best interests attorney evaluates objective information to determine the course of action that the client would choose if he were not impaired by a mental illness.[93] This approach recognizes that illness may distort a patient's ability to determine his own best interest.[94] Attorneys operating under this model presume that mentally ill clients need to be protected and habilitated by the state.[95] They often serve as fact finders and advisors, similar to guardians ad litem,[96] rather than as zealous advocates.[97] As one proponent argues, "[i]t is time for lawyers to lawyer in the mental institution situation with responsibility and sensitivity."[98] Further, attorneys seem to adopt the best interests approach naturally; one study has indicated that even when lawyers are trained in adversarial methods of

89. Abisch, *supra* note 20, at 120.

90. *Id.* at 123.

91. *Id.* at 129.

92. *Id.* at 127.

93. Cook, *supra* note 19, at 179.

94. Abisch, *supra* note 20, at 129.

95. *Id.* at 121.

96. *Guardians ad litem*, appoint to represent minor defendants, serve as officers of the court or fiduciaries, with the duty to protect the best interests of the minor. 42 AM. JUR. 2d *Infants* § 183 (2008). They do not act as advocates. *Id.*

97. Paul S. Appelbaum, *Paternalism and the Role of the Mental Health Lawyer*, 34 HOSP. & COMM. PSYCH. 211 (1983) (noting that, in the 1970s, "most lawyers involved in civil commitment hearings abandoned their traditional adversary role").

98. *Id.* at 212.

representation, they continue to exhibit paternalistic behavior in civil commitment hearings.[99]

This more sensitive approach faces serious criticism. First, it presumes that an attorney, who generally has no clinical training or expertise in the area of mental health, can determine what course is in the best interests of the patient.[100] Moreover, this approach can undermine the autonomy of the client and increase unnecessary institutionalization.[101] One commentator contends that the paternalistic role derives from a deeply rooted prejudice against people with mental illnesses, perpetuating the stereotype that they never can make decisions for themselves.[102] Best interests attorneys also are criticized for "paper pushing," playing a clerical role to give the appearance of representation.[103] The most serious critique, however, is that attorneys who follow the best interests model violate their clients' due process rights by assuming, prior to trial, that the patients are proper subjects for state paternalism.[104]

3. Realities in the Courtroom

Although mentally ill respondents receive formal hearings, these proceedings are widely criticized for their lack of any real formality. Empirical studies show that the mean duration of civil commitment hearings ranges from 3.8 to 9.2 minutes.[105] These hearings often occur in makeshift courtrooms set up in hospitals where patients appear before the judge in hospital gowns.[106] Observers have noted that judges frequently fail to inform respondents of their legal rights, do not permit them to participate in the proceedings, and downplay the role of respondents' attorneys by discouraging them from speaking or questioning witnesses.[107] Finally, judges tend to rubber stamp the recommendations of expert witnesses offered by the state; one study found that judges agree with expert witnesses in civil commitment hearings between 79 and 100 percent of

99. Norman G. Poythress, Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 LAW & HUM. BEHAV. 1 (1978).

100. Abisch, *supra* note 20, at 132.

101. *Id.*

102. MICHAEL PERLIN, THE HIDDEN PREJUDICE 48-57 (2000).

103. Winick, *supra* note 24, at 43.

104. *Id.*

105. Parham v. J.R., 442 U.S. 584, 609 n.17 (1979).

106. PERLIN, *supra* note 18, at 63-64.

107. Eric Turkheimer & Charles D.H. Parry, *Why the Gap? Practice and Policy in Civil Commitment Hearings*, 47 AM. PSYCHOLOGIST 646, 647 (1992).

the time.[108] Even the Supreme Court has noted that in civil commitment hearings "the supposed protections of an adversary proceeding . . . may well be more illusory than real,"[109] amounting to "time-consuming procedural minuets before the [patient's] admission."[110] The informal nature of these proceedings has been criticized not only as a violation of due process, but also as an anti-therapeutic exercise that devalues the patient and engenders distrust in the legal system.[111]

Attorneys who have adopted the best interests approach to representation often bear the blame for these hearings' lack of meaningful procedure.[112] One study found that only 2.3 percent of outside counsel, most of whom are appointed, contests the finding of mental illness.[113] Frequently, respondents' attorneys do not meet their clients until the hearing, nor do they seriously investigate the facts alleged to justify the commitment.[114] Many attorneys do not seek alternatives to hospitalization.[115] These attorneys often fail to challenge clinicians, performing little or no cross-examination and often waiving the patient's right to testify.[116] Because many attorneys take on this paternalistic role—deferring to experts, not zealously advocating the respondent's rights, and in some cases waiving these rights—some commentators speculate that an unrepresented patient may have a greater chance of release than one represented by counsel.[117]

Debate continues as to the optimal type of respondent representation in civil commitment hearings. Though the best interests approach predominates in most courtrooms, it is not necessarily the method that best upholds the constitutional minimums mandated by the Supreme Court. The next Part examines how these representation styles influence the dangerousness standard.

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108. Norman G. Poythress, Jr., *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 213 (1977).

109. *Parham*, 442 U.S. at 609.

110. *Id.* at 605.

111. WINICK, *supra* note 12, at 143.

112. *Id.* at 144.

113. Virginia A. Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. REV. 1027, 1039 (1982).

114. Jan C. Costello, *Why Would I Need a Lawyer? Legal Counsel and Advocacy for People with Mental Disabilities*, *in* LAW, MENTAL HEALTH AND MENTAL DISORDER 15, 30 (Bruce D. Sales & Daniel W. Shuman eds.. 1996).

115. *Id.*

116. *Id.*

117. *Id.*; WINICK, *supra* note 12, at 144.

III. ANALYSIS: THE INTERSECTION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS STANDARDS IN CIVIL COMMITMENT HEARINGS

Current legal scholarship on due process in the civil commitment context has examined the two major areas on which this Note has focused: the dangerousness standard[118] and respondent representation,[119] which represent, respectively, substantive and procedural due process. To date, however, research has not examined the two in concert to see how they influence each other.

This Analysis begins with a reexamination of *O'Connor*; the dangerousness standard as applied in that case is informed by a basic due process balancing test that has been overlooked in civil commitment jurisprudence. *O'Connor's* substantive standard requires a compelling state interest that outweighs the loss of liberty. The best interests style of representation subverts the *O'Connor* standard by failing to force the state to make a sufficient case for commitment.

A. O'Connor *Demands a Due Process Balancing Test*

Since establishing the dangerousness standard in *O'Connor*, the Supreme Court has failed to define what constitutes a "danger."[120] State legislatures have taken steps to fill this gap with civil commitment statutes, but they still have not clearly identified the dangers that justify commitment.[121] As a result, "[d]efinitions of what is 'dangerous' tend to be as diverse as the views of individual judges, courts, and jurisdictions."[122] A reexamination of the *O'Connor* decision and a return to the basic principles of due process yield some insight into the constitutional limitations inherent in the dangerousness standard.

Although the dangerousness standard serves as a constitutional minimum for civil commitment, without some limiting parameters, its wide latitude would render it meaningless. Discounting the need-for-treatment prong,[123] *O'Connor* identifies three broad categories of danger that justify civil commitment: injury to others, active injury to self, and passive injury to self.[124] One can

118. *See, e.g.*, WINICK, *supra* note 12, at 61-64; Groethe, *supra* note 14.

119. *See, e.g.*, Abisch, *supra* note 20; Cook, *supra* note 19.

120. Groethe, *supra* note 14, at 568.

121. REISNER, *supra* note 17, at 699.

122. Alexander Brooks, *Dangerousness Defined*, *in* LAW PSYCHIATRY & MENTAL HEALTH SYSTEMS 680 (1974).

123. *See supra* Part II.B.

124. Groethe, *supra* note 14, at 575.

easily imagine any number of slight or speculative "dangers" concocted by family members, attorneys, or judges seeking treatment of a mentally ill patient that would fit into one of these categories. For example, family members living with a mentally ill individual suffer inconveniences and discomfort on a regular basis, including the emotional anguish of caring for a sick relative. Sympathetic courts could construe this reality as a "danger" unless they are restrained somehow. If the ordinary behavior of a mentally ill person can rise to the level of a danger, then the dangerousness requirement is eviscerated and mental illness becomes the sole criteria for civil commitment. Assuming that the Court did not intend to establish a constitutional threshold without teeth, some limiting factor must inform the *O'Connor* dangerousness standard.

O'Connor offered some guidance as to the nature of this limiting factor in its dicta. It provided two examples of danger that do not merit civil commitment, and it discounted them by applying a due process balancing test. First, it rejected the danger that the patient will not enjoy a minimum living standard as a justification for commitment.[125] The Court noted "[t]hat the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution."[126] Though the Court did not call attention to its use of a due process balancing test, it essentially weighed the state interest (providing care and assistance to the unfortunate) against the rights of the patient (choosing his own home over an institution) and found the justification unconstitutional.[127] Similarly, the Court dismissed as illegitimate the danger of public discomfort stemming from contact with the mentally ill, stating that "[o]ne might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[128] Again, the state interest (avoiding public unease) fell short when balanced against the individual right (physical liberty). Thus, in discounting these purported dangers, the Court implied that a due process balancing test moderates the dangerousness standard.

This balancing test should be incorporated into a due process analysis as a matter of course; after all, any deprivation of liberty

125. O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975); Groethe, *supra* note 14, at 576.

126. *O'Connor*, 422 U.S. at 575.

127. *Id.* at 575-76.

128. *Id.*at 575.

demands that the state's interest outweigh the liberty interest involved.[129] Jurisprudence in the civil commitment context, however, seems to have strayed from this fundamental precept by relying on the dangerousness standard as a shortcut for all due process considerations. In other words, statutes that include some type of dangerousness standard are presumed to satisfy constitutional requirements,[130] regardless of the application of that standard. Evidence of this laxity appears in civil commitment courtrooms, where, as previously described, decisionmakers rubber stamp expert opinions rather than weigh competing interests.[131] Emphasis on the extracted phrase "danger to self or others" has oversimplified the ruling in *O'Connor*, which advocated a full due process balancing test even if it did not incorporate such a test into its holding.

B. Best Interests Representation Violates O'Connor

As noted, all states have civil commitment statutes that somehow incorporate the *O'Connor* dangerousness standard,[132] but such statutes do not necessarily guarantee mentally ill individuals their constitutionally granted rights. Insufficient representation of these patients still may deprive them of both procedural and substantive due process protections. Many critics have argued that the more relaxed best interests style of representation threatens procedural due process.[133] Representation by lawyers who "roll over" in a hearing violates the right to counsel, and the presumption by these attorneys that their clients need hospitalization violates the right to an impartial proceeding.[134] This Note extends this idea by proposing that, in addition to incurring procedural violations, such representation undercuts the substantive due process protections provided by the dangerousness standard.

Theorists have recognized a link between procedural and substantive due process in civil commitment hearings.[135] The overt act

129. United States v. Salerno, 481 U.S. 739, 748 (1987); *see also* Part II.B.

130. APPELBAUM, *supra* note 50, at 28 ("By the end of the 1970s, however, every state either had changed its statute to restrict hospitalization to persons who were dangerous . . . or had interpreted its preexisting statute in this way so as to 'save' it from being found unconstitutional.")

131. *See supra* Part II.D.iii.

132. APPELBAUM, *supra* note 50, at 28.

133. *See supra* Part II.D.ii; *see, e.g.*, WINICK, *supra* note 12, at 145 ("The paternalistic role played by some counsel in the civil commitment process . . . thus undermines and frustrates the goals of the procedural protections mandated by the Due Process Clause.").

134. WINICK, *supra* note 12, at 142-45.

135. Groethe, *supra* note 14, at 576 n.76.

requirement demands proof of an overt act of past dangerous behavior to justify civil commitment.[136] One commentator noted that this requirement inevitably raises the substantive standard by redefining dangerousness as a threat of harm grounded in past behavior rather than as the mere threat of future harm.[137] The overt act requirement, though procedural in character—asserting not *what* must be proven (dangerousness) but *how* it must be proven (with evidence of past acts)—influences the substantive standard.[138] The state must work harder to make its case for commitment when the overt act requirement is in effect. Thus, the commentator noted that "general definitions of dangerousness are given further content by the nature of the evidence required to support a finding that a person is dangerous."[139] This example is analogous, though contrary, to what occurs when courts permit informal methods of representation; in doing so, they reduce evidentiary standards, which in turn waters down the dangerousness standard required by due process.

As discussed above, the state should carry the burden of proving that the patient's level of dangerousness is sufficient to merit a substantial curtailment of liberty.[140] The state virtually is relieved of this burden, however, when the patient's attorney does not serve as a zealous advocate for his client.[141] In most civil commitment hearings, the state need only present the testimony of a single clinician recommending commitment because the best interests attorney will not challenge the expert opinion or seek alternatives to hospitalization.[142] Further, the best interests attorney who feels that his client needs hospitalization will tend to presume that the charges against the client are true, thereby failing to investigate or question the client thoroughly.[143] Thus, the court hears the testimony of one unopposed doctor, scant evidence with which to justify indefinite confinement. This style of representation undermines the dangerousness standard by significantly relaxing the burden on the state,[144] thus bypassing the due process balancing test that would

136 . *Id.* at 562.

137. *Id.* at 576.

138. Groethe, *supra* note 14, at 576.

139. *Id.*

140. *See supra* Part III.A.

141. *See generally* Costello, *supra* note 114.

142. *Id.* at 30-31.

143. *Id.*

144. *See id.*

force the state to prove that the danger posed is sufficient to justify commitment.[145]

Additionally, this approach transforms certain police power commitments into *parens patriae* commitments. Generally, the best interests attorney plays a passive role because he has determined that the patient needs hospitalization, and he knows that his failure to challenge the state's evidence will result in commitment.[146] He assumes that the client, in refusing treatment, does not recognize his own best interests, and he unilaterally decides that the patient needs the protection of the state.[147] Therefore, in cases where the client is committed under the "danger to others" prong, the best interests attorney privately applies a *parens patriae* justification while publicly invoking the police power. Though the best interests attorney presumably acts (or fails to act) with noble intentions, this paternalism subverts the dangerousness standard by presupposing that the patient needs hospitalization without a formal inquiry into his ability to care for himself or his competency to make his own treatment decisions.[148] Further, this method unfairly brands the patient as dangerous when, in reality, he may be a nondangerous individual who needs the treatment offered by the state. Placing the client in an inappropriate category of dangerousness potentially could affect his future treatment and his psychological health, and it also could negatively impact his relationships with the court system, the attorney, and even his family members.[149] Thus, the due process violations for this particular type of best interests representation carry particularly harmful repercussions for the patient.

The dangerousness standard, when properly defined as incorporating a case-by-case due process examination, represents a considerable limitation on civil commitments. When attorneys engage in best interests representation, they disregard the severity of this limitation by reducing the state's burden of proof for the dangerousness element, thus violating due process. The next Part will propose a solution that attempts to introduce adequate due process into the civil commitment hearing.

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145. *See supra* Part III.A.

146. *See generally* Costello, *supra* note 114.

147. *Id.* at 30-31.

148. *See* WINICK, *supra* note 12, at 145 ("[T]he system assumes that the individual is a legitimate subject of paternalism whose commitment is necessary to prevent danger to himself or others, when in fact he may not satisfy this condition . . . .").

149. *See, e.g.*, *id.* (examining how the legal process itself can have anti-therapeutic effects on civil commitment patients).

IV. SOLUTION: A MORE HONEST CIVIL COMMITMENT HEARING

This Note does not seek to vilify attorneys who presume that their clients need hospitalization and represent them accordingly. Best interests representation has flourished because well-meaning attorneys do not realize the harm they are causing for their clients and the system. Courts and legislatures have provided few guidelines regarding the required level of dangerousness[150] or the optimal style of representation.[151] This Part recommends a move towards more clearly defined civil commitment standards, which will eliminate the "basic dishonesty in the civil commitment process"[152] perpetuated in large part by best interests representation. In order to fashion a more honest civil commitment process, courts must reevaluate both the dangerousness standard and the role of respondents' counsel.

A. Reevaluating the Substantive Standard

As it stands, the dangerousness standard for civil commitment varies from jurisdiction to jurisdiction,[153] and because attorneys can manipulate the standard through best interests representation, it can even vary from case to case.[154] Though the *O'Connor* Court stipulated the "danger to self or others" requirement, it did not advise courts or attorneys on how to apply it.[155] The result is the hodgepodge of standards that now exists. The Supreme Court should resolve the confusion by clarifying the due process parameters of the dangerousness standard. The *O'Connor* Court used a balancing test to find a sufficient danger, but it did not highlight the test as necessary for due process compliance. The Court should explicitly require that, prior to any civil commitment, courts perform a due process balancing test that weighs the fundamental liberty interest at stake against the interests of the state.[156] While this compelling government interest test should be implicit in all state infringement cases, insisting that courts articulate the competing interests and their respective weights will ensure that they conduct the test properly and thoughtfully.

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150. Brooks, *supra* note 122, at 680.

151. Cook, *supra* note 19, at 182.

152. WINICK, *supra* note 12, at 143.

153. Brooks, *supra* note 122, at 680.

154. *See supra* Part III.B.

155. Groethe, *supra* note 14, at 568-69.

156. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (D.C. Wis. 1972) (describing the balancing test, extrapolated from the Supreme Court's decision in *Humphrey v. Cady*, 405 U.S. 504 (1972)).

The balancing test should incorporate each of the three major elements of dangerousness: the type of danger, the immediacy of the danger, and the likelihood of the danger.[157] These inclusions allow the court not only to consider the seriousness and likelihood of the possible harm, but also to account for the risk of error associated with predicting future behavior. For example, if the client's doctor testified to a slight chance that his patient would inflict serious bodily harm in the near future, the uncertainty of that prediction would reduce the state's interest in commitment. On the other hand, if doctors were certain that the patient would inflict serious property damage in the near future, the state's lesser interest in protecting property might be sufficient to justify commitment due to the certainty that the harm will occur. Thus, a balancing test that incorporates the key components of dangerousness provides the most robust analysis for determining when a certain danger substantiates commitment.

A redefined dangerousness standard that incorporates a comprehensive balancing test, like the one described above, would supply consistency and boundaries to the current dangerousness standard. Though the proposed balancing test appears in *O'Connor*'s dicta, the Court should revisit the issue to bring attention to the substantive due process minimums involved in civil commitment. A Supreme Court-mandated balancing test would compel the participants in the civil commitment process to acknowledge the fundamental nature of the liberties at stake and the correspondingly high level of danger necessary to revoke them.

B. Reevaluating the Role of Respondents' Counsel

With the debate between adversarial and best interests representation recast as a substantive due process debate, it becomes apparent that best interests representation violates the *O'Connor* standard.[158] As discussed above, the best interests attorney subverts the dangerousness standard by engaging in veiled paternalism, allowing the state to commit a person without proving that the potential danger outweighs the individual rights of the patient. Conversely, the adversarial model respects the dangerousness standard. By actively disputing that the patient needs hospitalization, the adversarial attorney compels the state to make a strong case in favor of commitment, forcing it to prove that the danger outweighs the consequences of the commitment.

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157. *See supra* Part II.B.

158. *See supra* Part III.B.

In order to preserve the dangerousness standard, the legal system should demand that attorneys deliver adversarial representation to their mentally ill clients. State legislatures and supreme courts could implement this requirement by enacting state statutes or amending court rules. Some states already have statutes that encourage zealous advocacy, but only Tennessee has adopted a state law specifically stating that the attorney should not act as a guardian ad litem.[159] Further, courts could sanction noncompliant attorneys with public censure or even monetary fines and suspension. These tactics would not prevent every attorney from adopting a best interests approach, but they would lend the symbolic support of the court to the adversarial model, which likely would have a noticeable impact on the behavior of the attorneys in that court.

Additionally, requiring a due process balancing test prior to civil commitment determinations would redefine the role of counsel in such hearings. Indeed, the due process balancing test previously described cannot serve its end without the participation of adversarial attorneys. The court cannot balance competing interests accurately unless presented with those interests during the hearing. Thus, an attorney who does not provide adequate representation would undermine the redefined dangerousness standard even more critically than he undermines the current one. Unlike the current standard, however, the balancing test removes some of the incentives for patients' attorneys to undertake best interests representation by reducing the perceived responsibility that they must act as guardians for their clients.[160] First, the revised standard shifts the burden of proof back to the state to articulate a compelling interest sufficient to outweigh a deprivation of liberty. If the client really needs treatment, the state likely would establish that need by following the strictures of the balancing test; patients' lawyers thus can let the state justify commitment without helping it to do so. Second, the test demands specific information and improves the transparency of the civil commitment process, which discourages any omissions. For example, if a best interest attorney fails to ask a doctor about the likelihood of a predicted harm, the court would request the information as necessary to the due process analysis that it must perform. Thus, the test would induce patients' attorneys to do their homework and present all relevant facts at the hearing.

As stated, patients' counsel should not bear all of the blame for the current laxity in applying the dangerousness standard; judges,

159. *See Stone*, *supra* note 20, at 624; Tenn. Code Ann. § 33-6-419 (2008).

160. *See supra* Part IV.A.

clinicians, and family members contribute to the dismal state of civil commitment jurisprudence.[161] Respondents' attorneys can alter the realities in the courtroom, however, by taking an active role in the proceedings. Once attorneys refuse to defer to expert witnesses, judges will accept that these attorneys have a right to voice their opposition and cross-examine witnesses, and doctors will come to expect the other side to challenge their opinions. Families seeking commitment will understand that confining a relative to a psychiatric hospital should not be taken lightly. Ultimately, all of these changes would benefit the patient, respecting his autonomy and right to a fair hearing. An adversarial stance by attorneys ultimately would result in a more honest civil commitment process.

CONCLUSION

The due process guarantee that no person shall "be deprived of life, liberty, or property, without due process of law"[162] faces unique challenges in the civil commitment context. A major area of debate has focused on the style of representation that optimizes procedural due process for the mentally ill patient, but this debate has overlooked how representation styles influence substantive standards. This Note argues that the best interests model of representation violates the dangerousness standard, which requires a due process balancing test in every civil commitment hearing, while an adversarial model upholds the heightened standards mandated by the Supreme Court and the Due Process Clause. Thus, attorneys must use an adversarial approach in civil commitment hearings to meet constitutional minimums. The extra effort expended by patients' attorneys would benefit not only the patients involved, but also the civil commitment system, improving its integrity by keeping it consistent with the spirit of a Due Process Clause that refuses to revoke fundamental rights without a compelling reason.

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161. WINICK, *supra* note 12, at 143-45.

162. U.S. CONST. amend. V.

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