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JOSEPH FRUEH

The *Anders* Brief in Appeals from Civil Commitment

ABSTRACT. In *Anders v. California*, the Supreme Court crafted a procedure to prevent appointed attorneys from abandoning their clients after trial. The Court provided that if counsel wishes to withdraw from a “frivolous” case, he or she first must file a brief referring to anything in the record that might support an appeal. Then, before permitting withdrawal, the appellate court examines the brief and the proceedings below to determine whether counsel’s assessment was proper. Since deciding *Anders* in 1967, the Supreme Court has not determined whether this procedure also applies to appeals from civil commitment. Several recent state court decisions, however, have rejected this possibility. This Note criticizes these decisions on both doctrinal and policy grounds. First, a review of relevant case law suggests that *Anders* should be viewed as derived from the Fourteenth Amendment rather than from the Sixth Amendment, furnishing a compelling constitutional basis for requiring *Anders* in both criminal and civil-commitment appeals. Moreover, *Anders* may have unique utility in furthering the norms of “therapeutic jurisprudence” by alleviating the role dilemma often manifested by civil-commitment attorneys.

AUTHOR. Yale Law School, J.D. 2008; University of Southern California, B.S. 2005. This Note owes a great debt to Jesse Brush for his thoughtful suggestions and careful editing.



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*Much Madness is divinest Sense –
 To a discerning Eye –
 Much Sense – the starkest Madness –
 'Tis the Majority
 In this, as All, prevail –
 Assent – and you are sane –
 Demur – you're straightway dangerous –
 And handled with a Chain –
 – Emily Dickinson¹*

INTRODUCTION

Since the deinstitutionalization movement of the 1980s, the practice of civil commitment has declined substantially in terms of both public visibility and duration of confinement.² Nonetheless, some commentators posit that current civil-commitment law may affect more individuals now than fifty years ago, as statistics often fail to note that short-term confinement with forced administration of psychotropic medication has replaced the long-term warehousing of patients as the practice of choice.³ Moreover, while the average duration of civil commitment has declined, the resulting social stigma and legal consequences remain extensive.⁴ These consequences include losing the rights to vote,⁵ practice a profession,⁶ or have custody of one's children.⁷ Hence, the substantive and procedural components of civil-commitment law continue to

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1. FINAL HARVEST: EMILY DICKINSON'S POEMS 101 (Thomas H. Johnson ed., Little, Brown & Co. 1961) (1890).
 2. See PAUL S. APPELBAUM, ALMOST A REVOLUTION 49-52 (1994); NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS. RESEARCH INST., INC., STATE PROFILE HIGHLIGHTS: LENGTH OF STAY IN STATE PSYCHIATRIC HOSPITALS (2002), <http://www.nri-inc.org/projects/Profiles/Profiles01/06LOS.pdf>.
 3. See BRUCE J. WINICK, CIVIL COMMITMENT 2-3 (2005).
 4. See generally *Jones v. United States*, 463 U.S. 354, 384-85 (1983) (Brennan, J., dissenting) (describing the ways in which "confinement in a mental institution is even more intrusive than incarceration in a prison"). Robert Ross Mezer and Paul D. Rheingold have identified thirty-one sociolegal consequences of incompetency determinations. See Robert Ross Mezer & Paul D. Rheingold, *Mental Capacity and Incompetency: A Psycho-Legal Problem*, 118 AM. J. PSYCHIATRY 827, 827-28 (1962).
 5. See, e.g., CAL. ELEC. CODE § 2201(b) (West 2007); WIS. STAT. § 6.03(3) (2007).
 6. See, e.g., ARK. CODE ANN. § 17-95-409(a)(2)(K) (2007) (physicians and surgeons); CAL. BUS. & PROF. CODE § 6007 (West 2007) (attorneys).
 7. See, e.g., CAL. FAM. CODE § 7826 (West 2007).

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markedly affect the lives of many Americans, and given that these individuals also constitute a particularly vulnerable and underserved group in society, the standards by which the state effects a “massive curtailment”⁸ of their liberties remain deeply reflective of the public’s values, priorities, and social conceptions.

Currently, state statutes provide many of the same procedural protections in civil-commitment hearings as in criminal proceedings, such as personal notice and a full adversarial hearing, which includes the rights to be present at the hearing, to examine witnesses, and to be represented by an attorney.⁹ A majority of states also provide respondents with the right to a jury.¹⁰ Of these procedural rights, the right to counsel has been the most crucial; since the various rights guaranteed by statute are not self-executing, the careful monitoring of appointed counsel is essential to their enforcement.¹¹ Hence, the quality of counsel—not merely the right itself—is highly determinative of the fairness of the civil-commitment hearing.¹²

Unfortunately, commentators are reluctant to associate any notion of fairness with civil-commitment hearings and often ascribe blame to the quality of appointed counsel. Civil-commitment attorneys have been described as “reticent, ineffective, ill-prepared, mostly silent, lacking interest, rarely extending any effort, giving only perfunctory representation, doing little or nothing to obtain a client’s release and seldom challenging adverse statements by witnesses or adverse psychiatric testimony.”¹³ Ultimately, some have concluded that the poor performance of counsel typically renders the protections of an adversarial proceeding “more illusory than real.”¹⁴

In both the civil-commitment and criminal contexts, ensuring the effective assistance of appointed counsel remains elusive. Public defenders’ offices, which often provide appointed counsel in both types of proceedings, are

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8. *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)) (internal quotation marks omitted).
 9. BARBARA A. WEINER & ROBERT M. WETTSTEIN, *LEGAL ISSUES IN MENTAL HEALTH CARE* 55-57 (1993).
 10. *Id.* at 57.
 11. See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 *LAW & HUM. BEHAV.* 39, 47 (1992) (citing Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 *HASTINGS L.J.* 665, 678-79 (1987)).
 12. Perlin, *supra* note 11, at 41-42.
 13. Virginia Aldigé Hiday, *The Attorney’s Role in Involuntary Civil Commitment*, 60 *N.C. L. REV.* 1027, 1030 (1982) (footnotes omitted).
 14. *Parham v. J.R.*, 442 U.S. 584, 609 (1979); see APPELBAUM, *supra* note 2, at 41-44.

notoriously overworked and often lack adequate funding.¹⁵ Moreover, in the civil-commitment context, appointed counsel often lack sufficient expertise in mental-health law and psychiatry to properly serve their clients.¹⁶ Other institutional barriers, such as the inability to contact one's client or receive sufficient time to interview experts, also diminish the effectiveness of civil-commitment counsel.¹⁷ To make matters worse, since the standard of ineffective assistance of counsel in both criminal and civil-commitment cases is rather deferential under *Strickland v. Washington*,¹⁸ clients often have no remedy when their appointed attorneys fail as advocates.

One of the few means to ensure the effective assistance of counsel in criminal appeals is the *Anders* procedure, as prescribed by the Supreme Court in *Anders v. California*.¹⁹ In *Anders*, the Court sought to prevent appointed counsel from abandoning their clients after trial, asserting that the "constitutional requirement of substantial equality and fair process" can only be obtained "where counsel acts in the role of an active advocate in behalf of his client."²⁰ Although professional ethics require an attorney to withdraw from "frivolous" appeals,²¹ *Anders* also requires that a request to withdraw be accompanied by "a brief referring to anything in the record that might arguably support the appeal."²² After the attorney provides a copy of the brief to the defendant, the appellate court examines all of the proceedings and determines

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15. See 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2B-6, at 220-23 (2d ed. 1998); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1372-73 (7th ed. 2004); Elliott Andalman & David L. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43, 44 (1974).
 16. See Andalman & Chambers, *supra* note 15, at 50; Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, LAW & CONTEMP. PROBS., Summer 1982, at 161, 166.
 17. Perlin & Sadoff, *supra* note 16, at 165.
 18. 466 U.S. 668, 689, 692 (1984) (asserting that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution"); see Phyllis Coleman & Ronald A. Shellow, *Ineffective Assistance of Counsel: A Call for a Stricter Test in Civil Commitments*, 27 J. LEGAL PROF. 37 (2003).
 19. 386 U.S. 738 (1967).
 20. *Id.* at 744.
 21. AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS Canon 44 (2006) (adopted in 1928); see also *id.* Canon 22 (adopted in 1908) ("It is unprofessional and dishonorable to deal other than candidly with the facts in . . . the presentation of causes. A lawyer should not offer evidence which he knows the Court should reject, . . . nor should he address to the Judge arguments upon any point not properly calling for determination by him.").
 22. *Anders*, 386 U.S. at 744.

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whether an appeal would be “wholly frivolous.”²³ If the court agrees with counsel’s assessment, it grants permission to withdraw.²⁴ Otherwise, any arguable points entitle the defendant to pursue an appeal with the aid of appointed counsel.²⁵

The Supreme Court has not determined whether the *Anders* procedure applies to appeals from civil commitment, but several state supreme courts have recently held that the procedure is not required in that context.²⁶ In so holding, these courts primarily rely on the assumption that *Anders* derives from the Sixth Amendment. Since the Sixth Amendment right to counsel applies to criminal cases rather than “civil” commitment, they conclude that the *Anders* procedure is not constitutionally required. Thus, if the relevant state statute does not provide for the procedure, appointed counsel are free to abandon their clients’ “frivolous” appeals without any court oversight.

This Note advances a two-pronged argument to require *Anders* procedures in appeals from civil commitment. The first argues in constitutional terms, taking issue with the narrow circumscription of the right to counsel. A doctrinal synthesis of Supreme Court case law reveals that unlike some procedural protections, such as the Double Jeopardy Clause and the “beyond-a-reasonable-doubt” standard of proof, the right to appointed counsel has a tenuous relationship with notions of criminality. Instead, the right to appointed counsel bears a well-developed association with the deprivation of physical liberty—an aspect shared by both criminal and civil-commitment proceedings. Part I unpacks this doctrinal synthesis and carries it through to the appellate level, revealing a persuasive constitutional basis for requiring *Anders* in appeals from civil commitment that hinges on the Fourteenth Amendment rather than the Sixth Amendment. Part II proceeds to contrast this argument with recent state court decisions that refused to extend *Anders* to the civil-commitment context and demonstrates how their reasoning appears comparatively less satisfying.

Part III offers the second prong—a policy argument for requiring *Anders* in appeals from civil commitment. Specifically, Part III proposes that *Anders* would further the norms of “therapeutic jurisprudence” by enhancing

23. *Id.*

24. *Id.*

25. *Id.*

26. See *In re Leon G.*, 26 P.3d 481, 484 (Ariz. 2001); *San Diego County Health & Human Servs. Agency v. Ben C.* (*In re Conservatorship of Ben C.*), 150 P.3d 738 (Cal. 2007); *In re Richard A.*, 771 A.2d 572 (N.H. 2001).

respondents' "perceptions of fairness, participation, and dignity."²⁷ This argument begins by acknowledging the cognitive dissonance or "rolelessness" of civil-commitment attorneys, often torn between the traditional role of zealous advocate and the desire to remain passive when commitment seems to be in their clients' "best interests." As a result, many attorneys engage in "role-shifts" or "work-arounds," occasionally ignoring procedural violations or evidentiary burdens because they believe that their clients should be committed, despite or absent their clients' expressed wishes. Granted, some of these tactics may produce just or therapeutic outcomes; however, the subversive nature of this practice degrades the dignity of respondents and may exacerbate feelings of helplessness or persecution. In a subtle way, *Anders* may help to correct this practice by introducing a form of appellate scrutiny that would emphasize the formal impermissibility of role-shifts and work-arounds.

I. CIVIL COMMITMENT AND *ANDERS*: A DOCTRINAL SYNTHESIS

The right to *Anders* procedures in the civil-commitment context derives from a synthesis of case law relating to the right to appointed counsel; hence, it seems appropriate to begin with the Sixth Amendment—the only text of the Constitution to mention counsel. As originally conceived, the Sixth Amendment provided federal criminal defendants with the *privilege* to obtain counsel, rather than requiring the appointment of counsel.²⁸ From that early understanding, the Supreme Court has greatly expanded the applicability and content of the constitutional guarantee of appointed counsel. The following Sections detail this transformation and demonstrate how these precedents may be interpreted to support the following propositions: (1) the Constitution guarantees appointed counsel outside of the criminal context, including civil-commitment proceedings; (2) this guarantee extends to first appeals of right from civil commitment; and (3) the content of this right includes the effective assistance of counsel on appeal, which in turn requires the *Anders* procedure.

A. *Physical Liberty as the Touchstone of the Right to Counsel*

The conception of the right to counsel as a "privilege" rather than a right was finally abandoned in 1938 with *Johnson v. Zerbst*,²⁹ which guaranteed counsel in federal criminal proceedings. It was not until 1963 with *Gideon v.*

27. WINICK, *supra* note 3, at 161.

28. SALTZBURG & CAPRA, *supra* note 15, at 839.

29. 304 U.S. 458 (1938).

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Wainwright,³⁰ however, that this right was applied to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment. Until that time, the Supreme Court had occasionally employed due process tenets to require states to appoint counsel under a case-by-case, “special circumstances” approach.³¹

Soon after *Gideon*, the Supreme Court sought to determine the elements necessary to trigger the constitutional guarantee to appointed counsel. Although the text of the Sixth Amendment appeared to limit the right to appointed counsel to “criminal prosecutions,”³² it remained unclear whether this protection applied to prosecutions for misdemeanors and other minor charges; *Gideon* involved a felony prosecution,³³ and the Court had applied the Sixth Amendment right to a jury only when defendants faced potential imprisonment of more than six months.³⁴ Ultimately, the Court clarified that the right to appointed counsel applies in all situations where a person faces “actual imprisonment,”³⁵ even if that person has been charged with a petty offense.³⁶

Disposing of the felony prerequisite in favor of the actual imprisonment standard moved the right to counsel closer to the civil-commitment context. Nevertheless, even the actual imprisonment standard appears to adhere to a definitively criminal conception of the right. While “imprisonment” and “commitment” may have basic similarities, the term “imprisonment” seems to specifically envision confinement resulting from criminal proceedings.³⁷

30. 372 U.S. 335 (1963).

31. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (“All that it is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . .”).

32. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).

33. *Gideon*, 372 U.S. at 336-37.

34. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

35. *Alabama v. Shelton*, 535 U.S. 654, 657 (2002) (citing *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979)); see also *People v. Roseberry*, 641 N.W.2d 558, 559 n.3 (Mich. 2002) (“An indigent defendant is constitutionally entitled to appointed counsel to defend against a misdemeanor charge if the defendant is ‘actually imprisoned’ as a result of being convicted of the charged misdemeanor.”).

36. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

37. See *Prochaska v. Brinegar*, 102 N.W.2d 870, 872 (Iowa 1960) (“It must be kept in mind that Appellant is not charged with a crime and is not so incarcerated. He is being restrained of

Frequently, the Court has been loath to apply protections that are emblematic of criminal prosecutions to civil proceedings. For example, in *Kansas v. Hendricks*,³⁸ Justice Thomas wrote for five members of the Court that Kansas's Sexually Violent Predator Act did not violate the Double Jeopardy Clause of the Fifth Amendment by subjecting a prisoner to civil commitment after his prison term. The Court's holding centered on the civil-criminal distinction, finding that the statute did not implicate the primary objectives of criminal punishment—retribution and deterrence—and did not require a finding of scienter.³⁹ Moreover, Justice Thomas addressed the distinction between imprisonment in the criminal context and “affirmative restraint” of the mentally ill:

[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. . . . If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.⁴⁰

Although at least some procedural protections hinge on the civil-criminal distinction,⁴¹ the Court has held that the right to appointed counsel transcends both contexts. In the case *In re Gault*,⁴² the Court held that the Due Process Clause of the Fourteenth Amendment required appointed counsel in juvenile proceedings. Unlike Justice Thomas's discussion of the Double Jeopardy Clause in *Hendricks*, the *Gault* Court held that the civil-criminal distinction was

his liberty in that he is not free to come and go at will but such restraint is not in the way of punishment . . .”).

38. 521 U.S. 346 (1997).

39. *Id.* at 361–62.

40. *Id.* at 363 (citations omitted).

41. In addition to the Double Jeopardy Clause of the Fifth Amendment, the Court has also addressed the constitutionally required burden of proof in civil-commitment proceedings. See *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, the civil-criminal distinction was central to the Court's holding that a “middle level of . . . proof” was a constitutionally adequate burden of proof in civil-commitment proceedings. *Id.* at 427–33 (“This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the ‘moral force of the criminal law,’ and we should hesitate to apply it too broadly or casually in noncriminal cases.” (quoting *In re Winship*, 397 U.S. 358, 364 (1970))).

42. 387 U.S. 1 (1967).

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irrelevant with regard to the right to counsel. Justice Fortas, writing for seven members of the Court, explained, “It is of no constitutional consequence . . . that the institution to which he is committed is called an Industrial School. . . . [H]owever euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.”⁴³ After this explanation, Justice Fortas concluded,

[I]n respect of proceedings . . . which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.⁴⁴

The comparison of *Hendricks* and *Gault* suggests that the right to counsel has a unique relationship with the deprivation of physical liberty. Although past and recent decisions have neglected to explain this special relationship, there is an intuitive logic to employing the most potent procedural protection to protect the “transcending value” of physical liberty.⁴⁵ Indeed, to the extent that procedures serve a legitimating purpose for the state’s authority to curtail

43. *Id.* at 27; see also *In re Winship*, 397 U.S. at 365-66 (“[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for ‘[a] proceeding where the issue is whether the child will be found to be “delinquent” and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.’” (second alteration in original) (quoting *In re Gault*, 387 U.S. at 36 (Harlan, J., concurring in part and dissenting in part))).

44. *In re Gault*, 387 U.S. at 41; see also *In re Winship*, 397 U.S. at 375 n.7 (Harlan, J., concurring) (describing *Gault* as requiring the State “to provide counsel for indigents ‘in cases in which the child may be confined’” (quoting *In re Gault*, 387 U.S. at 72)).

45. *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)) (internal quotation marks omitted); see *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . .”); cf. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing the liberty guaranteed by the Due Process Clause as a “rational continuum which . . . recognizes . . . that certain interests require particularly careful scrutiny”). While capital punishment would clearly constitute a greater deprivation, the idiosyncratic treatment of this area of the law and its intersections with the Eighth Amendment make it problematic to place capital punishment on a continuum of deprivations and corresponding procedural protections. See *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’ States have constructed elaborate sentencing procedures in death cases . . . because of constraints we have said the Eighth Amendment places on capital sentencing.” (second alteration in original) (citation omitted)).

the liberties of individuals,⁴⁶ deprivation of physical liberty would demand the most extensive protections to avoid the appearance of paradigmatic authoritarianism. Appointed counsel is one such extensive protection; as courts and commentators have recognized, “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”⁴⁷ During both ideologically “liberal” and “conservative” periods, the Supreme Court has appeared to recognize this relationship, as this principle has endured expansive and restrictive reinterpretations of the Due Process Clause of the Fourteenth Amendment.

At the apogee of the Court’s expansion of due process jurisprudence, *Goldberg v. Kelly*⁴⁸ required a full evidentiary hearing before a state could terminate welfare benefits. Writing for a five-member majority, Justice Brennan held that the prospect of a “grievous loss”⁴⁹ required the opportunity to present evidence and confront adverse witnesses before a neutral decisionmaker.⁵⁰ Noticeably absent from the holding, however, was the right to appointed counsel. Acknowledging that “[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel,”⁵¹ the Court ultimately asserted, “We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.”⁵² While the Court does not explicitly

46. See, e.g., Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-50 (1976) (“State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality’s demand for participation in decisions affecting individual and group interests.”); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 278-79 (2004) (“The notion that the procedures for the adjudication of civil disputes should be legitimate is not controversial. . . . [A]s a matter of political morality it would be unjust to coerce compliance with the judgments of a civil justice system that could not be regarded by reasonable citizens as legitimate.”).

47. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)) (internal quotation marks omitted).

48. 397 U.S. 254 (1970).

49. *Id.* at 262-63 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (internal quotation marks omitted).

50. See *id.* at 267-71.

51. *Id.* at 270 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)) (internal quotation marks omitted).

52. *Id.*

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connect the right to counsel with the deprivation of physical liberty, its holding is not inconsistent with this relationship.

As the Burger Court took shape with the arrival of Justices Rehnquist, Powell, and Blackmun, due process doctrine became more restrictive,⁵³ while the relationship between the right to counsel and the deprivation of physical liberty remained and grew more explicit. In *Mathews v. Eldridge*,⁵⁴ the Court abandoned *Goldberg*'s "grievous loss" test in favor of a "rather abstract liberty interest analysis."⁵⁵ Under *Mathews*, the dictates of due process derived from three factors: (1) the private interest affected by state action; (2) the risk of an erroneous deprivation of this interest through current procedures used, and the added value of additional safeguards; and (3) the government's interest, including the fiscal and administrative burdens imposed by additional safeguards.⁵⁶ This new test, however, did not encroach upon the right to counsel where the "private interest" was physical freedom. In *Lassiter v. Department of Social Services*,⁵⁷ the Court applied the *Mathews* test to determine whether a mother in a parental rights termination hearing was entitled to appointed counsel. Before embarking on the *Mathews* test, however, Justice Stewart explained that "[t]he pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."⁵⁸ Reaffirming the significance of *Gault*, Justice Stewart asserted, "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel"⁵⁹ Although the *Lassiter* Court ultimately held that due process did not require counsel in parental termination hearings, the Court effectively proclaimed that appointed counsel was imperative in any proceeding that threatened the loss of physical liberty.

The Supreme Court has not had occasion to determine directly whether the Fourteenth Amendment guarantees counsel in civil-commitment proceedings, but ample evidence suggests this to be the case. In *Vitek v. Jones*,⁶⁰ a Nebraska

53. See FRED COHEN, *THE LAW OF DEPRIVATION OF LIBERTY* 340 (1991).

54. 424 U.S. 319 (1976).

55. COHEN, *supra* note 53, at 340-41.

56. *Mathews*, 424 U.S. at 334-35.

57. 452 U.S. 18 (1981).

58. *Id.* at 25.

59. *Id.*

60. 445 U.S. 480 (1980).

state prisoner sought an injunction against the State's efforts to transfer him to a state mental hospital. A three-judge district court issued the injunction and found the transfer procedures unconstitutional insofar as they failed to provide appointed counsel for indigent prisoners.⁶¹ On appeal, only five Supreme Court Justices reached the merits of the case, while the remaining Justices dissented on justiciability grounds.⁶² Writing for the majority, Justice White first acknowledged that "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement."⁶³ Nonetheless, due to the "stigmatizing consequences of a transfer,"⁶⁴ the "mandatory behavior modification[s]" involved therein,⁶⁵ and the "greater need for legal assistance" of the mentally ill,⁶⁶ Justice White and three other Justices affirmed the provision of appointed counsel. Justice Powell concurred in this analysis, but suggested that "due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer."⁶⁷ The holding in *Vitek* lends considerable support to the conclusion that counsel must be appointed in civil-commitment proceedings. If stigmatization, mandatory behavior modification, and the greater need for legal assistance of the mentally ill were sufficient to warrant appointed counsel (or an "independent adviser") in *Vitek*, surely the additional loss of physical liberty present in typical civil commitments would require appointed counsel. The Supreme Court's precedents, particularly *Gault* and *Lassiter*, suggest as much.

Lower federal and state courts have consistently ignored the "civil" label of commitment proceedings in holding that the curtailment of physical liberty mandates the provision of counsel. The Second Circuit summarized, "A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection."⁶⁸ Indeed, as recently as 2006, the Virginia Supreme Court held "that in view of the substantial liberty interest at stake . . . the due process protections embodied in the federal and Virginia

61. *Id.* at 484-85.

62. *See id.* at 500-01 (Stewart, J., dissenting); *id.* at 501-06 (Blackmun, J., dissenting).

63. *Id.* at 493.

64. *Id.* at 494.

65. *Id.*

66. *Id.* at 497 (plurality opinion).

67. *Id.* at 499 (Powell, J., concurring).

68. *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983). Other federal courts have also drawn this inference. *See, e.g., Sarzen v. Gaughan*, 489 F.2d 1076, 1086 (1st Cir. 1973); *In re Barnard*, 455 F.2d 1370, 1375-76 (D.C. Cir. 1971); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097-99 (E.D. Wis. 1972).

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Constitutions mandate that the subject of the involuntary civil commitment process has the right to counsel at all significant stages of the judicial proceedings.”⁶⁹ Similarly, many academics writing in the field of mental disability law around the time of *Gault* embraced the decision as “the cornerstone for the proposition that counsel is constitutionally required in civil commitment.”⁷⁰ In more recent scholarship, this proposition appears all but assumed.⁷¹

Currently, the right to counsel in civil-commitment proceedings remains a dormant constitutional imperative. The generative case law of this right occurred nearly half a century ago, and given the current legal landscape, the right is unlikely to be tested. The right to civil-commitment counsel is now established by statute in all U.S. jurisdictions,⁷² effectively displacing any future federal constitutional litigation on the matter. Nonetheless, courts should recognize the redundancy of the right guaranteed by such statutes. The right to counsel in civil-commitment proceedings, if interpreted to have a federal constitutional basis in the Fourteenth Amendment, is not confined to the four corners of state statute and would include all of the correlative federal rights that the Supreme Court has found to spring from the state’s constitutional obligation to provide counsel.

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69. *Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006). Other state courts have also found a constitutional right to counsel in civil-commitment hearings. *See, e.g.*, *Pullen v. State*, 802 So. 2d 1113, 1119 (Fla. 2001); *In re Simons*, 698 P.2d 850, 851 (Mont. 1985); *Rashid v. J.B.*, 410 N.W.2d 530, 532 (N.D. 1987); *McDuffie v. Berzzarins*, 330 N.E.2d 667, 669 (Ohio 1975); *Ex parte Ullmann*, 616 S.W.2d 278, 283 (Tex. Civ. App. 1981).
70. Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 *YALE L.J.* 1540, 1541 (1975); *see also, e.g.*, *Andalman & Chambers*, *supra* note 15, at 45 (“Unless the Court is prepared to scuttle its reasoning in *Gault* and related decisions, it is almost certain to hold, when presented with the question, that states must provide counsel to all indigent persons it seeks to deprive of liberty because of an alleged mental illness.”).
71. *See, e.g.*, 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, 609 (2002) (“If the mentally ill person subject to involuntary confinement is unable to afford an attorney, an attorney is provided by the State of Maryland through the Office of the Public Defender. The right is based in large part on the United States Supreme Court decision in *In re Gault* . . .” (citation omitted)); *see also* WINICK, *supra* note 3, at 141 (noting that it is “widely accepted” that the Fourteenth Amendment requires the right to counsel before civil commitment may occur).
72. *Perlin*, *supra* note 11, at 44. *See generally* WINICK, *supra* note 3, at 141, 162-64 (providing references to numerous state statutes). Many state statutes provide appointed counsel not only at the initial hearing, but also on appeal. *See infra* note 102.

B. Counsel in Civil-Commitment Appeals: Cutting Anchor with the Sixth Amendment

Although a right to counsel in civil-commitment proceedings employs the Sixth Amendment as a useful reference point, the argument quickly cuts anchor with that segment of the Bill of Rights and settles in the Fourteenth Amendment. The reason is fairly clear: the text of the Sixth Amendment begins with the qualifier “[i]n all criminal prosecutions,”⁷³ plainly excluding civil commitments from its auspices. Although the Supreme Court, reasoning through analogy, may borrow from the Sixth Amendment to give content to the right to appointed counsel in non-criminal contexts,⁷⁴ decisions have indicated that the right to counsel in the civil context—typically (but not solely) triggered by official threat to physical liberty⁷⁵—derives from the Due Process Clause of the Fourteenth Amendment. Similarly, the corollaries to the right to appointed counsel, such as the continued right to counsel on appeal and the right to effective counsel, must be rooted in the Fourteenth Amendment to have any application in the civil-commitment context; otherwise, the civil-criminal distinction that was central to cases such as *Hendricks* would deny these correlative rights in civil-commitment proceedings. The following analysis proposes that the Sixth Amendment and the civil-criminal distinction play a negligible role in the relevant precedents.

The constitutional right to appellate counsel was an outgrowth of several equal protection and due process decisions. Rather than give content to the meaning of the Sixth Amendment, these decisions sought to ensure that states would provide indigent defendants with the same procedural protections as nonindigents. In *Griffin v. Illinois*,⁷⁶ the Court held that a state must provide free trial transcripts to indigent defendants when needed for adequate appellate

73. U.S. CONST. amend. VI.

74. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981) (citing the Sixth Amendment cases *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

75. Deprivation of physical liberty appears to be a sufficient, but not necessary, condition for the right to appointed counsel. See *Vitek v. Jones*, 445 U.S. 480, 494 (1980); *id.* at 497 (plurality opinion). Moreover, under the *Mathews* test, it remains conceivable that a private interest could be great enough, the risk of erroneous deprivation substantial enough, and the government’s interest negligible enough, that due process would require appointed counsel without the threat to physical liberty. See *San Diego County Health & Human Servs. Agency v. Ben C. (In re Conservatorship of Ben C.)*, 150 P.3d 738, 746 (Cal. 2007) (George, C.J., dissenting) (applying the *Mathews* balancing test and concluding that the *Anders* brief was required in civil-commitment appeals).

76. 351 U.S. 12 (1956).

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review. The Court recognized that by denying defendants free transcripts, the State “effectively denie[d] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.”⁷⁷ Although the Constitution did not require states to provide any appeals process, the Court asserted that a state could not grant a right to appellate review that would exclude the poor.⁷⁸ “Consequently,” the Court held, “at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.”⁷⁹

Immediately following *Griffin*, the Due Process and Equal Protection Clauses were repeatedly applied to cases where indigent appellants were encumbered by filing fees and transcript costs in the prosecution of their appeals.⁸⁰ The Sixth Amendment did not justify, nor did it preclude, the application of this precedent. In *Mayer v. City of Chicago*,⁸¹ the Court held that an indigent defendant appealing from a misdemeanor conviction could not be denied a free transcript. In its argument, the City of Chicago “note[d] that the defendants in all the transcript cases previously decided by this Court were sentenced to some term of confinement.”⁸² Nevertheless, Justice Brennan spoke for a unanimous Court,

This argument misconceives the principle of *Griffin* . . . [I]ts principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination . . . is not erased by any differences in the sentences that may be imposed.⁸³

Here, Justice Brennan’s reasoning suggests that even where the Sixth Amendment would not require counsel under the “actual imprisonment” standard, a constitutional right to appellate counsel may exist under due process and equal protection considerations.

77. *Id.* at 18.

78. *Id.*

79. *Id.*

80. See, e.g., *Lane v. Brown*, 372 U.S. 477, 484-85 (1963); *Eskridge v. Wash. State Bd.*, 357 U.S. 214, 216 (1958) (per curiam).

81. 404 U.S. 189 (1971).

82. *Id.* at 196.

83. *Id.* at 196-97.

Douglas v. California,⁸⁴ which guaranteed the right of appointed counsel on appeal, emerged as a logical extension of the *Griffin* line of cases.⁸⁵ Justice Douglas, speaking for six members of the Court, explained that whether the encumbered procedural protection was a transcript or an attorney, “the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’”⁸⁶ In arriving at this holding, the Court again relied upon the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁸⁷ Since that decision was handed down, however, many commentators assert that *Douglas*’s equal protection reasoning has been curtailed and that subsequent cases have eroded that justification by denying the right to counsel on discretionary and post-conviction review.⁸⁸ Commentators also attack *Douglas*’s equal protection rationale as a limitless endorsement of wealth equalization.⁸⁹ *Douglas*’s erosion appears largely exaggerated, however, as does the claim that its application of the Equal Protection Clause is unworkable. The *Douglas* decision was explicitly agnostic regarding discretionary and post-conviction proceedings.⁹⁰ It flatly rejected any broad “wealth equalizing”

84. 372 U.S. 353 (1963).

85. As Justice Brennan would later affirm in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), “[j]ust as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.”

86. *Douglas*, 372 U.S. at 355 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

87. See *id.* at 356-57.

88. See, e.g., EARL M. MATZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986*, at 216 (2000); James J. Tomkovicz, *Against the Tide: Rehnquist’s Efforts To Curtail Expansion of the Right to Counsel*, in *THE REHNQUIST LEGACY* 129, 143 (Craig M. Bradley ed., 2006). In *Ross v. Moffitt*, 417 U.S. 600 (1974), Associate Justice Rehnquist wrote for six members of the Court in holding, “we do not believe that the Equal Protection Clause . . . requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.” *Id.* at 612. In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), Chief Justice Rehnquist wrote for five Justices, holding that the *Ross* rationale also precluded a constitutional right to counsel on post-conviction review. *Id.* at 556-57.

89. See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 479 (1992); see also *Douglas*, 372 U.S. at 362-63 (Harlan, J., dissenting) (“[N]o matter how far the state rule might go in providing counsel for indigents, it could never be expected to satisfy an affirmative duty . . . to place the poor on the same level as those who can afford the best legal talent available.”).

90. See *Douglas*, 372 U.S. at 356 (“We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.”).

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principle, stating simply, “[a]bsolute equality is not required; lines can be and are drawn and we often sustain them.”⁹¹ As recently as 2005, the Court reaffirmed the role of equal protection in the right to appellate counsel on appeal,⁹² and state courts have adhered to the rationale as well.⁹³

Both *Douglas*’s due process and equal protection rationales play a role in defending a right to counsel in appeals from civil commitment. Equal protection alone, while ensuring that the rights of poor litigants are recognized on appeal, does not require states to establish any direct appeal proceedings in the first place. By implication, the state would be free to deny various procedural protections on appeal, as long as such denials were not discriminatory. In *Evitts v. Lucey*,⁹⁴ however, the Court interpreted *Douglas* to reject this argument; once direct appellate review is established, it must comport with the essential fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Writing for seven members of the Court, Justice Brennan explained, “[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”⁹⁵ *Douglas* explicitly provided that a state’s denial of appellate counsel “[d]id not comport with fair procedure,”⁹⁶ and as Justice Stevens later elaborated in *Penson v. Ohio*,

[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages . . . although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.⁹⁷

91. *Id.* at 357.

92. *See Halbert v. Michigan*, 125 S. Ct. 2582, 2586-87 (2005).

93. *See, e.g.,* *People v. Kelly*, 146 P.3d 547 (Cal. 2006); *In re Barnett*, 73 P.3d 1106, 1110-11 (Cal. 2003); *In re Andrew B.*, 47 Cal. Rptr. 2d 604 (Ct. App. 1995); *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006); *Scott v. State*, 80 S.W.3d 184 (Tex. Ct. App. 2002); *State v. Giles*, 60 P.3d 1208 (Wash. 2003).

94. 469 U.S. 387 (1985).

95. *Id.* at 401; *see also Halbert*, 125 S. Ct. at 2587 (“Cases on appeal barriers . . . ‘cannot be resolved by resort to easy slogans or pigeonhole analysis. . . . [T]he due process concern homes in on the essential fairness of the state-ordered proceedings.’” (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996))).

96. *Evitts*, 469 U.S. at 404 (quoting *Douglas*, 372 U.S. at 357).

97. 488 U.S. 75, 85 (1988).

The Equal Protection Clause, in turn, mandates that the court offer fair procedure to both indigent and nonindigent appellants alike.⁹⁸ Therefore, a reasonable interpretation of *Douglas* suggests that if the state provides for an appeal as of right from a civil-commitment determination, the Due Process and Equal Protection Clauses would mandate the appointment of appellate counsel for indigents.

Important for purposes of defending a right to appellate counsel on appeals from civil commitment is the recognition that the Sixth Amendment played no role in justifying the line of precedent culminating in *Douglas*, an observation noted by courts and commentators alike.⁹⁹ Ultimately, at the appellate level (as was the case at the trial level), the civil-criminal distinction is not a significant factor in determining whether to appoint counsel for litigants facing the deprivation of physical liberty. Recalling Justice Stewart's language in *Lassiter*, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel" at trial.¹⁰⁰ On appeal, the Due Process and Equal Protection Clauses of the Fourteenth Amendment "largely converge to require that a State's procedure 'affor[d] adequate and effective appellate review'" to indigent appellants.¹⁰¹ In the criminal context, such appellate procedure requires appointed counsel, and the Court's precedents have provided scant indication that at the appellate level—in contrast to the trial level—considerations of criminality should suddenly be decisive. It is unsurprising, therefore, that the few courts to recognize and grapple with these doctrinal interrelationships have found a constitutional right to counsel in appeals from civil commitment.¹⁰²

98. See *Evitts*, 469 U.S. at 405.

99. See, e.g., *In re Andrew B.*, 47 Cal. Rptr. 2d 604, 610 (Ct. App. 1995) ("*Douglas* established the indigent appellant's federal constitutional right to counsel on appeal, based not on a Sixth Amendment right to counsel, but on the Fourteenth Amendment's guarantees of due process and equal protection."); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 785 (3d ed. 2007) ("[T]he Sixth Amendment right to counsel does not apply to criminal appeals. The federal constitutional right to counsel on the first appeal as of right is based instead on both due process and equal protection principles.").

100. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

101. *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

102. See *In re Civil Commitment of D.L.*, 797 A.2d 166, 174 (N.J. Super. Ct. App. Div. 2002) ("Just as an indigent criminal defendant has a right to counsel on appeal, so should an indigent person who has been committed . . . The label affixed to a case, whether it be civil or criminal, is not the dispositive consideration."); *Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006) ("[I]n view of the substantial liberty

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In *Douglas*, a crucial consideration for the Court in requiring appointed appellate counsel was ensuring that the indigent's right to appeal did not amount to a "meaningless ritual."¹⁰³ In keeping with this consideration, the Court fashioned what became known as the "*Anders* brief" to ensure the effectiveness of appointed counsel on appeal. In *Anders v. California*,¹⁰⁴ the Court held that the "constitutional requirement of substantial equality and fair process"—as identified in *Douglas*—"can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*."¹⁰⁵ Although appellate counsel is obligated by professional ethics to withdraw from "frivolous" appeals,¹⁰⁶ the *Anders* Court held that a request to withdraw also requires a brief presenting any potential arguments that might support an appeal.¹⁰⁷ The appeals court examines the brief and then independently reviews the record below to determine whether counsel's assessment was proper.¹⁰⁸ Subsequent Supreme Court cases have provided states with some latitude in implementing this procedure. For example, counsel need not be required to expressly submit that an appeal would be frivolous or request permission to withdraw, but may instead simply provide the court with a summary of the proceedings below and request that the court examine the record for arguable grounds for appeal.¹⁰⁹ The central holding of

interest at stake in an involuntary civil commitment . . . the due process protections embodied in the federal and Virginia Constitutions mandate that the subject of the involuntary civil commitment process has the right to counsel at all significant stages of the judicial proceedings, *including the appellate process.*" (emphasis added)). In many states, statutes already provide for appointed appellate counsel. See, e.g., FLA. STAT. ANN. § 394.916(3) (West 2007); MINN. STAT. ANN. § 253B.19(1) (West 2007); N.C. GEN. STAT. § 122C-289 (2007).

103. *Douglas v. California*, 372 U.S. 353, 358 (1963).

104. 386 U.S. 738 (1967).

105. *Id.* at 744.

106. AM. BAR ASS'N, *supra* note 21, Canon 44; see *supra* note 21.

107. *Anders*, 386 U.S. at 744.

108. *Id.*

109. *Smith v. Robbins*, 528 U.S. 259, 265 (2000) (upholding California's implementation of *Anders*, as originally prescribed in *People v. Wende*, 600 P.2d 1071 (Cal. 1979)). As the Court noted, such a procedure would alleviate difficult problems of professional ethics. See *id.* at 281-82 ("One of the most consistent criticisms . . . is that *Anders* is in some tension both with counsel's ethical duty as an officer of the court . . . and also with his duty to further his client's interests (which might not permit counsel to characterize his client's claims as frivolous).").

Anders, however, which requires appellate courts to examine lower proceedings and police the withdrawal of appointed counsel, remains intact.

Accepting the right to appellate counsel in appeals from civil commitment, it seems rather uncontroversial to recognize also a constitutional right to *Anders* procedures in this context. First, Supreme Court case law interpreting the Fourteenth Amendment's Due Process Clause has consistently recognized a relationship between the deprivation of physical liberty and the right to counsel at the trial level. Supreme Court doctrine has also held both the Due Process and Equal Protection Clauses to require the assistance of counsel to extend to first appeals of right. Finally, *Anders* establishes a prophylactic rule to ensure the effectiveness of appellate counsel, and there seems scant reason why this last logical step would apply to criminal appeals without also applying to appeals from civil commitment. Assuming that counsel is required in both contexts, it would be a strange argument to assert that the Constitution envisions two types of appellate counsel: "Sixth Amendment Counsel," held to *Anders*'s effectiveness standards on appeal, and "Due Process Counsel," permitted to shirk their duty as "active advocate[s] in behalf of [their] client[s]." ¹¹⁰ While *Anders*—consistent with the *Griffin* and *Douglas* lines of cases—makes some mention of "criminal defendants," "prosecutions," and the like, a careful reading reveals that these terms are mainly descriptive of their particular facts and play little functional role in their holdings. Indeed, *Anders* mentions the Sixth Amendment only once to describe the holding of *Gideon v. Wainwright*. ¹¹¹ Both case law and commentary agree that *Douglas*'s right to appellate counsel has limited foundation in the Sixth Amendment. By implication, *Anders*'s gloss on the right established in *Douglas* should not be characterized as a right restricted to criminal prosecutions.

II. WHY DENY *ANDERS* IN CIVIL COMMITMENT? EVALUATING STATE COURT DECISIONS

Few states have specifically addressed whether the dictates of *Anders* apply to appeals from civil commitment. Among the courts that have addressed the issue, no clear majority rule has emerged. Among courts declining to apply *Anders*, however, a consistent analytical approach is followed. Generally, these decisions seize upon language in the Supreme Court case *Pennsylvania v. Finley* ¹¹² that seems to circumscribe *Anders* to cases involving Sixth Amendment

^{110.} *Anders*, 386 U.S. at 744.

^{111.} *See id.* at 742.

^{112.} 481 U.S. 551 (1987).

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counsel. Nevertheless, a careful reading of *Finley* and subsequent decisions suggests that *Anders* should apply whenever counsel is constitutionally required, and in both criminal and civil-commitment appeals, the constitutional basis for counsel lies in the Fourteenth Amendment, not the Sixth Amendment.

In broad terms, Chief Justice Rehnquist announced in *Finley* that *Anders* did not apply to collateral postconviction proceedings.¹¹³ The principle underlying this holding was that *Anders* was triggered “when, and only when, a litigant has a previously established constitutional right to counsel.”¹¹⁴ Since there is no constitutional right to counsel in collateral postconviction proceedings,¹¹⁵ goes the argument, *Anders* does not apply.¹¹⁶ Thus far, *Finley*’s holding does not clearly preclude a right to *Anders* procedures in appeals from civil commitment, since—as the previous Sections discussed—the right to counsel in such appeals can be derived from the Constitution itself. *Finley*, however, proceeds to add a curious gloss to the Court’s holding in *Douglas*. Speaking for six members of the Court, the Chief Justice summarizes *Douglas* to hold that the constitutional right to appellate counsel derives from “the source of that right to a lawyer’s assistance, *combined with the nature of the proceedings*.”¹¹⁷ The Chief Justice explains,

[Postconviction relief] is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.¹¹⁸

As discussed in Section I.B, the Court has held that although states are not required to establish appeals from criminal convictions, due process requires

^{113.} *Id.* at 554.

^{114.} *Id.* at 555.

^{115.} *See id.*

^{116.} *Id.* at 557 (“Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right.”).

^{117.} *Id.* at 556 (emphasis added).

^{118.} *Id.* at 557 (citations omitted).

appointed counsel if a state chooses to establish appellate review.¹¹⁹ Still, as *Finley* provides, due process does not require appointed counsel if a state provides for collateral postconviction review. Evidently, some aspect of the “nature of the proceedings” permits this distinction. Nonetheless, concluding that the non-criminal or “civil” nature of collateral postconviction review provides this distinction arguably proves too much.

Strictly speaking, first appeals of right—which require appointed counsel under *Douglas*—are also “not part of the criminal proceeding.” As Marc Miller and Ronald Wright explain, “The criminal prosecution ends with a conviction and sentence. If the defendant appeals the case, the government is defending the judgment rather than ‘prosecuting’ the case.”¹²⁰ Instead, the right to counsel on direct appeal is distinguished from collateral postconviction proceedings through an approach appropriately grounded in due process concerns. As Justice Ginsburg explained after *Finley* in *Halbert v. Michigan*,

First, [an appeal as of right] entails an adjudication on the “merits.” Second, first-tier review differs from subsequent appellate stages “at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.” . . . [A] defendant who had already benefited from counsel’s aid in a first-tier appeal as of right would have, “at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case.”¹²¹

Therefore, as Chief Justice Rehnquist asserted, the “nature of proceedings” does in fact affect whether the Constitution provides an indigent litigant with appellate counsel. Whether the proceedings are “criminal” need not be determinative; rather, the relevant issues concern whether the proceedings are on the merits and whether the litigant has already had the aid of counsel at the appellate level. Neither issue, however, would reject a constitutional right to appellate counsel in first appeals of right from civil commitment. As distinguished from discretionary or postconviction review, first appeals of right from civil commitment are reviewed on the merits and do not provide the appellant with any previously generated appellate work product.

119. See *supra* text accompanying notes 94–97.

120. MILLER & WRIGHT, *supra* note 99, at 785.

121. 125 S. Ct. 2582, 2587 (2005) (citations omitted) (second alteration in original).

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A. In re Richard A.

After carefully reviewing the import of *Finley*, one should hesitate to accept the reasoning of *In re Richard A.*¹²² In that case, the Merrimack County Probate Court ordered the civil commitment of Richard A. to New Hampshire Hospital for one year.¹²³ Richard A. told his lawyer that he wished to appeal the decision, but his attorney “concluded that an appeal would be frivolous.”¹²⁴ His attorney then requested that the probate court certify two questions to the New Hampshire Supreme Court—one of which was whether the attorney was required to submit an *Anders* brief to withdraw from the appeal.¹²⁵ After detailing the withdrawal procedures described in *Anders* and reviewing the relevant state laws, the New Hampshire Supreme Court disposed of the federal constitutional question in five sentences.¹²⁶ The court first provided that “[o]nce a criminal case has gone beyond the first level of appellate review to proceedings where there is no federally guaranteed right to counsel, *Anders* does not apply.”¹²⁷ After citing *Finley* for this proposition, the court concluded, “[t]hus, under the Federal Constitution, counsel in this case had no obligation to assist the respondent with a frivolous appeal.”¹²⁸

Ignoring the New Hampshire Supreme Court’s unfortunate prejudgment of the respondent’s appeal as “frivolous,” the court’s analysis of Richard A.’s federal rights remains unnecessarily narrow.¹²⁹ The court assumes without explanation that the Constitution does not provide for appointed counsel in appeals from civil commitment. In arriving at this conclusion, the court does not examine the “nature of the proceedings,” as *Halbert* recommends, to determine whether procedural rights in postconviction proceedings should be identical to those in civil-commitment appeals. Indeed, as Part I illustrates, Supreme Court precedent does not appear to dictate the same limited procedural rights to litigants in such dissimilar proceedings. Instead, the long line of precedent provides a strong argument for a constitutional right to counsel in appeals from civil commitment. *Finley* and its subsequent

^{122.} 771 A.2d 572 (N.H. 2001).

^{123.} *Id.* at 575.

^{124.} *Id.*

^{125.} *Id.*

^{126.} *See id.* at 575-78.

^{127.} *Id.* at 578.

^{128.} *Id.*

^{129.} In contrast, the court’s analysis of Richard A.’s rights under the New Hampshire Constitution is admirably thorough. *See id.* at 576-78.

interpretations do not persuasively undermine this constitutional right to civil appellate counsel.

B. In re Leon G.

The Arizona Supreme Court refused to apply *Anders* to appeals from civil commitment in a similarly swift fashion. *In re Leon G.* involved a person who had been committed under Arizona's Sexually Violent Persons (SVP) statute.¹³⁰ Leon G.'s appointed appellate counsel believed that an appeal would be frivolous and filed an *Anders* brief with the Arizona Court of Appeals.¹³¹ Consistent with *Anders*, the Court of Appeals independently examined the trial record after reviewing the *Anders* brief.¹³² The court then independently raised the question of whether the SVP statute violated Leon G.'s substantive due process rights, and it answered in the affirmative.¹³³ On appeal to the Arizona Supreme Court, a preliminary question was whether Leon G. was entitled to that *Anders* procedure in the first place. The court answered the question in three sentences:

The right to full review of the record on appeal when appointed counsel files an *Anders* brief, attached as it is to the Sixth Amendment right to counsel in criminal cases, does not apply in civil proceedings. Commitment proceedings under the SVP statute are civil in nature. Therefore, the *Anders* procedure does not apply to persons committed under the SVP statute.¹³⁴

In support of its premise that *Anders* is "attached...to the Sixth Amendment," the Arizona Supreme Court cited three state court decisions. One would presume that support for the court's interpretation of *Anders* would come from the *Anders* opinion itself. As detailed in Section I.C, however, the *Anders* opinion does not explicitly adopt a holding based on the Sixth Amendment. Rather, *Anders* simply ensures the effectiveness of appellate counsel provided by *Douglas*, and *Douglas* interpreted the guarantees of the Fourteenth Amendment. Thus, rather than citing *Anders*, the Arizona Supreme Court was limited to citing state cases that are easily distinguished from the

^{130.} 26 P.3d 481, 482 (Ariz. 2001).

^{131.} *Id.* at 483.

^{132.} *Id.*

^{133.} *Id.*

^{134.} *Id.* at 483-84 (citations omitted).

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civil-commitment context. These cases concerned the right of a parent to appointed counsel in a parental rights termination hearing, a plaintiff in a tort suit, and a prisoner in an application for a voluntary transfer to a state hospital.¹³⁵ None of the cases involved the deprivation of physical liberty,¹³⁶ and only one involved a litigant in a defensive posture. Conceding the court's minor premise that "[c]ommitment proceedings under the SVP statute are civil in nature,"¹³⁷ the court's major premise still remains so tenuously supported that its conclusion should be disregarded. Again, a more doctrinally consistent approach would recognize the centrality of physical liberty (rather than criminality) in right-to-counsel jurisprudence, along with *Anders*'s position in a line of case law interpreting the Fourteenth (rather than the Sixth) Amendment.

C. In re Conservatorship of Ben C.

Finally, in the recent California Supreme Court case *In re Conservatorship of Ben C.*,¹³⁸ the court employed the *Mathews* balancing test to determine whether a conservatee was entitled to *Anders* procedures on appeal. Employing reasoning similar to that in *Leon G.* and *Richard A.*, the court viewed *Anders* as a procedural accoutrement subject to the *Mathews* balancing test rather than a nonseverable aspect of constitutional counsel. While the court's analysis under *Mathews* was thoughtful and thorough, its propriety is doubtful if appellate counsel is required not merely by statute, but also by the Constitution.

The California Supreme Court began its analysis by citing the holding of *Finley*, noting that "[i]f a defendant 'has no underlying constitutional right to appointed counsel,' the defendant cannot 'insist on the *Anders* procedures.'"¹³⁹ As in *Leon G.*, the *Ben C.* court proceeded to assume that there was no

135. *Id.* at 484. It should also be noted that the case involving a prisoner's application for a voluntary transfer to a state hospital was handed down two years before the U.S. Supreme Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980). For a discussion of *Vitek*, see *supra* text accompanying notes 60-67.

136. The voluntary transfer from a state prison to a state mental hospital does not constitute a deprivation of physical liberty; as the U.S. Supreme Court noted in *Vitek*, "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement." 445 U.S. at 493.

137. *In re Leon G.*, 26 P.3d 481, 484 (Ariz. 2001).

138. San Diego County Health & Human Servs. Agency v. Ben C. (*In re Conservatorship of Ben C.*), 150 P.3d 738 (Cal. 2007).

139. *Id.* at 741 (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)).

constitutional right to counsel in appeals from civil commitment.¹⁴⁰ In support of this assumption, the court cited two state cases: a parental rights termination case and a civil commitment case.¹⁴¹

The citation of a parental rights termination case seems highly suspect; as Justice Stewart's "*Lassiter*-preamble" asserted long ago, the deprivation of physical liberty is the paradigmatic prerequisite for the assistance of counsel, while the liberty involved in a parental rights termination is a much closer question. The *Lassiter* Court provided, "[W]e thus draw . . . the *presumption* that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his *physical liberty*. It is against this presumption that *all the other elements* in the due process decision must be measured."¹⁴² Thus, the *Ben C.* court's citation to a parental rights termination can be viewed as an inapposite comparison that only superficially addressed the question of whether the Constitution requires counsel on appeals from civil commitment.

The civil commitment case cited by the court—*In re Conservatorship of Susan T.*¹⁴³—would seem to be a more promising authority for the proposition that the Constitution does not require appointed counsel for appeals from civil commitment, since the case at least involved the deprivation of physical liberty. Further examination of *Susan T.*, however, reveals that its authority is quite limited. In *Susan T.*, the California Supreme Court decided the narrow issue of whether the exclusionary rule applies to civil-commitment hearings. Relying on U.S. Supreme Court cases involving an unpaid tax assessment and a deportation proceeding, *Susan T.* concluded that the deterrent effect of the exclusionary rule is dampened in the civil-commitment context because of the beneficent, rather than punitive, aims of the state.¹⁴⁴

In light of this holding, *Susan T.* hardly supports *Ben C.*'s conclusion that the right to counsel is not required in appeals from civil commitment. As *Douglas* provides, the right to appellate counsel is rooted in the Fourteenth Amendment; if *Susan T.* involved the Sixth Amendment, then perhaps it would provide some insight, given that the Sixth Amendment at least involves

¹⁴⁰. The court explained that "[t]he conservatee is not a criminal defendant and the proceedings are civil in nature." *Id.* Therefore, *Ben C.* has no constitutional right to appellate counsel, and hence *Anders* procedures "are not required in appeals from [civil-commitment] proceedings." *Id.*

¹⁴¹. *Id.* (citing *In re Sade C.*, 920 P.2d 716 (Cal. 1996); *Lake County Mental Health Dep't v. Susan T. (In re Conservatorship of Susan T.)*, 884 P.2d 988 (Cal. 1994)).

¹⁴². *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981) (emphasis added).

¹⁴³. 884 P.2d 988.

¹⁴⁴. See *id.* at 993-94 (discussing *United States v. Janis*, 428 U.S. 433 (1976), and *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

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the relevant procedural protection. However, a Fourth Amendment case concerning the deterrence value of the exclusionary rule in civil proceedings provides little insight. The U.S. Supreme Court has consistently engaged in different modes of analysis depending on the procedural protection at issue: *Kansas v. Hendricks* focused on the retributive and deterrence goals of a proceeding to decide whether to apply the Double Jeopardy Clause,¹⁴⁵ and Fourth Amendment case law balances the social costs of exclusion against its likelihood of deterring unreasonable searches and seizures by the state.¹⁴⁶ In contrast, the Court has asserted that “it is the defendant’s interest in personal freedom . . . which triggers the right to appointed counsel.”¹⁴⁷ With respect to the central issue of *Ben C.*, therefore, *Susan T.* seems to simply stand for the proposition that criminal and civil cases are different;¹⁴⁸ *Susan T.* sheds little light on whether this difference justifies denying the right to appellate counsel.

When juxtaposed with the previous Sections, cases such as *Leon G.*, *Richard A.*, and *Ben C.* present a dissatisfying approach to determining whether *Anders* procedures are required for appeals from civil commitment. While *Anders* was indeed a criminal case, a close examination of its holding and the precedent from which it derives reveals that this characteristic is fairly inconsequential. As courts determine *Anders*’s applicability to appeals from civil commitment, they must engage in a more searching analysis of the principles underlying its holding. In so doing, they will realize that decades of layered precedent do not neatly categorize *Anders*’s procedural protections under crisp labels of “criminal” and “civil,” “Sixth Amendment” or “Fourteenth Amendment.” This need for a searching analysis relates more broadly to the way in which adjudication achieves legitimacy in a constitutional democracy—namely, by grappling with the reasons, sources, and authorities that direct outcomes in a manner that is objectively rational. Insofar as constitutional adjudication, conceived in this way, is an expression of the “public morality,”¹⁴⁹ a deliberative and accessible approach would seem particularly warranted when

145. 521 U.S. 346, 361-62 (1997); see *supra* text accompanying notes 38-40.

146. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 367 (1998); *Lopez-Mendoza*, 468 U.S. at 1041-42; *Stone v. Powell*, 428 U.S. 465, 493-94 (1976); *Janis*, 428 U.S. at 453-54.

147. *Lassiter*, 452 U.S. at 25.

148. Cf. *San Diego County Health & Human Servs. Agency v. Ben C.* (*In re Conservatorship of Ben C.*), 150 P.3d 738, 748 n.1 (Cal. 2007) (George, C.J., dissenting) (noting that while the majority employed *Susan T.* to make this proposition, in the end such a distinction was “irrelevant to the analysis” of the instant case).

149. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979) (developing this classic description of constitutional adjudication).

the rights of society's most vulnerable constituents—such as the mentally ill—are determined.

III. POLICY JUSTIFICATIONS FOR *ANDERS* PROCEDURES IN CIVIL-COMMITMENT APPEALS

In broad terms, the constitutional rationale underlying the *Anders* procedure is meant to ensure the effectiveness of appointed appellate counsel. Viewed in isolation, the goal of providing civil-commitment respondents with effective appellate counsel is laudable and alone may validate a right to *Anders* in civil-commitment appeals. This justification, however, fails to appreciate the potential value of *Anders* in light of the unique issues impeding respondents from benefiting from an effective and therapeutic attorney-client relationship. First, the institutional barriers faced by civil-commitment attorneys are so peculiar and pervasive that the judicial oversight imposed by *Anders* may be especially warranted in civil-commitment appeals. Second, and critically, *Anders* may help to break down the unique role-dilemma manifested by civil-commitment attorneys. The “rolelessness” of appointed counsel often results in respondents perceiving the proceedings as “empty rituals” or “rubber stamps,” ultimately exacerbating respondents’ feelings of persecution and helplessness.

A. Institutional Barriers in Civil-Commitment Proceedings

Institutional barriers consist of fairly concrete administrative structures and work-related realities that often render civil-commitment attorneys ineffective. While the civil-commitment context presents institutional barriers that are fairly unique, institutional barriers, broadly defined, are also recognizable in the criminal context, such as the power imbalances between the state and the indigent defendant and the limited resources and crushing caseloads of public defenders. Though institutional barriers are fairly identifiable and often lend themselves to legislative retooling, the great costs and narrowly directed benefits of legislative action in civil commitment suggest that a judicial remedy—*Anders*—may be a more immediate and flexible means of ensuring effective representation.

Of the many challenges to the civil-commitment attorney, one of the greatest is the high level of expertise required to serve one's client effectively. Generally speaking, however, most attorneys are unfamiliar with the civil-commitment process¹⁵⁰ and possess “scant knowledge about psychiatric

150. See Andalman & Chambers, *supra* note 15, at 50.

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decision-making, diagnoses, and evaluation tools.”¹⁵¹ As a result, even traditionally skilled attorneys will find themselves unable to adequately serve their clients in the civil-commitment context since “[u]nderstanding psychiatric reasoning and jargon – and knowing how to cross-examine expert psychiatric witnesses – requires considerable experience and skill.”¹⁵² Attorneys functioning in the civil-commitment context must recognize and criticize the elusiveness of the legal standards under which the forum operates. For example, statutes often define “mental illness” in a circular fashion,¹⁵³ leading courts to blindly defer to the expert testimony of mental health professionals who employ clinical, rather than legal, criteria.¹⁵⁴ Also, predicting dangerousness – let alone defining the concept and establishing its relationship to mental illness – is notoriously discredited and open to vigorous attack by a forceful advocate.¹⁵⁵ Similarly, the notion of incompetency has also been attacked by experts as “too broadly defined.”¹⁵⁶

For these reasons, scholars are “virtually unanimous” in advocating that civil-commitment attorneys be provided through “organized regular mechanisms” of properly trained specialists.¹⁵⁷ While some jurisdictions provide for these specialized cadres of mental-health lawyers,¹⁵⁸ the vast majority of civil-commitment attorneys are appointed on an individual basis

151. Perlin & Sadoff, *supra* note 16, at 166.

152. Thomas R. Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816, 830 (1974).

153. See, e.g., *People v. Marquardt (In re Marquardt)*, 427 N.E.2d 411, 414 (Ill. App. Ct. 1981) (“[A]ny definition [of mental illness] which could be made legally explicit would necessarily be so broad or circular as to preclude accurate application.”); 1 PERLIN, *supra* note 15, § 2A-3.1, at 66-68; see also *id.* § 2A-3.3, at 92 (“Litigators should be especially wary of circular, overinclusive, underinclusive, and self-contradictory definitions [of mental illness].”).

154. WINICK, *supra* note 3, at 48.

155. See, e.g., *Heller v. Doe*, 509 U.S. 312, 324 (1993) (“[M]any psychiatric predictions of future violent behavior by the mentally ill are inaccurate.”); JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT* (2001); JOHN PARRY & ERIC Y. DROGIN, *MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY* 15 (2007); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 719 (1974); Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, 45 HOSP. & COMMUNITY PSYCHIATRY 663, 665 (1994).

156. WINICK, *supra* note 3, at 67; see Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients To Consent to Psychiatric and Medical Treatments*, 19 LAW & HUM. BEHAV. 149, 172-73 (1995).

157. Perlin, *supra* note 11, at 44.

158. See, e.g., LA. REV. STAT. ANN. § 28:171K (2007) (“The attorneys provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.”).

without any demonstrated expertise in mental-health law.¹⁵⁹ Moreover, without an established and centralized method of education, individual attorneys are unlikely to obtain a satisfactory level of expertise on their own because civil-commitment matters, particularly appeals, are so infrequent.¹⁶⁰ This state of affairs stands in contrast with attorneys who are able to develop expertise in frequently litigated matters such as criminal and juvenile appeals.¹⁶¹ Finally, the expertise demanded of civil-commitment lawyers is not isolated to an understanding of specialized statutes and psychiatric literature; counsel must develop heightened interviewing and counseling skills to communicate effectively with their clients, who often have special needs and present unique challenges to the traditional attorney-client relationship.¹⁶²

Without a centralized, state-sponsored system of supplying mental-health lawyers for civil-commitment proceedings, the individual attorney appointed to represent respondents requires significant time and resources to achieve the requisite level of expertise.¹⁶³ Consistently, however, the necessary resources and time are simply unavailable. Courts frequently appoint counsel on one of several “occasional” bases for nominal fees.¹⁶⁴ Due to a lack of financial resources, appointed civil-commitment attorneys are typically unmotivated or unable to expend the effort necessary to properly represent their clients.

159. 1 PERLIN, *supra* note 15, § 2B-6, at 220.

160. See, e.g., Fred Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 441 (1966) (“[T]he lawyer involved in a civil commitment case . . . develops no experience in this area because of a limited number of appearances”); Litwack, *supra* note 152, at 818; Deborah L. McHenry, *The Duty of Counsel in Civil Commitment Cases*, W. VA. LAW., Dec. 1995, at 12, 13; see also San Diego County Health & Human Servs. Agency v. Ben C. (*In re* Conservatorship of Ben C.), 150 P.3d 738, 750 (Cal. 2007) (George, C.J., dissenting) (noting that the “scarcity” of civil-commitment cases “prevents counsel from specializing in this area of law”).

161. For example, over fifty percent of the contested matters filed with the California appellate courts in fiscal year 2005-2006 were criminal matters, while over fifteen percent were juvenile matters. See JUDICIAL COUNCIL OF CAL., 2007 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 24 tbl.4 (2007), available at <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf>.

162. See PARRY & DROGIN, *supra* note 155, at 43-46; Andalman & Chambers, *supra* note 15, at 54; Cohen, *supra* note 160, at 434.

163. See, e.g., Andalman & Chambers, *supra* note 15, at 74 (“[N]o system can provide effective counsel unless the attorneys working within it . . . have the knowledge, time, and resources to expend adequate effort.”).

164. See 1 PERLIN, *supra* note 15, § 2B-6, at 220-23; Andalman & Chambers, *supra* note 15, at 44; Cohen, *supra* note 160, at 428 n.19; Litwack, *supra* note 152, at 817; see also Perlin, *supra* note 11, at 45 (arguing for the provision of “regularized” and “well-structured counsel” for the mentally disabled).

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Indeed, several studies show that while fewer commitments occur among respondents represented by private counsel, respondents with appointed counsel have no fewer commitments than respondents who are unrepresented.¹⁶⁵

Barring resource constraints, the institutional aspects of psychiatric hospitals may prevent appointed counsel from expending the time necessary to prepare for the proceedings. Hospital administrators typically “control virtually all aspects of the system,” including “access, time, conditions of confinement, [and] communications.”¹⁶⁶ Thus, counsel often arrives at the commitment hearing without a “full and complete understanding of the client’s views toward civil commitment and toward the psychiatric hospital.”¹⁶⁷ Moreover, many attorneys are appointed for a single day to represent several clients facing civil commitment,¹⁶⁸ which affords the attorneys no time to find and interview expert witnesses¹⁶⁹ and eviscerates their ability to investigate potential alternatives to civil commitment.¹⁷⁰ As a result, individuals are often placed in antitherapeutic institutions. As one attorney in West Virginia observed, “Sharpe Hospital has no capacity to treat individuals with alcoholism or mental retardation. Yet we find that such individuals are routinely sent to these facilities which severely limit their liberties and afford absolutely no opportunity for a therapeutic environment.”¹⁷¹

Given the extensive difficulties faced by civil-commitment attorneys, the potential for erroneous commitments is formidable. Upon reviewing empirical studies of reformed commitment statutes, commentators have found that “as many as half the persons committed in a jurisdiction do not meet the jurisdiction’s statutory criteria for commitment.”¹⁷² These commentators posit, “If such standards were accompanied by rigorous, adversary procedures, reasonable limitations on wrongful commitment might result. Such . . . procedural behavior do[es] not seem likely to be instituted, however,

165. See Hiday, *supra* note 13, at 1031.

166. Perlin & Sadoff, *supra* note 16, at 165.

167. Stone, *supra* note 71, at 614.

168. 1 PERLIN, *supra* note 15, § 2B-6, at 220; Andalman & Chambers, *supra* note 15, at 55-57.

169. Given the extensive time and resource restraints, Michael Perlin and Robert Sadoff advise that “a lawyer must demonstrate a special degree of ingenuity and persistence to track down and interview these witnesses.” Perlin & Sadoff, *supra* note 16, at 166.

170. See, e.g., PARRY & DROGIN, *supra* note 155, at 386-87; Andalman & Chambers, *supra* note 15, at 50; Litwack, *supra* note 152, at 826; Perlin & Sadoff, *supra* note 16, at 170.

171. McHenry, *supra* note 160, at 13.

172. CAROL A.B. WARREN, *THE COURT OF LAST RESORT: MENTAL ILLNESS AND THE LAW* 90 (1982).

and as we have seen, statutory reform does not seem to make much difference.”¹⁷³

By providing an added layer of independent review, *Anders* would potentially serve as an added check against the manifestation of civil commitment’s institutional barriers. While many jurisdictions have legislatively addressed these barriers with some success,¹⁷⁴ the substantial liberties at stake and the relatively minor cost of employing *Anders* procedures in appeals from civil commitment suggest that adopting the added procedural protection would be a prudent development. Indeed, through surveys of practicing attorneys, commentators have concluded that “preparing an *Anders* brief can actually take less or roughly the same amount of time and work as an appeal briefed on the merits.”¹⁷⁵ Judges have similarly remarked that civil-commitment appeals “require minimal time to review, because they arise from proceedings that are neither lengthy nor complex.”¹⁷⁶ As one California judge colorfully asserted, “We did not find it too burdensome under these circumstances to expend two or three hours to review this sparse record for arguable issues. Such cases, after all, terrorize us with the prospect of extra work about as often as newly discovered asteroids threaten to collide with Earth.”¹⁷⁷

173. *Id.*

174. See 1 PERLIN, *supra* note 15, § 2B-4.1 to -6, at 206-22.

175. Cynthia Yee, Comment, *The Anders Brief and the Idaho Rule: It Is Time for Idaho To Reevaluate Criminal Appeals After Rejecting the Anders Procedure*, 39 IDAHO L. REV. 143, 166 (2002). In a recent study in six jurisdictions, one commentator found that “survey responses d[id] not indicate that following the dictates of *Anders* [was] generally more time-consuming than the average criminal appeal.” Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection Is More Equal than Others’*, 23 FLA. ST. U. L. REV. 625, 656 (1996).

176. San Diego County Health & Human Servs. Agency v. Ben C. (*In re Conservatorship of Ben C.*), 150 P.3d 738, 749-50 (Cal. 2007) (George, C.J., dissenting). Chief Justice George also asserted, “Not only are the records short, but the legal issues presented—whether proper procedures were followed and whether sufficient evidence supports the findings—are relatively simple.” *Id.* at 750 (footnote omitted).

177. Baker v. Margaret L. (*In re Conservatorship of Margaret L.*), 107 Cal. Rptr. 2d 542, 547 (Ct. App. 2001); see also *In re Andrew B.*, 47 Cal. Rptr. 2d 604, 607 (Ct. App. 1995) (“[T]he [*Anders*] process results in an opinion that is filed and final much sooner than one in an appeal that proceeds in the more conventional manner.”).

THE *ANDERS* BRIEF IN APPEALS FROM CIVIL COMMITMENT*B. The Problem of "Rolelessness"*

While the institutional barriers faced by civil-commitment counsel are pervasive and troubling, they are not the sole concern regarding the attorney-client relationship in the civil-commitment context. Indeed, some have recognized that "simply offering the incentive of decent fees will not overcome most attorneys' inclination to defer to the judgment of examining psychiatrists."¹⁷⁸ This inclination to remain passive relates to a larger problem of "rolelessness." Rolelessness entails the cognitive dissonance manifested by civil-commitment attorneys who find themselves in a foreign environment where traditional adversarial tactics seem inappropriate. By performing passively, these attorneys unknowingly foster a form of pretextual decisionmaking that intensifies respondents' feelings of persecution and helplessness.¹⁷⁹ Not only can *Anders* counteract institutional barriers through added appellate scrutiny, but it may also enhance the therapeutic qualities of the attorney-client relationship in the civil-commitment context.

1. Sources and Symptoms of Rolelessness

The rolelessness manifested by civil-commitment attorneys derives from several sources. First, upon entering the civil-commitment context, the appointed attorney has limited guidance and few professional cues outside of the civil-commitment proceedings themselves. Since the provision of counsel in civil commitment is a relatively recent phenomenon, and since the performance of these attorneys is relatively infrequent and unreported, civil-commitment counsel have little tradition and few examples upon which to rely.¹⁸⁰ In a similar vein, state-commitment statutes provide little guidance regarding the proper role of civil-commitment counsel. While an isolated number of statutes explicitly call upon counsel to assume an adversarial posture,¹⁸¹ the vast majority of statutes are silent on the issue,¹⁸² and most

¹⁷⁸. Andalman & Chambers, *supra* note 15, at 74.

¹⁷⁹. See, e.g., Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994).

¹⁸⁰. See Cohen, *supra* note 160, at 441; Coleman & Shellow, *supra* note 18, at 55; Litwack, *supra* note 152, at 818.

¹⁸¹. See, e.g., TENN. CODE ANN. § 33-6-419 (2007) ("An attorney representing the defendant shall not serve as guardian ad litem.").

¹⁸². Cohen, *supra* note 160, at 424; Hiday, *supra* note 13, at 1032; Note, *supra* note 70, at 1543.

reported cases are similarly unhelpful.¹⁸³ Although the American Bar Association's *Model Rules of Professional Conduct* admonish that an attorney representing a client with diminished capacity must, as far as "reasonably possible, maintain a normal client-lawyer relationship,"¹⁸⁴ many lawyers may unconsciously substitute their own perception of the client's best interests rather than zealously advocate for the client's expressed wishes. As commentary to the Rules relates, "The lawyer's position in such cases is an unavoidably difficult one."¹⁸⁵ Ultimately, this ambiguity can lead to a breakdown of the civil-commitment attorney's concept of "professional conscience."¹⁸⁶

Since appointed counsel have few external guideposts, they are vulnerable to the anti-advocacy pressures of the civil-commitment setting. These pressures often stem from the attorney's interaction with the client and other actors in the proceedings. For example, the attorney's clients may be "passive, frightened, heavily medicated, unable to articulate their wishes forcefully," and their appearance or manner of speech may coincide with stereotyped conceptions of mental illness.¹⁸⁷ Consequently, "the lawyer may feel somewhat foolish or awkward representing his client's views to the court" resulting in the "diminish[ed] . . . scope and quality of the attorney's advocacy."¹⁸⁸ Other actors in the proceedings, such as judges, clinicians, and hospital representatives, may also exert pressures contrary to the traditional norms of zealous advocacy. Judges frequently discourage attorneys from actively participating in the hearing and sometimes usurp the role of questioning witnesses.¹⁸⁹ For many attorneys, "the ardor of advocacy . . . is shaped in part

183. See Perlin & Sadoff, *supra* note 16, at 177-78 ("Even those cases which have sketched out the appropriate role of counsel have employed hortatory language, with little consideration of the specific ethical dilemmas which frequently surface." (footnote omitted)).

184. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003).

185. *Id.* R. 1.14 cmt. 8.

186. In contrast to "personal conscience," which reflects "individual, subjective ethical perspectives," Fred Zacharias and Bruce Green describe "professional conscience" as a "unique professional morality . . . stem[ming] from the lawyer's distinctive role" and learned from "socialization, professional lore, [and] independent reflection on the expectations of the lawyer's professional 'office.'" Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 22, 24, 35 (2005).

187. Perlin & Sadoff, *supra* note 16, at 167.

188. *Id.*; see also Litwack, *supra* note 152, at 831 (acknowledging that "the attorney may feel embar[r]assed to argue for a proposition directly contradicted by evidence visible in the courtroom itself").

189. WINICK, *supra* note 3, at 143; see Litwack, *supra* note 152, at 829 ("[I]n most cases, the attitude of the court is clear: it does not expect attorneys to represent their patient-clients in

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by [their] perception of the degree of ardor the judge will tolerate.”¹⁹⁰ Moreover, civil-commitment attorneys—already insecure in their level of psychiatric knowledge and judgment¹⁹¹—encounter intense animosity from clinicians and other medical experts testifying in support of commitment.¹⁹² As a result, attorneys feel compelled to defer to the conclusions of clinicians rather than probing the findings and exposing any behavioral or cognitive biases therein.¹⁹³

These anti-advocacy pressures exacerbate the attorney’s sense of rolelessness, increasing the tension between advocacy-instincts and the compulsion to remain passive. To alleviate this cognitive dissonance, attorneys will often fashion “role-shifts” and “work-arounds,” occasionally remaining passive and justifying their decisions with notions of paternalism and their clients’ “best interests.” As one civil-commitment attorney said, “I played God. I never met [the named class action plaintiff] or his aunt. And I never needed to do so. I knew what needed to be done.”¹⁹⁴ Whether it is appropriate for lawyers to adopt this posture has been hotly debated. Some argue that lawyers must be zealous advocates in the civil-commitment context,¹⁹⁵ and those commentators repeat familiar tropes of legal partisanship, such as principles of

the traditional legal manner.”); see also APPELBAUM, *supra* note 2, at 42 (“Confronted with psychotic persons who might well benefit from treatment . . . mental health professionals and judges alike were reluctant to comply with the law and release them.”).

190. Andalman & Chambers, *supra* note 15, at 74.

191. See COHEN, *supra* note 53, at 388; WINICK, *supra* note 3, at 144; Litwack, *supra* note 152, at 830.

192. See Cohen, *supra* note 160, at 435 (“Psychiatrists tend to equate legal process with the horrors of war and react to a call for a meaningful hearing as though it were a call to arms.”); Perlin, *supra* note 11, at 52.

193. See Perlin, *supra* note 11, at 57; Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 135-36 (1991); see also Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma*, 1 PSYCHOL. PUB. POL’Y & L. 120, 125 (1995) (“[C]linicians’ judgments as to whether patients are legitimately committable may be influenced by their own self-referential concepts of morality.”).

194. Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 611 (1990) (quoting the lead counsel for plaintiffs in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971)); see also Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 40-41 (1999) (describing the “paternalistic” or “best interests” approach as “pretextual[]” and reinforced by “a basic dishonesty in the civil commitment process”).

195. See, e.g., WINICK, *supra* note 3, at 155-56; Michael Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 ALB. L. REV. 92, 115 (1969); Note, *supra* note 70, at 1560-61.

autonomy¹⁹⁶ or enhancing the accuracy of fact-finding.¹⁹⁷ Other commentators suggest that a paternalistic approach is proper¹⁹⁸ and sometimes appeal to potential antitherapeutic consequences resulting from the crucible of trial.¹⁹⁹ Still others suggest something akin to a middle road, and advocate the adoption of alternative dispute resolution principles or mediation techniques.²⁰⁰

2. Anders as Therapeutic Jurisprudence

While commentators disagree as to the proper role of civil-commitment attorneys, none denies that as a formal, legal matter, the traditional adversarial model is generally intended for civil-commitment proceedings.²⁰¹ Hence, implicit in the call for role-shifts and work-arounds is a concerning subversive element—an endorsement to bend the law to privilege therapeutic ends above their means. This view, however, fails to recognize that such an approach fosters an attorney-client relationship that itself may be antitherapeutic toward respondents. Specifically, the school of mental-health law known as “therapeutic jurisprudence”²⁰² acknowledges that respondents’ negative perceptions of civil-commitment procedure can potentially hinder their

196. See, e.g., Blinick, *supra* note 195, at 115; Litwack, *supra* note 152, at 833.

197. See, e.g., Hiday, *supra* note 13, at 1029; Stone, *supra* note 71, at 615.

198. See, e.g., Samuel Jan Brakel, *Legal Aid in Mental Hospitals*, 1981 AM. B. FOUND. RES. J. 21, 92; Paul S. Appelbaum, *Paternalism and the Role of the Mental Health Lawyer*, 34 HOSP. & COMMUNITY PSYCHIATRY 211, 211-12 (1983).

199. See COHEN, *supra* note 53, at 388-89.

200. See, e.g., Abisch, *supra* note 193, at 122; Joel Haycock, David Finkelman & Helene Presskreischer, *Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 279 (1994).

201. See Appelbaum, *supra* note 198, at 211 (“Paternalism has become a term of opprobrium The once-accepted idea . . . has been all but overcome by the criminal law model, with its rigorous procedural guarantees.”); cf. Haycock et al., *supra* note 200, at 266 (“Further attack on involuntary civil commitment from the rights-based perspective has long since reached a point of diminishing returns: stricter standards, procedurally or substantively, do not in themselves ensure rights.”).

202. The school of “therapeutic jurisprudence,” or the study of law’s healing potential, provides that the civil commitment hearing must be conducted in a way that “increase[s] patients’ perceptions of fairness, participation, and dignity” in order to improve “the likelihood that they will accept the outcome of the hearing . . . and will participate in the treatment process in ways that will bring about better treatment results.” WINICK, *supra* note 3, at 161. For additional background on the school of therapeutic jurisprudence, see also David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, in THE EVOLUTION OF MENTAL HEALTH LAW 279, 279-89 (Lynda E. Frost & Richard J. Bonnie eds., 2001).

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progress under traditional mental-health therapies and treatment.²⁰³ As summarized by Bruce Winick,

Civil commitment hearings that are perceived by patients as phony rituals violate their sense of participation, dignity, and equal citizenship. The typical civil commitment hearing, instead of fulfilling the individual's participatory or dignitary interests, thus may actually produce feelings of worthlessness and loss of dignity, exacerbating the individual's mental illness and perhaps even fostering a form of learned helplessness that can further diminish performance, motivation, and mood in ways that can be antitherapeutic.²⁰⁴

Therefore, while it is a valid and pressing question whether the adversarial model is appropriate for civil commitment, the proper answer should not be implemented through the informal winks and nods of legal actors. By condoning the implicit use of role-shifts and work-arounds, current civil-commitment practice invites attorneys to ignore rules, procedures, and standards in an effort not to "rock the boat," resulting in the "rubber-stamp" nature of the proceedings.²⁰⁵ In contrast, by encouraging civil-commitment attorneys to adhere to formal legal requirements and, as professional ethics suggest, foster a "normal client-lawyer relationship," *Anders* would recognize respondents' dignity and further the tenets of therapeutic jurisprudence.

Current practice permits the civil-commitment attorney to perform passively at trial, rationalize his or her actions through notions of paternalism, and then neglect to file an appeal. The imposition of *Anders*, however, would force the attorney to confront the incongruence between civil-commitment laws as practiced and as written. The *Anders* procedure would complicate certain work-arounds, such as ignoring evidentiary burdens or turning a blind eye to various procedural violations, since the attorney could no longer avoid

203. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 49-57 (2002); Michele Cascardi, Norman G. Poythress & Alicia Hall, *Procedural Justice in the Context of Civil Commitment: An Analogue Study*, 18 BEHAV. SCI. & L. 731 (2000); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1155-67 (1997).

204. WINICK, *supra* note 3, at 146 (footnotes omitted).

205. Cohen, *supra* note 160, at 448; see also 1 PERLIN, *supra* note 15, § 2A-2.1c cmt., at 61 (noting that "approval of 'informal' mechanisms that treat institutionalization decisions as medical, not legal" contributes to "[t]he ambivalence that is the hallmark of contemporary civil commitment law").

filing an appeal without submitting that the hearings provided no meritorious grounds for appeal. Any submission that an appeal was meritless would be scrutinized by the independent review of a court of appeals; if an attorney claimed an appeal was frivolous while the record revealed plainly meritorious issues, that attorney would risk both reputational and disciplinary repercussions.²⁰⁶ Unlike judges at the hearing level, appellate judges would be detached from proceedings often characterized by “mutual expectations of perfunctory performance,” where judges, like attorneys and psychiatrists, “seem content to go through the empty ritual of the hearing and resist any temptation to indulge in self-evaluation.”²⁰⁷ Appellate judges also would not be influenced by patients who may be “unable to control [their] behavior in the courtroom or who ha[ve] delusions of persecution.”²⁰⁸ Instead, appellate judges would be able to focus on the factual record and the requirements of the commitment statute, pushing back against the “usual trend for judges to agree with clinicians’ recommendations.”²⁰⁹

Since the potential for appeal looms as a possibility after most civil-commitment hearings, requiring the *Anders* procedure would likely influence the conduct of civil-commitment counsel at the hearing stage;²¹⁰ civil-commitment attorneys would recognize from the appellate procedure that role-shifts and work-arounds are formally illegitimate at hearings and may be scrutinized by courts in the future. In turn, by encouraging civil-commitment attorneys to act as advocates rather than guardians ad litem, the *Anders* procedure would enhance the therapeutic qualities of the civil-commitment process.

On an intrapersonal level, the *Anders* process would also compel the “best interest” attorney to confront the reality that in light of current civil-commitment standards, he or she failed to carry out his or her function. As a signaling device, the *Anders* procedure would inject a form of “Socratic skepticism” into the civil-commitment process, compelling the attorney to

206. See Yee, *supra* note 175, at 169-70 (“[I]f appellate counsel were to ignore glaring issues ripe for appeal . . . there is little doubt that such an attorney . . . would . . . risk losing credibility before the appellate tribunal that he submitted such appeal to, as well as in the legal community in which [he or she] practices.”).

207. Cohen, *supra* note 160, at 448.

208. Litwack, *supra* note 152, at 833.

209. Abisch, *supra* note 193, at 124.

210. See R. Christopher Lawson, *Seeing the Appellate Horizon: Civil Trial Strategy and Standards of Review in the Eighth Circuit*, 4 J. APP. PRAC. & PROCESS 561, 562 (2002) (identifying “certain common situations in which the standards of review in the Eighth Circuit shape not only appellate strategy, but civil trial strategy as well”).

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engage in a conscientious ethical deliberation.²¹¹ This intrapersonal effect of the *Anders* brief stems in large part from its *writtenness*. The exercise of writing has special human significance, often honing issues that at first seem ambulatory or lending formal or weighty import to an assertion. Lon Fuller recognized this special quality long ago in his discussion of the statute of frauds in contract law. Fuller argued that the process of writing an agreement serves “cautionary” and “channeling” functions—a “check against inconsiderate action” and an exercise in “reduc[ing] the fleeting entities of wordless thought to the patterns of conventional speech.”²¹² In the same vein, courts have long recognized this special aspect of the *Anders* brief; as the U.S. Supreme Court has noted, “simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue,”²¹³ and similarly, “counsel may discover previously unrecognized aspects of the law in the process of preparing a written explanation for his or her conclusion.”²¹⁴ Ultimately, the *writtenness* of the *Anders* brief furthers a self-interrogative process that complicates the civil-commitment attorney’s practice of role-shifts and work-arounds. Under the *Anders* procedure, the attorney must document his or her circumvention of formal rules and can no longer simply rationalize these actions in light of subjective value judgments or paternalistic ideals.

In sum, *Anders* would operate on reputational, disciplinary, and intrapersonal dimensions to influence the behavior of civil-commitment attorneys. As a result, civil-commitment respondents would be more likely to experience civil-commitment hearings as legitimate undertakings in which attorneys represent their clients’ views of themselves rather than the attorneys’ views of their clients. While the hearing’s conclusion may be identical, the experience of having one’s views acknowledged and advanced will likely enhance the healing potential of the civil-commitment process.

211. David Luban describes “Socratic skepticism” as “aim[ing] to combat our basic drive to believe in our own righteousness in the most straightforward way possible: by . . . scrutinizing one’s own behavior—‘know thyself!’—with a certain ruthless irony.” David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 310 (2003).

212. Lon L. Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 800-02 (1941).

213. *Penson v. Ohio*, 488 U.S. 75, 82 n.4 (1988).

214. *McCoy v. Court of Appeals*, 486 U.S. 429, 442 (1988); see *Smith v. Robbins*, 528 U.S. 259, 290 (2000) (Stevens, J., dissenting) (“On a good many occasions I have found that the task of writing out the reasons that support an initial opinion on a question of law . . . leads to a conclusion that was not previously apparent.”).

C. *The Persistence of Pretext: Circumventing the Anders Requirement*

Since the Supreme Court decided the case in 1967, *Anders* has not been without its critics. Many reiterate Justice Stewart's dissent, in which he described the *Anders* brief as a "quixotic requirement."²¹⁵ As one commentator explains, "Although the *Anders* brief is supposedly supportive of the defendant's interest in appeal, when the attorney requests withdrawal he is implicitly telling the court that the issues raised in the brief to support the client's position are untenable."²¹⁶

In *Smith v. Robbins*, the Supreme Court responded to this tension when it held that states do not have to require attorneys to expressly label their client's claims as "frivolous" or request permission to withdraw.²¹⁷ Moreover, while the "implicit" message conveyed by the *Anders* brief does seem inconsistent with traditional notions of zealous representation, it remains to be seen how this ironic quality of the *Anders* brief hurts the client in a practical sense,²¹⁸ particularly where the alternative is to have the attorney simply abandon the client's appeal as frivolous. Perhaps one can imagine a court receiving an *Anders* brief and thus immediately prejudging the appeal as frivolous, yet no evidence has suggested this to be the case. Indeed, although Justice Stewart could not "believe that lawyers appointed to represent indigents [were] . . . likely to be lacking in diligence, competence, or professional honesty,"²¹⁹ at least one commentator has found that courts receiving *Anders* briefs typically scrutinize the lawyer's implicit finding of frivolousness rather than accept it at face value.²²⁰ In turn, lawyers have been observed to provide added care and

215. *Anders v. California*, 386 U.S. 738, 746 (1967) (Stewart, J., dissenting).

216. Michael R. Conner, Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals*, 49 IND. L.J. 740, 746 (1974); see Arthur Mendelson, *Frivolous Criminal Appeals: The Anders Brief or the Idaho Rule?*, 19 CRIM. L. BULL. 22, 26-30 (1983); Charles Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed To Pursue a Frivolous Criminal Appeal*, 9 CRIM. JUST. J. 45, 47-52 (1986).

217. 528 U.S. 259, 265.

218. See Frederick D. Junkin, Note, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 187-92 (1988). Indeed, the criticisms leveled at *Anders*'s "schizophrenic" or "quixotic" quality mainly concern professional ethics requirements, since filing an *Anders* brief may arguably run contrary to the norm of zealous advocacy. To err on the side of zealous advocacy, the American Bar Association and some states have simply urged attorneys to pursue every appeal. See James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives*, 3 J. APP. PRAC. & PROCESS 65 (2001).

219. *Anders*, 386 U.S. at 747 (Stewart, J., dissenting).

220. See Yee, *supra* note 175, at 169.

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attention to the construction of *Anders* briefs.²²¹ Ultimately, while commentators continue to criticize the *Anders* brief insofar as it seems an awkward solution for the attorneys saddled with frivolous appeals,²²² these criticisms implicitly assume that the *Anders* procedure succeeds in providing added protection for indigent appellants.²²³

Nevertheless, while it appears that the *Anders* framework generally fulfills its role as an added procedural safeguard for the client, this apparent achievement may actually spawn troubling incentives. For example, in order to circumvent the *Anders* procedure, an attorney who wishes to essentially abandon his or her client may simply file a poorly argued pretextual merit brief.²²⁴ As the U.S. Supreme Court acknowledged in *Jones v. Barnes*, as long as appellate counsel raises one nonfrivolous issue in the appellate brief, a court has no duty to independently examine the record for arguable issues.²²⁵ This possibility is particularly worrisome in the civil-commitment context; if a civil-commitment attorney feels his or her client should be committed even though the state violated procedural requirements or failed to carry its burden, the attorney may simply submit a poorly argued brief in furtherance of the client's "best interests."

When attorneys circumvent *Anders* through pretextual merit briefs, they offend the dignitary values central to therapeutic jurisprudence. Nonetheless, several considerations suggest that this possibility should not preclude the potential benefits of requiring *Anders* in civil-commitment appeals. For example, one may anticipate that institutional barriers may cause civil-commitment attorneys to evade *Anders*; recognizing the added time and expense to compile a scrupulous *Anders* brief, the overburdened and underserved civil-commitment attorney may opt to file a poorly argued appellate brief. This scenario, however, is essentially no different than what would occur without the *Anders* requirement: without the *Anders* requirement,

221. *Id.*

222. See, e.g., Duggan & Moeller, *supra* note 218, at 92-99; Pengilly, *supra* note 216, at 52; Warner, *supra* note 175, at 643-44; Conner, *supra* note 216, at 746-47.

223. See Duggan & Moeller, *supra* note 218, at 101-03; Warner, *supra* note 175, at 642 ("It is a common experience of appellate judges to discover arguable points that were not raised in the briefs."); see also, e.g., *Penson v. Ohio*, 488 U.S. 75, 79 n.1 (1988) ("In examining the record, the Court of Appeals discovered that the trial court neglected to instruct the jury concerning an element of this crime. Applying the State's plain-error doctrine, which requires a showing of substantial prejudice, the Court of Appeals reversed petitioner's conviction under count 6 of the indictment . . .").

224. See Conner, *supra* note 216, at 746 ("[A]n attorney anxious to withdraw might easily write a brief overlooking many potentially important arguments.")

225. 463 U.S. 745, 753-54 (1983); see Warner, *supra* note 175, at 635.

the attorney simply abandons the respondent without filing an appeal, while with the *Anders* requirement, the attorney leaves a “Dear John” letter of sorts – a pretextual appellate brief.

While abandonment is possible with or without *Anders*, imposing the *Anders* requirement would carry the potential benefit of making this course of action less likely. Indeed, an overworked attorney may be easily tempted to deem an appeal frivolous when he or she is not required to substantiate that determination. However, such an attorney – despite crushing caseloads and few resources – cannot similarly be expected to affirmatively file negligent, misleading, or dishonest papers with a tribunal.²²⁶ In the former situation, a civil-commitment attorney can more easily assuage any ethical qualms: the attorney reasons that the appeal will probably fail, the respondent probably needs treatment, and limited time and resources would be better spent on closer cases.²²⁷ In contrast, affirmatively violating professional standards while under the oversight of an appellate court carries greater ethical opprobrium and professional risk.

The potential for circumventing *Anders* also arises in light of the rolelessness of civil-commitment attorneys. Rather than submit an *Anders* brief and subject the record to independent review by an appellate court, a civil-commitment attorney who believes that commitment is in the respondent’s “best interests” may file a pretextual appellate brief to ensure this outcome. This tactic would not only vitiate *Anders*’s aim to provide added procedural protection to respondents, but also contribute to their perception of civil-commitment proceedings as preordained, “empty rituals.” Again, however, this possibility appears unlikely and should not detract from the potential benefits that *Anders* could provide. The roleless civil-commitment counsel typically avails paternalism and a “best-interests” posture as a justification for succumbing to the anti-advocacy pressures of the civil-commitment context.

Hence, the problem of rolelessness does not describe attorneys who have an aggressive paternalistic agenda, but rather captures a reactive, second-order phenomenon in which these attorneys rationalize their passive representation of respondents.²²⁸ The attorney who assumes the role of guardian ad litem and,

226. For the ethical canons prohibiting such conduct, see MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3, 3.3 (2003), which detail the duty of competence, duty of diligence and duty of candor toward the tribunal.

227. For the view that attorneys should be permitted to deem appeals “frivolous” without court oversight in order to focus energy on more meritorious appeals, see, for example, James J. Doherty, *Wolf! Wolf! – The Ramifications of Frivolous Appeals*, J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 2-3 (1968).

228. See *supra* notes 194-200 and accompanying text.

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consistent with his or her personal value judgments, seeks to have his or her client committed, could likely achieve this end whether or not the *Anders* procedure were enforced. In the more typical scenario, however, *Anders* would counteract the anti-advocacy pressures faced by the truly “roleless” attorney. Such attorneys would be loath to surrender to these pressures even when the “best-interests” rationale provides a noble excuse, as appellate-court scrutiny makes role-shifts and work-arounds professionally risky and highlights their formal impermissibility. In sum, *Anders* would function as a salve to rolelessness and its correlative pathologies, not as a prophylactic against aggressive violations of positive law and professional ethics.

D. Anders and Excessive Adversarialism

The infrequent filing of *Anders* briefs in the civil-commitment context would not necessarily indicate that attorneys are dishonestly circumventing the requirement. Indeed, infrequent filings may equally suggest the procedure’s effectiveness. When faced with the stark choice either to proceed with an appeal or to claim that no basis for appeal exists, the attorney may finally be forced to acknowledge and adopt the formal legal standards that govern the civil-commitment process, which results in more appeals. Through extrapolation, attorneys may feel compelled to eschew a paternalistic approach altogether at the hearing stage, as the *Anders* procedure signals to them over time that the “best-interests” model is formally unacceptable.

If this extrapolation is accurate, a marked swell of advocacy (and a correlative decline in paternalism) may result in very few certificates of commitment, as civil-commitment attorneys scrutinize the archaic legal standards and procedural violations that feature prominently in the civil-commitment hearing.²²⁹ This apparent victory for civil liberties, however, may be far from celebratory, as many respondents, failing to receive treatment in a psychiatric hospital, would be forced to return to the often ill-equipped and unwelcoming community.²³⁰ Even the school of therapeutic jurisprudence,

229. See Haycock et al., *supra* note 200, at 270 (“Judging by the law, one would . . . expect a routinely high percentage of court refusals to grant petitions for commitment either because the difficult standard of proof was not met . . . or because the court found . . . a less restrictive alternative to hospitalization . . .”).

230. See, e.g., APPELBAUM, *supra* note 2, at 50-52; WINICK, *supra* note 3, at 5 (“Without needed services in the community, many former patients committed minor offenses—trespassing upon private property, wandering in traffic, acting in a threatening manner, or urinating in public—that resulted in their arrest and imprisonment in jails that were ill-equipped to meet their medical needs and that produced stress that brought about further decompensation.”).

while emphasizing the importance of honestly adhering to due process principles and the participatory rights of respondents, acknowledges “the potentially antitherapeutic consequences of legal protections.”²³¹ Thus, while one hopes *Anders* would function solely to prevent erroneous commitments and protect the dignitary interests of respondents, one could reject *Anders* on the grounds that the consequences of a rigid adversarial system may far outweigh these benefits.

Although this consequentialist critique is cogent, it does not invariably lead to the conclusion that *Anders* should not be applied to civil-commitment appeals; indeed, it may even suggest the opposite response. Because attorneys and other actors in the civil-commitment context may chafe under a system requiring greater fidelity to formal procedural rules, these actors may accordingly feel obliged to revise the procedures under which they operate. Previously, if these actors found aspects of the adversarial model of civil-commitment law unworkable, then they had sufficient autonomy and flexibility to bypass its strictures.²³² By introducing *Anders*, however, persons representing legal, medical, and community interests may feel constrained to engage the legislative process and revise the prevailing strictures of civil commitment in a way that is transparent and respectful to the dignity of civil-commitment respondents. In several states, patient advocates, psychiatrists, and legislatures have already begun to pursue a “middle ground” between an adversarial model and one that focuses on meeting the treatment needs of the severely mentally ill.²³³ When faced with the *Anders* procedure in civil-commitment appeals, like-minded attorneys may also be prompted to offer their perspective in formulating a rights- and dignity-respecting model of civil commitment, as they were similarly impelled to formulate “*Anders* alternatives” in the past.²³⁴ Indeed, as Fred Cohen observed, “[T]he legal process and the legal profession have the responsibility for protecting individual liberties and, at the same time, contributing to the evolutionary process that one hopes will culminate with mental illness being treated as any other illness.”²³⁵

231. David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, in *LAW IN A THERAPEUTIC KEY* 587, 594 (David B. Wexler & Bruce J. Winick eds., 1996).

232. See *supra* notes 194-198 and accompanying text.

233. ROBERT I. SIMON, *CLINICAL PSYCHIATRY AND THE LAW* 157 (2d ed. 1992).

234. Duggan & Moeller, *supra* note 218, at 65, 92-99.

235. Cohen, *supra* note 160, at 432.

THE *ANDERS* BRIEF IN APPEALS FROM CIVIL COMMITMENT**CONCLUSION**

Both doctrinal and policy-oriented arguments justify implementing the *Anders* procedure in appeals from civil-commitment. As a matter of constitutional law, the Supreme Court has long indicated that the right to trial counsel need not be circumscribed by the Sixth Amendment's reference to "criminal prosecutions"; rather, the right to trial counsel appears to bear a consistent relationship with the curtailment of physical liberty, a characteristic that is plainly apparent in the civil-commitment hearing. This relationship between physical liberty and the right to trial counsel is exemplified by decisions denying counsel to defendants facing misdemeanor charges without the threat of imprisonment yet providing counsel for civil juvenile proceedings in which children could be involuntarily placed in an institution. Moreover, notions of criminality are not availed when determining whether this right to counsel continues to the appellate stage; instead, courts and commentators consistently recognize due process and equal protection concerns as the prominent sources of the right to appellate counsel. Finally, the procedure prescribed by the Supreme Court in *Anders* simply ensures the effective performance of constitutionally guaranteed appellate counsel, and it is difficult to articulate a principled rationale for limiting its applicability to criminal cases. Such a limitation, moreover, would oddly suggest that civil appellate counsel is held to a lower standard of constitutional effectiveness than criminal appellate counsel. Ultimately, from a doctrinal perspective, *Anders* should be viewed as a constitutional guarantee in both criminal and civil-commitment appeals.

Considerations of policy also urge in favor of importing the *Anders* procedure into the civil-commitment context. First, the policy considerations motivating the *Anders* decision seem particularly apt in the civil-commitment context, where the daunting institutional barriers faced by civil-commitment attorneys should command additional procedural safeguards to ensure the effectiveness of appellate counsel. In light of the minor costs associated with the *Anders* procedure, precluding the process in the civil-commitment context while requiring it in minor criminal cases seems not only imprudent, but also disrespectful toward the dignity of respondents facing civil-commitment.

A deeper examination of the function of civil-commitment counsel reveals that the *Anders* procedure could also address the problem of rolelessness. By affording an additional layer of independent review, the *Anders* procedure may inhibit civil-commitment counsel from adopting passive roles of representation when they feel that commitment is in their clients' "best interests." While this paternalistic practice may be intended to achieve just and therapeutic outcomes, its subversive nature contributes to the appearance of civil-commitment hearings as contrived "empty rituals." By discouraging these

tendencies, *Anders* would further the notions of therapeutic jurisprudence by enhancing respondents' self-worth and preventing feelings of persecution and indignity. In turn, respondents who participate in dignity-respecting civil-commitment hearings may ultimately be more receptive to mental-health treatment or therapies. Alternatively, if civil-commitment attorneys chafe under this procedurally imposed imperative to adhere to formal obligations, the legal community and the broader public may be spurred to reevaluate the strictures governing the treatment of the mentally ill. Yet rather than pursue these changes through ad hoc role-shifts and knowing winks and nods, the relevant actors would be obliged to modify the civil-commitment framework in a public and transparent setting. Ultimately, in either scenario, extending *Anders* to the civil-commitment context may bring the protective and healing potential of the law to those who need it most.