CONSTITUTIONAL LAW—PROCEEDINGS—THE RIGHT TO COUNSEL IN OHIO INVOLUNTARY CIVIL COMMITMENT—*In re Fisher*, 39 Ohio St. 2d 71 (1974).

I. INTRODUCTION

On June 19, 1972, a group of involuntarily committed mental patients[1] at Ohio's Hawthornden State Hospital filed a joint petition for a writ of habeas corpus in the Summit County Court of Common Pleas. The petitioners, all indigents, had been committed under the procedure outlined in Ohio Revised Code § 5122.15.[2] The claim of the petitioners was that since they had neither been afforded court appointed counsel at their respective commitment hearings, nor had they voluntarily waived the right to counsel, they had been deprived of their liberty without due process of law.

The petition, which raised a somewhat novel issue in Ohio, faced many obstacles. There was no absolute right to counsel in civil commitment proceedings in Ohio for a number of reasons.[3] First, the proceeding was labeled civil, not criminal. This is significant since the sixth amendment right to counsel, as incorporated in the fourteenth amendment due process clause, generally extends only to criminal proceedings.[4] Furthermore, considerably relaxed due process protections have traditionally been afforded subjects of involuntary civil commitment proceedings on the theory that the state, acting as *parens patriae* in such proceedings, seeks only what is in the best interests of the subject; therefore, strict procedural safeguards are unnecessary.[5] Finally, involuntary civil commitment proceedings have traditionally been regarded as medical in nature. Therefore, the introduction of an adversary setting and legal red tape (which is assumed to accompany the introduction of mandatory counsel) is

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[1] Appellees and the dates of their commitments are as follows: Donald Joyner - 1952, Ralph Weaver - 1940, Janet McClellan - 1955, Robert Horvath - 1960, Harold Fisher - 1959, Pat Keiser - 1969, Deborah Carr - 1972.

[2] OHIO REV. CODE ANN. § 5122.15 (Page 1972) allows the subject of civil commitment proceedings to retain private counsel, and the probate judge may, in his discretion, appoint counsel. No provision is made, however, for mandatory appointment of counsel in the absence of waiver.

[3] Mandatory right to counsel in civil commitment procedure is also absent in many other states. As of 1971, twenty-six states did not have laws requiring counsel to be appointed in all civil commitment cases. S. BRAKEL AND R. ROCK, THE MENTALLY DISABLED AND THE LAW 125-27 (1971 ed.).

[4] Hullom v. Burrows, 266 F.2d 547 (6th Cir. 1959), *cert. denied*, 361 U.S. 919. *See also* Kirby v. Illinois, 406 U.S. 682 (1972).

[5] *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1084-85 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). *See also* S. BRAKEL AND R. ROCK, *supra* note 3, at 2.

seen as not only unnecessary, but also potentially injurious to the health of the subject.[6]

These obstacles were no doubt recognized by the Summit County Court of Common Pleas. That court denied the writ of habeas corpus on the grounds that Ohio's commitment laws are not only constitutional, but also necessary in that they perform a beneficial service to both the public and the mentally ill.[7] The court reasoned that since the proceedings are nonadversary in character, Ohio's laws adequately protect the rights of allegedly mentally ill individuals.

On appeal, however, the court of appeals reversed the decision of the trial court and granted the writ.[8] The court based its opinion on some suggestive, yet tenuously vague, dicta in the Ohio supreme court case *In re Popp*.[9] Nevertheless, it was the firm conclusion of the court of appeals that the involuntary commitment of individuals to state mental institutions following hearings in which they were neither afforded court appointed counsel nor advised of their right to such counsel, constitutes denial of due process of law and is therefore illegal.

The Ohio supreme court granted a motion to certify the record and affirmed the decision of the court of appeals.[10] The court held that an individual subject to civil commitment proceedings must be advised of and, in the absence of an intelligent waiver, be afforded the right to counsel. This decision will undoubtedly have a major impact upon the administration of Ohio's mental health commitment laws. It is the purpose of this case note to first analyze the court's rationale, and second, to explore the major problems and challenges which flow by implication from the opinion.

II. Analysis of Fisher

The court utilized at least three separate approaches in reaching its decision in *Fisher*. The first involved the adoption of the logic used in the United States Supreme Court case of *In re Gault*.[11] As a second

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[6] *See* Davidson, *Mental Hospitals and the Civil Liberties Dilemma*, 51 MENTAL HYGIENE 371 (1966).

[7] *In re* Fisher, No. 72-6-1324 (Summit County C.P., July 12, 1972).

[8] *In re* Fisher, No. 7077 (9th Dist. Ct. App., Sept. 19, 1973).

[9] 35 Ohio St. 2d 142 (1973). In this case, the Ohio supreme court reversed a court of appeals holding which required appointment of counsel for indigents facing civil commitment proceedings on the ground that habeas corpus action did not lie since the case was moot. Chief Justice O'Neill, dissenting, expressed his view that the due process right to counsel applied in civil commitment proceedings.

[10] *In re* Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

[11] 387 U.S. 1 (1967).

approach, the court scrutinized the constitutionality of the entire Ohio civil commitment procedure and judged it to be so procedurally deficient as to require counsel at every step of the proceedings. In its third approach, the court questioned the constitutionality of affording greater due process rights to criminals facing civil commitment than to noncriminals facing virtually identical proceedings. The following is an analysis of each of these three rationales upon which the *Fisher* decision rests.

A. *Adoption of the* In re Gault *rationale*

In *Gault*, the Court held that the due process requirements of the fourteenth amendment, including the right to counsel, apply to state juvenile delinquency proceedings. The Court explicitly rejected the argument that strict due process safeguards are not applicable since juvenile proceedings are civil in nature and are undertaken by the state in its role as *parens patriae*. In determining the applicability of due process safeguards, the crucial fact according to *Gault*, was not whether the proceeding was labeled "civil" or "criminal," or whether undertaken pursuant to good motives, but rather that the juvenile proceeding carried with it the "awesome prospect of incarceration in a state institution" for a lengthy period of time.[12]

The analogy between juvenile proceedings and civil commitment of the mentally ill is striking. Both are labeled civil. Both have traditionally been seen as being undertaken by the state in its role as *parens patriae*. And in both, the due process protections have been considerably relaxed because of the allegedly beneficial and civil character of the proceedings. Yet before the Ohio supreme court could fully apply *Gault* to the field of mental health commitment, it had to deal with the appellant's argument that civil commitment for treatment and rehabilitation of the mentally deficient is distinguishable from juvenile delinquency proceedings, the purpose of which is not rehabilitation, but incarceration by the state.

The court rejected this attempted distinction by citing, with approval, the case of *Heryford v. Parker*.[13] In that case, the United States Court of Appeals for the Tenth Circuit invalidated much of the Wyoming civil commitment procedure, flatly rejecting the same type of attempted distinction and applied the logic of *Gault* to civil commitment proceedings. In a segment of the *Heryford* opinion, quoted with approval in *Fisher*, the court stated:

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[12] *Id.* at 36.

[13] 396 F.2d 393 (10th Cir. 1968).

> It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.[14]

This rejection of the incarceration/rehabilitation distinction and the consequent adoption of the *Gault* logic is extremely significant in *Fisher*. Such a rejection evinces a shift of judicial focus away from the motive and purposes of commitment and towards the personal effects upon individual rights and liberties which may result therefrom. Given this shift of focus, the Ohio court saw no need to consider the motives or purposes of the state in civil commitment proceedings. The major judicial concern, after accepting the *Gault* rationale, was whether or not the proceeding in question put an individual in jeopardy of involuntary loss of liberty and personal rights. If it did, then the due process right to counsel must attach. And as the court in its opinion accurately observed, the effects of civil commitment upon personal rights and liberty in Ohio are truly devastating.[15]

B. *Constitutional Defficiencies of the Ohio Civil Commitment Process*

The second approach which the court utilized in reaching its decision in *Fisher* will have far reaching effects upon the entire civil commitment procedure in Ohio. The argument, briefly, is that the Ohio civil commitment process is so procedurally unsound, and consequently open to abuse, that the protection of counsel at every step of the proceeding is doubly necessary in order to insure the integrity of the fact-finding process.[16]

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[14] *Id.* at 396.

[15] A person is adjudged legally incompetent prior to civil commitment in Ohio. OHIO REV. CODE ANN. § 5122.36 (Page 1972). In addition, the committed individual is deprived of the right to vote, (OHIO REV. CODE § 3503.18), to hold elected office (OHIO CONST. art. XV, § 4), or to serve on a jury (OHIO REV. CODE § 2313.06), and is deprived of his licence to drive an automobile (*Id.* § 4507.08(B)). The head of the hospital to which the individual is committed is required to take possession of any money and valuables on the person of the commited individual. *Id.* § 5123.42. Lastly, the children of an incompetent may be put up for adoption without the individual's consent. *Id.* § 3107.06(B). The Ohio court further noted that "[t]he social stigma accompanying commitment in a mental institution will present obstacles to former patients in seeking employment and entering into commercial transactions." 39 Ohio St. 2d 71, 81, 313 N.E.2d 851, 857 (1974).

[16] While the court did not explicitly state that counsel is necessary to preserve the integrity of the fact finding process, this is the only reasonable inference which could possibly connect

The court laid the basis for this approach by citing the case of *Lessard v. Schmidt*.[17] In that case, a federal district court sweepingly condemned as unconstituional Wisconsin's statutory civil commitment procedures, which, as the Ohio court noted, were "similar to those in Ohio."[18] After praising the *Lessard* opinion as being a "most comprehensive statement" and "a well-reasoned opinion,"[19] the Ohio court went on to state:

> [T]he problems pointed out in *Lessard* exist also in Ohio. Although they have not been raised in the present action, the number of constitutional infirmities and their gravity emphasize the need for the protection by counsel at every step in the commitment process . . . .[20]

Thus, while not specifically ruling upon the constitutionality of the various "problems" involved with the Ohio commitment process (since that question was not before the court), the Ohio supreme court did not hesitate to point out these "constitutional infirmities" in order to form a second argument for the need of mandatory representation by counsel at every step of the commitment procedure.

C. *Procedural Protection Afforded Criminal versus Noncriminal Subjects of Commitment Hearings*

As its third rationale, the court in *Fisher* compared the protections afforded psychopathic criminals in commitment procedures with the protections afforded noncriminals in civil commitment. The result of the comparison, not surprisingly, was that criminals convicted of specific crimes and referred to psychiatric examination for determination of whether commitment is necessary are given greater procedural protection at commitment hearings than are individuals involved in noncriminal commitment proceedings. This, in effect, touched an "equitable nerve" of the Ohio court. As the court concluded:

> It seems incongruous to protect the constitutional rights of

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the court's broadside attack upon the procedural constitutionality of the entire Ohio civil commitment process with the court's imposition of the right to counsel in commitment proceedings. In short, the court viewed the constitutional infirmities as impairing the integrity of the fact finding process in civil commitment hearings, and as one remedy for this impairment, counsel was made mandatory in commitment proceedings.

[17] 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

[18] 39 Ohio St. 2d at 78, 313 N.E.2d at 856.

[19] *Id.*

[20] *Id.* at 79.

> those convicted of crimes and subsequently confined to a mental institution and not provide *the same or more extensive protection to noncriminals*. The Ohio procedure, pursuant to R. C. 5122.15, in effect, punishes noncriminals who are the subject of civil commitment proceedings.[21]

The court not only reasoned that such an incongruity is inequitable, but, moreover, it strongly suggested that such a disparity of treatment is unconstitutional. The court bases its somewhat cryptic constitutional rationale upon the United States Supreme Court case of *Robinson v. California*.[22] The Supreme Court held that a California statute imposing criminal penalties for drug addiction was cruel and unusual punishment on the grounds that drug addiction was a disease and not a crime. The Ohio court then characterized the reduced procedural protection which is afforded the noncriminal subject of commitment proceedings as "punishment" for being mentally ill, and thus within the scope of the *Robinson* "cruel and unusual punishment" doctrine. This constitutional argument is perhaps the weakest of the court's three lines of reasoning since it relies totally upon two questionable premises: (1) that the disparity between procedural protections afforded criminals and noncriminals in the commitment process constitutes a "punishment" of the noncriminals, and (2) that this "punishment" is analogous to a state criminal statute. The argument that a denial of procedural protections constitutes a cruel and unusual punishment, at the very least, is a novel one.

Yet this constitutional argument, while possibly open to doubt, remains significant simply because it illustrates that the Ohio court, once again, attacked the entire Ohio commitment process as a means of substantiating its narrow right to consel holding. This further bolsters the already strong implication given by the court that it views the entire Ohio civil commitment procedure as falling considerably short of constitutional adequacy.

Thus, the Ohio supreme court utilized at least three separate rationales in support of its holding in *Fisher*. Specifically, the court held that the fourteenth amendment requires that individuals subject to involuntary civil commitment be advised of their right to be represented by retained counsel, or, if indigent, by court appointed counsel. Furthermore, the right to counsel must be made available "at the earliest state of the proceedings commensurate with the individual's need for a timely preparation of a defense or advancement of an

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[21] *Id.* at 81, 313 N.E.2d at 858 (emphasis added).

[22] 370 U.S. 660 (1962).

argument for alternative modes of treatment . . . ."[23] While the court did not hold that an individual is entitled to the presence of counsel at psychiatric interviews, all reports and results of such interviews which will be introduced at the hearing must be made available to counsel.

The *Fisher* case is a substantial step in the direction of revolutionizing Ohio civil commitment procedures. While the strict holding of the case is relatively narrow, requiring only one of the multitude of due process rights heretofore absent in civil commitment proceedings,[24] that holding—providing the right to counsel—is a significant and meaningful one.[25] Moreover, the *Fisher* opinion virtually bristles with implications which present difficult problems and challenges to at least three separate groups: the Ohio legislature, probate judges, and members of the bar involved in civil commitment. How these groups deal with the problems and how effectively they meet the challenges will, in large part, determine the total impact of *Fisher* upon civil commitment in Ohio. The identification and discussion of three of the most significant *Fisher* implications is the subject of the next section.

III. PROBLEMS AND CHALLENGES OF FISHER

A. *Constitutionality of the Entire Ohio Commitment Process*

The Summit County Court of Common Pleas, in the course of denying a writ of habeas corpus to the petitioners in *Fisher*, stated that Ohio's civil commitment statutes may possibly need revision. In that court's opinion, however, it was totally up to the legislature, not the judiciary, to decide how and when to change the commitment laws.[26]

The Ohio supreme court went much further than the common pleas court and made evident its unflattering opinion of the Ohio

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[23] 39 Ohio St. 2d at 82, 313 N.E.2d at 858.

[24] Other due process rights absent in Ohio civil commitment proceedings include: the right to trial by jury, the right of confrontation of witnesses, the right to adequate notice of charges, the right to minimum evidentiary standards, the privilege against self-incrimination, and the right to an adequate record of the proceedings for purposes of appeal.

[25] A study conducted in an Ohio mental hospital shows that the mere presence of counsel at civil commitment hearings significantly reduces the likelihood of involuntary commitment or continuation thereof. Wenger and Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. HEALTH & SOCIAL BEHAVIOR 66 (1969).

[26] The court stated: "[I]t may be beneficial for the Legislature and the Division of Mental Hygiene to make further study of the laws and to determine whether further statutes may be beneficial. This is a matter for the Legislature and not for the Courts." *In re* Fisher, No. 72-6-1324 (Summit County C.P., July 12, 1972).

commitment statutes.[27] However, the supreme court's deference to the legislative branch was somewhat less than total. Indeed, the strong and intimidating message transmitted by the court to the Ohio legislature by *Fisher* was very clear. The message, simply stated, was this: change the entire civil commitment process so as to incorporate a broad range of fourteenth amendment due process protections,[28] or the change will be effected by the court. In fact, it seems almost certain from the tone and rational of *Fisher* that the court would have struck down much more of the Ohio commitment process as unconstitutional had it been asked on appeal to do so.

Futhermore, the question of which particular aspects of the commitment process are constitutionally inadequate was not entirely left to legislative conjecture, because the *Fisher* opinion explicitly pointed out these deficiencies which the court characterized as "problems" and "constitutional infirmities."[29] They include: (l) lack of a mandatory requirement for personal notice of,[30] or even personal presence

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[27] *See* text accompanying note 26 *supra*.

[28] It is not entirely clear whether the court purposefully limited its recommendations for due process rights to those enumerated in its opinion or whether it advocated a grant of the full range of due process protections presently required by the fourteenth amendment in criminal proceedings. (Notably absent in the court's list of due process deficiencies are the right of trial by jury and the privilege against self-incrimination.)

There is, however, some indication that the court is unwilling to extend the full panoply of due process rights to subjects of civil commitment hearings. This conclusion stems from a cryptic, one sentence limitation upon the court's holding found near the end of the *Fisher* opinion wherein the court states that an individual is not entitled to the presence of counsel at psychiatric interviews because, as the courts states, "of the debate over the efficacy of counsel at such interviews and the possible deleterious effect upon the individual and the examination process." 39 Ohio St. 2d at 82, 313 N.E.2d at 858. This limitation evinces a withdrawal from the full due process right to counsel applicable in criminal proceedings and, moreover, a reluctance by the court to endorse a strict privilege against self-incrimination in the commitment hearing. It could be persuasively argued that a psychiatric interview pursuant to a commitment hearing is analogous to an "in custody" interrogation of a criminal suspect where, by settled case law, the criminal accused has both the right to counsel and the right to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966).

If this analysis is correct, the court in *Fisher* is not endorsing full due process rights in commitment hearings, but rather, some midpoint between the present Ohio civil commitment process and full due process protection. The extremely significant questions of (1) where should this "midpoint" be located, and (2) whether full due process rights should be granted are left unanswered by *Fisher*. As to the first question, its answer will be obtained only through much litigation. As for the second question, one may only speculate concerning the reasons why the court stops short of endorsing full due process rights. It is the author's opinion that such action is a partial return by the court to the former *parens patriae*, medical model of civil commitment (see text accompanying notes 5 and 6 *supra*, and, as such, is totally inconsistent with the rationale of *Gault*—a rationale which the Ohio court professed to fully adopt vis-a-vis civil commitment.

[29] 39 Ohio St. 2d at 79, 313 N.E.2d at 856.

[30] OHIO REV. CODE ANN. §§ 5122.12 and 5122.18 (Page 1972).

of the subject at,[31] the commitment hearing, (2) lack of provisions requiring an adequate record of the hearing for purposes of appeal, (3) lack of any statutory standards for commitment, (4) lack of a statutory duty upon the court to explore other less restrictive alternatives to commitment, and (5) inadequate evidenciary standards for commitment hearings.[32]

In response to this rather explicit "hint" by the court in *Fisher*, the Ohio legislature has drafted and is currently considering a bill[33] which would meet nearly all the above five suggested deficiencies,[34] and, in addition, introduce provisions for: (1) preliminary hearings to determine probable cause for commitment,[35] (2) broad discovery of all relevant documents, reports, and information held by the state,[36] and, (3) trial by jury in mandatory hearings to continue commitment.[37] The bill, if passed, will thus effect a major revision of Ohio's commitment procedures, and it will constitute a commendable response on the part of the Ohio legislature to one of the major challenges put forth by *Fisher*.[38]

B. *Waiver of Counsel*

A second problem area, which will present an interesting challenge to probate judges in Ohio, involves the question of how an individual can effectively "waive" the right to counsel which *Fisher* guarantees. Surprisingly, the majority opinion does not discuss this issue at all. Chief Justice O'Neill, however, detecting a possible deficiency, felt obliged to briefly discuss the question of waiver in a concurring opinion. In laying down what he called a corollary rule to the *Fisher* holding, O'Neill stated:

> [T]he right to counsel may be waived by the subject of the proceeding, but an alleged waiver will be effective only if the subject, immediately prior to the purported waiver, is advised of his right to counsel. Since waivers of constitutional rights are valid only if

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[31] *Id.* at § 5122.15.

[32] 39 Ohio St. 2d at 79, 313 N.E.2d at 857.

[33] Sub. H.B. 984, 110th Gen. Assembly (1974).

[34] The proposed bill does not, however, require the presence of the subject of the commitment hearings if "unusual circumstances of compelling medical necessity exist which render the respondent unable to attend and the respondent has not expressed a desire to attend." *Id.* § 5122.15 (A)(2).

[35] *Id.* § 5122.141.

[36] *Id.* § 5122.15(A)(1)(a) & (b).

[37] *Id.* § 5122.15(H)(6).

[38] It is possible, however, that the legislature went too far beyond the *Fisher* mandate. *See* note 28 *supra*.

> knowingly and intelligently made, a waiver of right to counsel in an involuntary commitment proceeding is valid only if the Probate Court expressly finds that the subject is capable of understanding his right to counsel and the effect of a waiver thereof.[39]

The difficulty in applying this standard of waiver lies in the nature and purpose of a civil commitment hearing. In such a proceeding, the probate court is charged with the duty of determining whether the subject of the hearing is "mentally ill and subject to hospitalization by court order."[40] The statutory definition of one who is "mentally ill and subject to hospitalization by court order" is as follows:

> [A] mentally ill individual who, because of his illness, is likely to injure himself or others if allowed to remain at liberty, or is in need of care or treatment in a mental hospital, and because of his illness lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization.[41]

Thus, the court, prior to ordering an individual indeterminately hospitalized, must find that the individual is (1) mentally ill and (2) either dangerous or lacking in capacity to make decisions as to his hospitalization. Significantly, the key term "mentally ill," is statutorily defined as a person "having an illness which substantially impairs the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations . . . ."[42]

In light of these statutory definitions, a crucial question then arises whether or not a person who is adjudged to be "mentally ill and in need of hospitalization by court order" can be capable of sufficiently understanding and effectively waiving a legal right. If not, can a probate judge ever permit waiver of counsel by a subject of a commitment hearing and thereafter validly adjudge that subject to be mentally ill?

Even assuming that the criteria for the two tests (i.e., the tests for effective waiver and for mental illness) are not *identical*, it is at least strongly arguable that a rebuttable presumption would arise that a mentally ill person cannot effectively waive a constitutional right. The practical effect of this situation inevitably will be to make probate judges extremely reluctant to accept a waiver of counsel by a subject of involuntary civil commitment proceedings.

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[39] 39 Ohio St. 2d at 83, 313 N.E.2d at 859 (concurring opinion).

[40] OHIO REV. CODE ANN. § 5122.15 (Page 1972).

[41] *Id.* § 5122.01(B).

[42] OHIO REV. CODE ANN. § 5122.01(A). Sub. H.B. 984 does not significantly alter this definition.

But the "catch-22" quality of waiver within the context of *Fisher* is not totally dispensed with by even a blanket refusal by probate judges to accept attempted waivers. Suppose, for example, that an individual chooses to appear *pro se* in an involuntary commitment proceeding. The judge, for reasons previously discussed, refuses to permit the waiver, and counsel is appointed. Thereafter, the individual is adjudged to be sane and in no need of mental treatment or commitment. The question then becomes who pays for the appointed lawyer? Certainly it would be unjust to require the subject of the hearing to pay for counsel that he did not desire. Furthermore, serious constitutional questions would arise concerning the denial of the individual's "right" to appear *pro se*.[43]

Answers to these questions concerning waiver of the *Fisher* right to counsel will have to be resolved by the appelate courts. Until then, however, probate court judges must grapple as best they can with the perplexing problems of waiver raised by the court in *Fisher*.

C. *Role of Counsel in Civil Commitment Proceedings*

The traditional role of the lawyer in the Anglo-American legal system is that of zealous advocate of his client's interests and adversary to those who would oppose his client's desires.[44] However, due to the peculiar development and characteristics of mental health commitment proceedings,[45] attorneys have not generally assumed their normal adversary role in this area, but, rather, have assumed a passive, paternalistic role.[46] In this role, the attorney acted more as a member of a team composed of himself, the court, and the psychiatrists than as an advocate of his client's interests. The attorney's function was calculated to give the appearance of legality and fairness rather than to have any substantial effect upon the outcome of the proceedings.[47]

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[43] The federal courts are divided over whether there is a constitutional right to appear *pro se*. *See* People v. Sharp, 7 Cal. 3rd 448, 499 P.2d 489 (1972) (collecting authorities). *See also* Adams v. United States, 317 U.S. 269 (1942).

[44] *See* ABA CANONS OF PROFESSIONAL ETHICS No. 7.

[45] For a summary of the historical development of civil commitment, *see* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

[46] *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Andalman and Chambers, *Effective Counsel for Persons Facing Civil Commitment: a Survey, a Polemic, and a Proposal*, 45 MISS. L. J. 43 (1974); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816 (1974).

[47] *See* Cohen, *The Function of the Attorney and the Commitment of the Mental Ill*, 44 TEX. L. REV. 424 (1966); Andalman and Chambers, *Effective Counsel for Persons Facing Civil*

The reasons for the development of this atypical role stem from the traditional characterization of civil commitment as a "medical" proceeding, undertaken by the state as *parens patriae* for the benefit of both the individual and society. Given this characterization, it was reasoned that if a lawyer were to become involved in civil commitment proceedings, he should not take an active effective role because: (1) active attorney participation would impose a courtroom atmosphere which would be detrimental to the objectives of the state and the health of the individual[48] and (2) effective attorney participation would thwart the treatment needs of many mentally ill individuals and expose society to possibly dangerous psychopaths.[49]

Fisher represents a shift of judicial focus from the motives and purpose of commitment to its effects on personal liberty. This shift in focus in itself weakens the justifications for the continued assumption of a passive, ineffective role by attorneys in the area of mental health. More significantly, however, it can be argued that *Fisher* affirmatively mandates an effective, adversary role for attorneys in civil commitment proceedings. At least three aspects of *Fisher* seem to support this conclusion.

First, the court included, as part of its holding, a provision that consel must be given adequate time for preparation of a defense for his client.[50] The use of the word "defense" is significant. The term necessarily implies something to defend against and someone to defend. In short, the term implies an adversary setting and an adversary role for counsel who takes sides with and fully advocates the position of his client.

Commitment: a Survey, a Polemic, and a Proposal, 45 MISS. L. J. 43 (1974); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816 (1974).

[48] Davidson, *supra* note 6, at 373.

[49] This argument was articulated by the Summit County Common Pleas Court as one basis for rejecting the right to counsel claim by the petitioners in *Fisher*. The court stated:

> It is common knowledge that many citizens of the United States have been killed by persons who are mentally ill and that many such mentally ill persons have themselves committed suicide or injured themselves or others. It is obvious that the provisions of the law above mentioned are placed there to protect society from the mentally ill individual and to provide a reasonable place of abode for him. Such laws are not only constitutional but necessary.

For a similar view in the juvenile setting see the opinion of Justice Stewart dissenting in *In re* Gault, 387 U.S. 1, 78-80 (1966). It should be noted that this view represents a rather significant departure from typical legal theories in the criminal area. In effect, the view atriculated by the Summit County Common Pleas Court implies that if the legal system is to err in the civil commitment area, it should err on the side of committing too many, rather than too few individuals. This, of course, is directly opposed to the traditional criminal justice view that it is better to release ten guilty criminals than to incarcerate one innocent person.

[50] See text accompanying *supra* note 23.

Second, the court recognized that one of the major reasons for insuring the right to counsel in civil commitment proceedings was the fact that the accused needs protection from the possible procedural improprieties in the commitment process.[51] By stating that a major duty of counsel is to protect the client from possible prejudicial actions of the court or other parties, the court obviously envisioned an adversary proceeding in which conflicting claims are advocated and resolved in a procedurally fair manner.

Finally, throughout *Fisher*, the court emphasized the basic theme that commitment involves a deprivation of liberty, and that, therefore, the subject of the commitment process is entitled by due process of law to protection of his right of liberty. To provide this fundamental right, the court has required that counsel be provided for all subjects of commitment procedures. It seems both counter-intuitive and illogical to believe that the court envisioned anything but an effective counsel, who fully and effectively advocates the position of his client, to fulfill this vital constitutional function.

Thus, the implicit mandate of *Fisher* would seem to be that the subject of involuntary civil commitment proceedings is entitled not merely to counsel, but, moreover, to effective, adversary counsel. Not surprisingly, however, this significant mandate poses a number of problems and challenges to both Ohio legislators and members of the bar.

Initially, in order to fulfill the effective counsel mandate of *Fisher*, there must, of course, be a certain segment of the bar willing to devote the time and energy necessary to acquire the necessary education and expertise in the area of psychiatry and mental health.[52] Due to the specialized nature of the civil commitment process, it will probably be necessary to develop, to some extent, a correspondingly specialized bar to practice in the mental health area.[53]

A far greater challenge to the effective counsel mandate is posed, however, by the systematic obstacles which are built into the Ohio commitment process. For example, there is no requirement that a prosecutor or other proponent on the issue of commitment be present at the hearing. Thus, an attorney may find himself in the disconcerting position of being an adversary without an opponent.[54] Moreover,

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[51] See text accompanying *supra* note 21.

[52] Andalman and Chambers, *supra* note 46, at 50-54; and Litwack, *supra* note 46.

[53] Andalman and Chambers, *supra* note 46, at 50-54; and Litwick, *supra* note 46. For an excellent discussion of a potential moral dilemma which may face attorneys in the area of mental health, *see* Shaffer, *Introduction to Symposium: Mental Illness, The Law, and Civil Liberties*, 13 SANTA CLARA LAW. 369 (1973).

[54] Cohen, *supra* note 46, at 446, describes this problem as one of "rolelessness."

there is a serious problem for court-appointed counsel of inadequate compensation.[55] The requirements of effective representation are time consuming, and even if a lawyer were willing to take a personal loss, he nevertheless would face the crippling disadvantage of lacking funds to obtain expert witnesses, such as psychiatrists, who would often be vital to his client's case.

These systematic obstacles to an effective, adversary role of counsel in civil commitment cannot be remedied merely by a dedicated or experienced segment of the bar. Only the legislature can effectively remove these obstacles. Once again, however, the Ohio legislature has responded admirably to the challenge presented to it by *Fisher*. Now pending before the Ohio General Assembly is a bill, which if passed would: (1) require a designee of the director of the Division of Mental Health to "present the evidence for the state,"[56] (2) provide funds for independent expert evaluation of indigents[57] and (3) allow court-appointed counsel "such fees as are determined by the Probate Division."[58] While the compensation provision is somewhat less than ideal, the proposed statute would go a long way toward removing the present obstacles to an effective, adversary role of counsel in civil commitment proceedings.

Thus, while the implicit mandate of *Fisher* for an effective, adversary role of counsel in the commitment process presents several challenges, these challenges are not insurmountable. A responsive legislature and a dedicated segment of the bar can meet and overcome the various problems and thereby fulfill the effective counsel mandate of *Fisher*.

IV. CONCLUSION

Fisher will have great impact upon Ohio's civil commitment procedure due not only to the strict holding of the case, but also due to the significant implications of the opinion. Moreover, *Fisher* is sound from both a legal and a public policy perspective. With more Americans confined in public mental institutions than are confined in penitentiaries,[59] the issue of the civil rights of those facing commit-

[55] Indeed, there is presently no provision for any payment whatsoever by the state of Ohio to an attorney appointed to an indigent facing civil commitment.

[56] Sub. H.B. 984, 110th Gen. Assembly, § 5122.15(A)(10).

[57] *Id.* § 5122.15(A)(4).

[58] *Id.* § 5123.96(G).

[59] As of 1971, there were 308,000 persons institutionalized in our nation's public mental hospitals. *Hearings Before a Subcomm. of the House Comm. on Appropriations, Dept.'s of Labor and Health, Education and Welefare Appropriations for 1973*, 92nd Cong., 2nd Sess., pt. 3, at 97 (1972).

ment can no longer be ignored by either society or the courts. Many of this vast number of individuals who presently sit in institutions, idly wasting their lives away, were placed in that situation involuntarily, and without even a semblance of due process of law.

Fisher, along with a growing number of other federal and state cases,[60] rightly spells an end to the belief that procedural protections have no place in civil commitment proceedings since commitment is for the individual's own good and due process of law merely obstructs effective medical treatment. The startling fact is that many, if not most, commitments are neither made for the good of the committed individual, nor are they followed by any significant or effective forms of treatment.[61] But even if this were not the case, and commitment were both for the benefit of, and beneficial to, the committed individual, denial of due process of law in civil commitment hearings would still not be justifiable. As the court in *Fisher* quite properly emphasized, civil commitment is, after all is said and done, the involuntary deprivation of one of the committed individual's most precious rights—liberty.. If the right to due process of law is to mean anything, it must not be disregarded on the basis of such a superficial factor as the self-proclaimed purpose and motive of the state in depriving a citizen of liberty or property. For as Louis Brandeis once said:

> [E]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invitation of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[62]

Jonathan M. Norman

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[60] Other cases granting the right to counsel in civil commitment proceedings include: *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971); Quesnell v. State, 517 P.2d 568 (Wash. 1973); *In re* Hayes, 18 N.C. App. 560, 197 S.E.2d 582 (1973); In re Collman, 9 Ore. App. 476, 497 P.2d 1233 (1972); *In re* Adams, 497 P.2d 1080 (Okla. 1972); Woodall v. Bigelow, 20 N.Y.2d 852, 231 N.E.2d 777, 285 N.Y.S.2d 85 (1967); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964).

[61] *See* R. ROCK, M. JACOBSON AND R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 69-70 (1968); and Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1973). For a report on the quality of treatment in Ohio's mental hospitals *see* REPORT OF GOVERNOR'S TASK FORCE ON MENTAL HEALTH AND MENTAL RETARDATION (1971).