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PROTECTIVE SERVICES FOR THE ELDERLY: THE LIMITS OF PARENS PATRIAE

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I. INTRODUCTION

Elderly persons who are thought to be unable to manage their personal or financial affairs in their own best interests are subject to the imposition of "protective services" designed to protect them from themselves and from unscrupulous third parties. This article will examine the plight of those elderly persons for whom protective services are deemed appropriate, yet who do not desire protection.

Protective services imposed as a result of legal proceedings are commonly referred to as guardianship.¹ To be a proper subject for a guardianship proceeding, an elderly person must be alleged to be no longer able to function as a self-reliant individual. If the aged are suspect in their ability to be self-reliant, it is not because lack of self-reliance is a biological dictate of old age.² The American system

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1. Guardianship traditionally refers to protection and care of the individual; conservatorship refers to protection and care of the estate. These terms are, however, often used interchangeably. In California, for instance, a "guardianship" of the person and/or the estate is contemplated. CAL. PROB. CODE § 1460 (West 1956). In New York, the term "committeeship" is used for both purposes. N.Y. MENTAL HYGIENE LAW § 101, *et seq.* (McKinney 1971). For purposes of this article, the term "guardian" will be used to refer to the one who is appointed by a court to care for the person and/or the estate of a ward. The term "ward" shall be used to refer to any person found to be in need of a guardian's protection as a result of legal proceedings.

2. Chronological age appears to be a familiar and reliable landmark, but "aging" may bring physical, physiological or psychological changes or may bring hardly any alteration in its wake. Individuals vary enormously at any given age in respect to almost all human characteristics. In the case of the characteristics studied here, the variation increases as the age of people studied increases. Indeed this has been the finding in most works on the aging, and makes any generalizations about "the aged" very unsound. Chronological age is thus a very poor guide to the state of a man's . . . mental alertness.

is replete with legal, social and economic barriers to elderly self-reliance. Mandatory retirement,³ a social security program which penalizes work after age 65,⁴ and pension plans which are designed so that most workers never qualify for their benefits,⁵ all contribute to the proliferation of elderly persons bereft of the ability to provide for their own financial welfare.

Outside the economic sphere, the continued presence of a work ethic which equates an individual's productivity with his worth,⁶ and a youth-orientation which often links activity and vitality with youth, and senility with old age,⁷ go further toward conditioning elderly persons to adopt for themselves the role which society has trained them to accept.

In the past these policies and prejudices affected a relatively small portion of the population. In 1900, three million persons over the age of 65 made up only 4% of the total population.⁸ Today,

A. HERON & S. CHOWN, *AGE AND FUNCTION* 67 (1967). See also H. LEHMON, *AGE AND ACHIEVEMENT* (1953).

3. The Federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (1971), generally prohibits discrimination on the basis of age in all areas of employment, including hiring, discharge, compensation, and terms and conditions of employment. However, the protections of the Act are "limited to individuals who are . . . less than 65 years of age." 29 U.S.C. § 631 (1971).

4. The "retirement test" requires that recipients of old age assistance benefits under the age of 72 shall lose \$1.00 in benefits for every \$2.00 earned above \$2400.00 per year. Social Security Act § 203(b)(3), 42 U.S.C. § 403(b)(3) (1971). At the same time, social security benefit payments were never intended to fully compensate for the loss of income at retirement. See M. FRIEDMAN & W. COHEN, *SOCIAL SECURITY: UNIVERSAL OR SELECTIVE* (Rational Debates, 5th Series, American Enterprise Institute for Public Policy Research, 1970-71); see also National Senior Citizens Law Center, *Constitutional Issues in Social Security*, 8 CLEARINGHOUSE REVIEW 79 (1974).

5. SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, 1971, S. REP. NO. 634, 92d Cong., 2d Sess. 111 (1972).

6. SPECIAL COMM. ON AGING OF THE UNITED STATES SENATE, DEVELOPMENTS IN AGING, 1967, S. REP. NO. 1098, 90th Cong., 2d Sess. 66 (1968); see generally M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958).

7. "Another persistent . . . factor in fostering the devaluation of the aged . . . is what is termed here the cult of youth — that is, the prevalent value system which glorifies youth as a symbol of beauty, vigor and progress and discriminates in favor of youth in employment and in the allocation of . . . resources." Cowgill, *The Aging of Populations and Societies, Political Consequences of Aging*, in 415 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 15-16 (R. Lambert ed. 1974).

8. Since 1900, while the total population of the United States has grown threefold, the over-65 population has grown sevenfold, and it is still growing, relative to the size of the under-65 population. Between 1960-1970, the over-65 population increased by 21% as compared with a 13% growth in the under-65 population. See, *e.g.*, SPECIAL COMM. ON AGING OF THE UNITED STATES SENATE, DEVELOPMENTS IN AGING: 1973 AND JANUARY-MARCH 1974, S. REP. NO. 846, 93d Cong., 2d Sess. xix (1974); Brotman, *Who Are the Aging?*, in *MENTAL ILLNESS IN LATER LIFE* 25 (E. Busse & E. Pfeiffer ed. 1973).

largely because of a declining birth rate and advances in medicine which have effectively controlled early deaths due to infectious diseases, persons over the age of 65 number over 21 million in the United States, or 10% of the population.⁹ It is estimated that by 1985, there will be 25 million Americans over the age of 65.¹⁰

The purpose of this article is threefold: first, to emphasize what has often been ignored in guardianship proceedings, namely that the declaration of incompetency coincident with most guardianships is an event of great consequence for the individual; second, to demonstrate the striking absence of procedural formality amidst which incompetency determinations are currently made, and to examine the "best interests" doctrine as an historical and legal justification for procedural informality; third, to demonstrate how poorly the "best interests" doctrine has served the elderly in guardianship matters. Although used with good intentions, this doctrine has served to conceal underlying adverse interests of other parties, to mask the tremendous consequences awaiting the individual deemed appropriate for guardianship, and to justify the lack of procedural safeguards which would assure fairness and reduce the possibility of erroneous findings of incompetency. Worst of all, there is growing evidence that the elderly may be no better off after such drastic methods are employed in service of their well-being.

II. THE "PROTECTIVE SERVICES" CONCEPT

Although "protective services" in its generic sense may apply to any one of a number of voluntary social services offered by public or private agencies to assist elderly persons with their personal or financial affairs, the term is also used extensively in the area of guardianship and conservatorship,¹¹ where the issue most often revolves around the alleged mental incompetency of the proposed ward. In this context, the term "protective services" is a misleading euphemism for a proceeding which deprives the elderly of their personal autonomy, and often of their dignity, integrity, and self-esteem as well.

While guardianship may be imposed upon incapacitated adults of any age, a recent California study¹² shows that 4 out of 5 persons for whom guardianship is deemed appropriate are over the age of 60.

9. Brotman, *supra* note 8, at 21, 23.

10. *Id.* at 25.

11. A good discussion of the alternative ways in which the term "protective services" may apply to the elderly may be found in Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569 (1972).

12. See note 79 *infra*.

Unfortunately for the aged person who is the subject of a guardianship hearing, the proceeding focuses more on his sanity than on his self-reliance. This is due to the close historical ties between guardianship and involuntary commitment of the mentally ill, to the failure of the courts to adequately distinguish the two, and to the willingness of legislatures and courts, by relying on psychiatric labels, to shun their responsibility for making decisions about what constitutes acceptable behavior.

A. *Historical Foundations of Guardianship*

Proceedings for the protection of the property of incompetent persons were formally conducted in Rome at the time of Cicero.¹³ In medieval England, guardianship of the person and property of the mentally disabled was the function of the lord of the manor.¹⁴ With the enactment of the statute *De Praerogativa Regis*¹⁵ in the 14th century, guardianship was formally recognized in England as a duty of the sovereign and exercised through the Lord Chancellor. Thenceforth, the Crown, as *parens patriae* (a term derived from the emerging English concept of the King's role as father of the country)¹⁶ would shoulder responsibility for protection and care of the person and property of mentally disabled persons. *De Praerogativa Regis* divided mentally disabled, or "insane," persons into two classes, the "idiot" and the "lunatic." While the "idiot" was a person born with no understanding, a "lunatic" was one who had been born with understanding but had "lost the use of his reason." The King was granted custody of the lands and property of such persons and was to be responsible for maintaining their persons and households with the profits from the lands. The property of lunatics was returned to them when they were no longer *non compos mentis* (of unsound mind). After the "idiot's" death, the land was to be returned to the "right heirs."¹⁷

The method for determining an individual's mental status

13. AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 1 (rev. ed. 1971) [hereinafter cited as AMERICAN BAR FOUNDATION STUDY].

14. This guardianship actually applied to both the person and the property of the 'insane'; but the chief reason for its existence was apparently proprietary, stemming from the desire to prevent the mentally disabled from becoming a public burden or dissipating their assets to the detriment of their heirs.
Id. at 250.

15. 17 Edw. 2, c. 9 (1324).

16. N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 3 (1971) [hereinafter cited as KITTRIE].

17. AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 2.

called for the Chancellor, upon petition, to issue a writ *de idiota inquirendo*, which was tried by a jury of 12 men.

If an incompetent were determined by the jury to be a lunatic, the Chancellor committed him to the care of some friend, who received an allowance with which to care for him. The incompetent's heir was generally made manager of the estate, although according to Blackstone, "to prevent sinister practices" he was not given custody of the incompetent. For the custody of the estate, the heir was responsible to the court of chancery, to the recovered lunatic, or to his administrator.¹⁸

The obligations of the guardian as a fiduciary gradually developed into a set of customs, rules, and standards for the proper management of a lunatic's property.

After the American Revolution, a similar pattern developed in the United States.¹⁹ State courts of equity, applying English common law, or acting under constitutional provisions or statutes, exercised a modified form of *parens patriae* jurisdiction over the persons and property of the mentally incompetent to assure that those unable to care for themselves were protected from harm.²⁰ Currently, many different kinds of courts in all 50 states conduct incompetency hearings in guardianship proceedings or their equivalent.²¹

1. The State's Authority to Act

Formal proceedings to protect and preserve the property of mentally disabled persons substantially predated provision for their institutional confinement and care.²² Although the ward's property has always been well cared for, his body, depending upon the tem-

18. *Id.* at 3-4.

19. Regan, *supra* note 11, at 571.

20. AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 250. By 1890, the Supreme Court, in *Mormon Church v. United States*, 136 U.S. 1 (1890), "suggested that the *parens patriae* power . . . is rooted in the very nature of the state in modern society. The Court described the *parens patriae* power as 'inherent in the supreme power of every state . . . and often necessary to be exercised in the interest of humanity.'" Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974) (footnotes omitted).

21. In California, the relevant statute provides that for purposes of appointing a guardian,

the phrase "incompetent person," "incompetent," or "mentally incompetent" shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.

CAL. PROB. CODE § 1460 (West 1956).

22. AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 250.

per of the times, has at worst been subjected to tortures designed to exorcise the spirits possessing it, and at best been cared for privately by friends or relatives.²³ During the Middle Ages, the raving insane were most often driven out of the city enclosures and forced to roam about the countryside as social outcasts.²⁴ When institutionalization became a concern, during the Renaissance, it was used primarily to confine those mentally disabled persons who were so violent as to be dangerous to the community,²⁵ rather than for treatment or alleviation of the affliction. In early America, too, the pre-eminent concern in clashes of the state with the mentally ill was the confinement of "furiously mad" individuals in order to stop or prevent acts of violence.²⁶

2. The Police Power

The state's authority to confine dangerous individuals for the health and safety of others may be described as its "police power."²⁷ The criminal law is a familiar exercise of the state's police power. Behavior which society deems to be sufficiently harmful is prohibited. Individual offenders may be deprived of their liberty in order to protect the community at large. In the civil area, the police power may be exercised to confine those mentally disordered persons who are predictably²⁸ dangerous.

23. *Id.* at 8.

24. KITTRIE, *supra* note 16, at 57.

25. AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 8.

26. KITTRIE, *supra* note 16, at 58.

27. The reference here is to the police power in the strict or narrow sense. In a broader sense, the term could encompass all state actions. See P. FREUND, POLICE POWER 242 (1904); 16 AM. JUR. 2d *Constitutional Law* § 262 (1964), cited in KITTRIE, *supra* note 16, at 58 n. 22.

28. Since many of these persons have not previously committed a dangerous act or violated the criminal code, they are confined because of a prediction of future dangerous conduct. The concept of "preventive detention" has been largely rejected as a justification for confining sane individuals who seem likely to commit or re-commit crimes in the future, in part because of the problem of accurately predicting the future course of individual human conduct has not yet been solved.

At the same time that "preventive detention" is rejected for use with the predictably dangerous sane, it is widely employed to confine the mentally ill. Detshowitz, *On Preventive Detention*, New York Review of Books 22 (March 13, 1969). In Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101, 107 (1971), it is stated that:

probably fifty to eighty percent of all ex-felons will commit future crimes, but we do not confine them. Ghetto residents and teenage males are also much more likely to commit dangerous acts than the "average" member of the population, but we do not confine them. Of all the identifiably dangerous groups in society, only the "mentally ill" are singled out for preventive detention, and . . . they are probably the least dangerous, as a group, of the groups here mentioned.

(Footnotes omitted).

Recent studies have shown that psychiatrists are no better at accurately and reliably

3. The *Parens Patriae* Power

The state's police power should be distinguished from its power, as *parens patriae*, to protect the well-being of individual citizens unable to care for themselves.²⁹ While the police power may be exercised to the detriment of the individual if a substantial public benefit is to be achieved thereby, the individual's well-being is the sole justification for the exercise of the state's authority as *parens patriae*.

While the state's exercise of its police powers has always been limited by the strictest of procedural safeguards protecting the individual's rights from arbitrary infringement, the state's *parens patriae* powers have traditionally been exercised in an atmosphere of informality. Relaxed procedures were said to be justified by the fact that the proceedings were nonadversary; the sole preoccupation of the court was to be the individual's best interests. This happy idyll was disturbed when treatment and care of the individual began to include his involuntary institutionalization. Thereafter, whether the state was exercising its police powers or acting *in parens patriae*, the individual's liberty was at stake. Nevertheless, proceedings labeled *parens patriae* continue to deprive individuals of fundamental rights without the procedural requirements which would assure a fundamentally fair hearing.

Currently, the formality of the procedure by which an individual is deprived of his liberty depends upon the state's characterization of its motives in acting. If the state is acting in social defense, then the strictest safeguards are applied to assure a fundamentally fair hearing. On the other hand, if the state claims to be acting for the "best interests" of the individual, then he is often deprived of his liberty in the most casual manner.

This creates a significant potential for abuse of the state's role as *parens patriae*. Since the interests of the individual depend upon who is defining them, state laws which authorize involuntary confinement if the individual is "in need of treatment"³⁰ may actually

predicting dangerousness as a result of a mental disorder than is a layman. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

29. The King, as the political father and guardian of his kingdom, has the protection of all his subjects, and of their lands and goods; and he is bound, in a more peculiar manner to take care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.

KITTRIE, *supra* note 16, at 59, quoting 2 L. SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 9 (1833).

30. Pennsylvania provides for the commitment of those "in need of care and treatment by reason of mental disability." Quoted in N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE*

hide social defense purposes behind a facade of benefits to the individual. Furthermore, because the definition of mental abnormality rests so heavily on prevailing community behavioral norms,³¹ the individual's need to obtain treatment for a mental disorder may be determined by the needs and interests of the larger community. As a result, any legitimate interests the individual may have in avoiding institutionalized treatment may go unrecognized.

4. The Absence of Judicial Scrutiny of *Parens Patriae*

The state's power as *parens patriae* is subject to abuse primarily because it has never been given appropriate judicial scrutiny apart from the police power. Instead, most legal opinions involving involuntary confinement of mentally disordered persons refer indiscriminately to *parens patriae* and to police power justifications without any attempt to distinguish the different purposes and legitimate uses of each. As a result, persons may be confined absent an evidentiary showing adequate to sustain the exercise of either power.

The commingling of the purposes and limits of the two powers may be traced to an 1845 Massachusetts Supreme Judicial Court case³² which, according to Deutsch,³³ "was one of the most important decisions affecting the civil insane in the history of American jurisprudence."³⁴ In this case, *In re Josiah Oakes*, an attempt was made to establish limits to the state's power to involuntarily confine mentally disabled persons:

The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others And the necessity which creates the law, creates the limitation of the law. The question must then arise, in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation.³⁵

Ironically, the *Oakes* decision may have created more problems

AND ENFORCED THERAPY 66 n. 60 (1971).

31. See note 60 *infra*.

32. *In re Josiah Oakes*, 8 Law Reporter 122 (Mass. 1845).

33. A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* (2d ed. 1949).

34. *Id.* at 423, quoted in KITTRIE, *supra* note 30, at 66.

35. *In re Josiah Oakes*, 8 Law Reporter 122, 124-25 (Mass. 1845).

than it solved. The facts of the case³⁶ indicated that old Josiah Oakes' primary mental aberration was that he had become engaged to a young woman of unsavory character a few days after the death of his wife.³⁷ Although Chief Justice Shaw, in upholding the commitment, stated that "this species of insanity leads to ebullitions of passion, and in these ebullitions dangerous acts are likely to be committed,"³⁸ there was no evidence that Josiah Oakes was a violent man.³⁹ The decision left unclear whether his involuntary confinement was for his own benefit or for the safety of the community, or both. Although opinions have differed⁴⁰ about the impact of the *Oakes* opinion, it did introduce the first glimmer of judicial support for the idea that involuntary confinement may be properly used as a therapeutic measure taken for the good of the patient, as well as a social defense measure to protect the safety of the community. Today, American courts have generally recognized that the state has the power⁴¹ to require non-criminal involuntary confinement of non-dangerous persons for therapeutic purposes.⁴² The courts have

36. Josiah Oakes was 67 years of age. His acquaintances knew him to be a businessman of much shrewdness. *Id.* at 123. His sons had him committed and alleged, in addition to his intention to marry a younger woman of bad character, that he had engaged in some daring and extravagant business speculations, *id.* at 128, and that Mr. Oakes' demeanor upon hearing of his wife's death "exceedingly shocked the feelings of his daughters." *Id.* at 126. The court found, in this respect, that "he did not manifest the feeling upon that occasion which was to be expected from a person in his right mind." *Id.* at 126.

37. *Id.* at 123.

38. *Id.* at 129.

39. *Id.* at 123.

40. The *Oakes* opinion has been prominently cited as "the first time that the therapeutic justification for restraint was explicitly stated in a decision handed down by an American court." A. DEUTSCH, *supra* note 33, at 423; but see KITTRE, *supra* note 16, at 66 n. 63:

Yet the [*Oakes*] case contains no clear expression of [the Deutsch] proposition. The paucity of legal critiques of the *parens patriae* area is well illustrated by the continued reliance upon this lone and ambiguous case as a landmark decision in the growth of therapeutic commitment powers.

41. Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-22 (1974).

42. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962), where the Court stated that: "A state might determine that the general health and welfare require that the victims of [drug addiction] and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration." *Id.* at 666 (dictum); accord, *Driver v. Hinant*, 356 F.2d 761 (4th Cir. 1966). While holding that a chronic alcoholic may not be convicted of the crime of public drunkenness, the *Driver* court stated: "However, nothing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal." *Id.* at 765.

Although there is little recognition of the departure from the common law police power concept which limited compulsory restraint only to the dangerously insane, present commitment criteria are much broader. The exercise of state compulsion now extends to those who are homeless and helpless, and, oftentimes in the name of therapy to those incompetents who are completely harmless.

KITTRE, *supra* note 30, at 66.

not, however, directly confronted the task of establishing constitutional limitations⁴³ on the power of the "therapeutic state"⁴⁴ to impose this kind of compulsory treatment.

B. *The Distinction Between Involuntary Commitment and Guardianship*

The fact that there are overlapping elements of police power and *parens patriae* authority in both involuntary commitment and guardianship proceedings does not alter the fact that the primary purpose behind state intervention in each is quite different. Involuntary commitment of the mentally ill is primarily a police power activity.⁴⁵ Guardianship is primarily a *parens patriae* activity.

The involuntary confinement of a mentally disordered person is primarily warranted to protect the public from the violent acts of dangerous persons. Incidental state purposes which may accompany

43. Recently, several courts have acknowledged this problem and have begun an exploration of the constitutional limitations which may be applicable. *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972) *affirmed sub. nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971). For a detailed discussion of these cases, see pt. III of this article.

44. NICHOLAS KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971), uses this term to refer to the state's expanding authority, as *parens patriae*, to control or modify the behavior of individual citizens for their own well-being.

45. The nondangerous, mentally-disordered person who has violated no law should be allowed to make his own decision about obtaining treatment. This would extend to him the same right we now allow the nondangerous, physically ill person. It may be argued that mental illness is different from physical illness in that it destroys an individual's capacity to know when treatment would be a wise choice for him. This argument may be answered in two ways:

(1) There is a growing body of opinion which argues for relinquishing the archaic stereotype of the mentally ill as raving lunatics who are devoid of all reason. It can be persuasively argued that equating mental illness and mental incompetency is a serious mistake. As evidence for such an argument, it is pointed out that most mentally ill persons are perfectly capable of managing many of their own personal and financial affairs while undergoing a course of treatment. To support the proposition that the mentally ill are capable of making their own treatment decisions, it is pointed out that in Great Britain well over 80% of the admissions to mental hospitals are voluntary. (In this country, only 10% of mental hospital patients are voluntary.) *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 43, 179 (1961).

(2) Assuming that some mentally ill are unable to evaluate the wisdom of obtaining treatment, the obvious recourse, prior to imposing enforced therapy, would be a full hearing on the separate issue of mental competency. Since the issue there would be whether the individual is a capable judge of his own best interests, such a proceeding would be taken up more appropriately in the context of guardianship, where the individual's best interests would be paramount and where involuntary commitment to a mental institution would be only one alternative among others which might serve his interests in a less restrictive manner.

the primary goal are to protect the individual from self-inflicted physical injury or peril and to provide for the alleviation of his condition by therapeutic measures.

The purpose of issuing letters of guardianship, on the other hand, is to protect the person of an individual when he is unable to care for himself, and to safeguard his assets when he is incapable of managing his affairs. Incidental state purposes which may accompany the primary goal are to protect the community from having to assume the ultimate burden of economic responsibility for those incompetents who, without a guardian, would end up on the welfare rolls or occupying beds in public hospitals, and to protect the expectations of the natural beneficiaries and heirs to the ward's wealth.

C. *The Abuse of the Medical Model*⁴⁶

That the distinction between involuntary commitment and guardianship has become blurred is due only in part to the confusion over the different sources of the state's authority to act in such matters. It is also due in large part to the remarkable growth and popularity of psychiatric theory, to the popular acceptance of psychiatry as a medical science, and to the radical expansion of the meaning and scope of the term "mental illness,"⁴⁷ which in turn has

46. "The medical model essentially is that behavioral variances are analogous to disease in the physical body. The implication of the analogy is that there is a distinct discontinuity in the continuum of behavioral differences which can be objectively discerned, measured, and labeled 'pathological.'" Turner & Carr, *Towards an Enlightened Commitment Law in Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st and 2d Sess. 413 (1969-70).

47. Mental illness is [currently] defined so broadly that every human being is at times mentally ill. As one Commission doctor stated, "mental illness means any problem in living." Another well-respected psychiatric instructor called schizophrenia, "any massive problem in living." A few . . . [quotations] from the American Psychiatric Association's diagnostic manual of mental disorders* should convince anyone that every human being can be diagnosed as mentally ill:

307.4 Adjustment reaction of late life. Example: Feelings of rejection associated with forced retirement and manifested by social withdrawal.

303.0 Episodic excessive drinking. If alcoholism is present and the individual becomes intoxicated as frequently as four times a year, the condition should be classified here. Intoxicated is defined as a state in which the individual's coordination or speech is definitely impaired or his behavior is clearly altered.

301.82 Inadequate personality. This behavior pattern is characterized by ineffectual responses to emotional, social, intellectual and physical demands. While the patient seems neither physically nor mentally deficient, he does manifest inadaptability, ineptness, poor judgment, social instability, and lack of physical and emotional stamina.

301.6 Asthenic personality. This behavior pattern is characterized by easy fatigability, low energy level, lack of enthusiasm, marked incapacity for enjoyment, and oversensitivity to physical and emotional stress. This disorder must be differen-

led to an expansion of the grounds considered appropriate to invoke involuntary treatment.⁴⁸

The modern statutory terminology of incompetency for purposes of guardianship has not changed. Persons are subject to having a guardian appointed for them if they are "incompetent" (27 jurisdictions), "insane" (23 states), "lunatic" (11 states), "unsound mind" (9 states) and so forth.⁴⁹ Although the terms themselves remain unchanged, their meaning, scope and use is now substantially different. This fact has profoundly altered the nature of the guardianship proceeding. As a result, substantial confusion exists between mental illness requiring involuntary hospitalization, and mental incapacity requiring the assistance of a guardian in caring for oneself or in managing one's financial affairs. In addition, the decision-making power on the issue of incompetency has been removed from the court and the jury, and transferred to the psychiatric or medical expert.

Fourteenth century England was a time and place where the nonviolent manifestations of mental illness were largely ignored, and where the concept of involuntary hospitalization for treatment

tiated from Neurasthenic neurosis (q.v.).

301.81 Passive-aggressive personality. This behavior pattern is characterized by both passivity and aggressiveness. The aggressiveness may be expressed passively, for example by obstructionism, pouting, procrastination, intentional inefficiency, or stubbornness. This behavior commonly reflects hostility which the individual feels he dare not express openly. Often the behavior is one expression of the patient's resentment at failing to find gratification in a relationship with an individual or institution upon which he is over-dependent.

. . . .

295.1 Schizophrenia, hebephrenic type. This psychosis is characterized by disorganized thinking, shallow and inappropriate affect, unpredictable giggling, silly and regressive behavior and mannerisms, and frequently hypochondriacal complaints. *American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*, Washington, D.C.: American Psychiatry Association, Second Edition, 1968.

[These] ill-defined parameters of 'mental illness' are measured by the subjective impressions of the psychiatrist.

Turner & Carr, *Towards an Enlightened Commitment Law in Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, *supra* note 46, at 415-16.

48. A thorough discussion of the background and implications of the State's expanding role as purveyor of involuntary treatment may be found in N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971).

49. R. Allen, E. Ferster & H. Weihofen, *The Semantics of Incompetency*, in *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY, REPORT OF THE MENTAL COMPETENCY STUDY, AN EMPIRICAL RESEARCH PROJECT CONDUCTED BY THE GEORGE WASHINGTON UNIVERSITY INSTITUTE OF LAW, PSYCHIATRY AND CRIMINOLOGY UNDER THE SPONSORSHIP OF THE NATIONAL INSTITUTE OF MENTAL HEALTH, DEPT. OF HEALTH, EDUCATION AND WELFARE 32-45* (1968) [hereinafter cited as *GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY*].

was unknown. Although terms such as "lunacy," "insanity," "incompetency," and "*non compos mentis*" were used by legal commentators,⁵⁰ a jury of 12 common men from the vicinage was called upon to determine whether a guardianship was necessary. They did so by determining whether the proposed ward had "lost the use of his reason," had "failed of his wit," or was "not in his right mind."⁵¹

Today, the same terms (especially insanity and incompetency,⁵² the two most popular for guardianship purposes) have become psychiatric terms of art. The identification of them lies more and more within the diagnostic sphere of the medical expert.⁵³

Thus, the issue of whether guardianship is appropriate becomes a medical, rather than a legal, question. It is answered by medical experts testifying about matters beyond the knowledge of the layman. Consequently, a medical opinion as to mental competency is often dispositive of the ultimate legal question.⁵⁴ Instead of concentrating on questions about the functional abilities or inabilities⁵⁵ of the proposed ward, the courts concentrate on the condition of his

50. AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 2-3.

51. *Id.* at 2.

52. "This is a very general term, embraces all varieties of mental derangement. See insanity." [Under "insanity" appear a number of diagnostic labels currently or at one time part of the medical lexicon.] BLACK'S LAW DICTIONARY (4th ed. 1951).

53. Some of the incompetency statutes do not use the term "incompetent" at all, but simply state that a guardian may or shall be appointed for a person who suffers from a designated mental or physical disability. The statutes thus predicate the loss of the right to conduct one's business not on a finding of incapacity to do so, but on the determination of some medical diagnostic condition. Even those statutes which include the term "incompetent" often similarly lack the proper focus; generally, these provisions merely define an incompetent person as one who suffers from insanity or other adverse condition. Determinations of incompetency under these statutes are hence equally likely to be based on medical classifications to the exclusion of more precise considerations on the issue of whether the person in question is capable of managing his own affairs. Moreover, or perhaps as a result, the term "incompetent" itself often appears to be perceived (or even intended by the statutes) as a "diagnostic entity" rather than a term of legal status identifying or suggesting a limitation on legal rights. This perception thus produces the rather startling logic that a person is incompetent because he is incompetent.

AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 251.

54. In practice the medical standard becomes the primary, if not sole, basis for adjudicating incompetency. No specific inquiry is made into the way in which the particular aberrational condition affects the subject's ability to manage his financial resources. . . . The legal profession therefore abrogates the decision making power to the medical profession.

G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 25 (1972).

55. Questions which might be asked here might include the following: "Is he misplacing his Social Security check?", "Does he pay his heating bill?", "Does he pay his rent?", "Does he eat properly?", "Does he care for his personal needs?", or "Has he arranged for someone to look after him?"

mind, a condition measured not in terms of common sense behavior, but by medical opinion. Since the medical opinion often fails to connect its labels with any operative behavior,⁵⁶ the proposed ward is merely categorized by means of a conclusionary diagnostic label without further explanation.⁵⁷ In short, medical disability has become confused with legal disability.

The medical profession has not sought absolute power in guardianship proceedings, and many medical experts feel ill-equipped to give what, in effect, are legal conclusions disguised as medical diagnoses.⁵⁸ Such a role has been thrust on the medical profession partly because the historical terminology surrounding guardianship proceedings is now used as diagnostic classifications by modern psychiatry, and partly because legislatures have written laws which courts have applied so as to rely heavily on medical classifications in order to avoid making judgments about what kinds of behavior indicate mental incompetency. There is a natural reluctance to impose guardianships on the basis of merely abnormal, inappro-

56. "Not one transcript examined nor medical report studied revealed any attempt by the physician to detail the manner in which the patient's capacity to manage his estate had been effected by the underlying condition." G. ALEXANDER & T. LEWIN, *supra* note 54, at 24.

57. Both nationally and in New York physicians . . . improperly substitute their judgment for the law on the question of competency by labeling the underlying condition and then testifying in conclusionary terms as to whether in their opinion the subject is or is not competent to manage his affairs. *Id.* at 18.

58. The law tolerates with ease the legal fiction that judges and juries can determine "intent," "premeditation," "negligence," "deliberateness," and other mental states . . . without the benefit of experts

Why can it not then tolerate determination by the same fact finders, also without the benefit of experts, that a defendant was so deprived of voluntariness that his criminal act was excusable, or that he is of such poor comprehension of the trial proceedings that it would be unfair to try him? . . . 'psychiatric disengagement' would put the responsibility for society's ills where it belongs — on the people, . . .

. . . .
Psychiatrists cannot be as wise and certain as the weight given their testimony—which often decides the outcome of a case As an expert, I will not be allowed to report what I have observed. . . . I will be asked for opinions, conclusions. . . .

Such questions are impossible to answer because they are confusing. . . .

Fundamentally, of course, I am also questioning the legitimacy of the use of all diagnostic labeling for judicial or other social purposes, When we try to answer the court's questions we implicitly assent to their validity. We thereby reinforce the confusions of the judge, jury and public, while perpetuating an absurd dilemma for the legal system and forensic psychiatrists.

The time has come . . . to tell our judicial hosts simply: "We don't know, and can never know the answers to the questions you are asking us. . . ."

Dr. Harold Kaufman, Adjunct Professor of Law and Psychiatry, Georgetown Law Center, in *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st and 2d Sess. 401 (1969-70).

prate or irritating behavior, or on the basis of merely bad business judgment or unwise decisions on the part of the proposed ward.⁵⁹ Somehow the imposition of guardianship seems more justifiable if the proposed ward can be said to have a diseased mind. However, this rationale fails to consider two important arguments: (1) no matter how diseased a proposed ward's mind may be in the eyes of the medical or the legal community, the only valid question, if the historical purposes of guardianship are to be served, is whether he is able to care for his person and/or manage his property; (2) legislatures and courts cannot avoid judgments about the rightness or wrongness of behavior. Most medical experts in the field of psychiatry acknowledge that psychiatric disease syndromes are based not on objectively verifiable physiological problems but on subjectively defined behavioral abnormalities.⁶⁰ To allow medical experts to

59. This reluctance may in part be due to the fact that, absent mental illness, guardianship of the estate could not be justified on the basis of poor financial management.

Societal interests in involuntary guardianship, as distinct from family or personal interests, are of limited scope. If the goal is to protect society from dangerous individuals, confinement rather than involuntary guardianship would be the only satisfactory solution. If society is to be protected against bearing the welfare costs of persons who destitute themselves by dissipating their savings, this goal may be accomplished without the substantial incursions on individual freedoms represented by guardianship. Enforced savings programs such as social security may be used to assure steady sources of income for all the aged. Many aged . . . will already have provided for necessary security, and will not require the state's assistance. Society's interest in this respect, moreover, applies equally to all those who might become destitute — not only the mentally weak — and ceases once destitution is shown to have been avoided. It thus fails to explain the stringencies of involuntary guardianship upon private property control. Society does not use involuntary guardianship to further certain moral judgments and social norms. The very preference for family and the characterization of who is an "unworthy" taker are expressions of general community attitudes. A preference for youth or an intolerance of the aged and their burdensome and "eccentric" behavior may also be implicit in the imposition of involuntary guardianship. But if faced squarely with the question whether these implicit preferences or intolerances were to be enforced through explicit recognition of involuntary guardianship proceedings as adverse to the individual, it seems unlikely that courts or legislatures would often choose against the individual.

If involuntary guardianship should only be imposed in the interests of the ward, inability to manage property should not be sufficient grounds for imposition. Without a suggestion of mental weakness, there is no justification for protecting adults who can not manage property. Prevailing values allow an adult freedom to dispose of property as he wishes, and if he should choose to beggar himself or simply persist in bumbling through life, the law does not intervene paternally. Instead, society has chosen to retain a wide arena of unfettered freedom of decision despite the costs of mistakes and mismanagement.

Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 *YALE L.J.* 676, 690-91 (1964).

60. [T]he largest class of persons held in mental "hospitals" are suffering from what are known as "functional psychoses" for which there is no known organic or

make dispositive decisions about legal incompetency does not avoid value-laden normative judgments about behavior, it only assigns the making of those judgments to a less well-equipped body than a jury of 12 peers. Most damaging of all, it allows such decisions to be made irresponsibly, behind the facade of scientific objectivity.

physical cause.

This is an absolutely essential point—psychiatry deals first and foremost with behavior. It is admitted theoretically that all behavior has a biological base, but it must be made absolutely clear that the psychiatrist deals with behavior and not the human body. The psychiatrist is concerned with the physical body only peripherally. He deals principally in interpreting behavior and in trying to modify behavior. He tries to make the analogy between physical disease and deviant behavior but it must be recognized as that, *only an analogy*. The analogy may be a good one or it may be a bad one or more likely, partly good and partly bad, but it is only an analogy. The psychiatrist does not, except in cases where physical illness is suspected, make physical measurements in “diagnosing mental illness.” He makes interpretations of behavior. He attempts to fit his impressions of behavior into an abstract theory of the “mind.”

Turner & Carr, *1969-70 Hearings*, *supra* note 46, at 418.

Mental health is defined in terms of a community norm, and, conversely, those persons needing treatment are so categorized because they deviate too greatly from the norm. By definition then, a determination that a person is mentally ill is highly dependent on the community in which the determination is made.

Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOYOLA L. REV. 93, 110-11 (1974) (footnotes omitted).

The attack on the validity of mental illness as a medical concept is rooted in the fact that, with the exception of some conditions which can be traced to organic sources, mental illness presently is characterized and ultimately defined by behavioral deviations from the social norm. Unlike the diagnosis of physical ailments in which the patient's symptoms are usually accepted by patient and doctor as an indication of an identifiable underlying illness, diagnosis of most mental conditions is a highly subjective procedure in which the clinician uses his own concept of normality to classify the behavior and emotions of his patient; a diagnostician with a different view of normal behavior might well find no mental illness or a different disease based on the same behavior.

Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1255 (1974) (footnotes omitted).

Obviously, the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase “mental illness” effectively masks the actual norms being applied. And, because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoe-horn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.

Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, 94 S. Ct. 713 (1974), *amended opinion*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded for reconsideration in light of Huffman v. Pursue of the district court's jurisdiction to issue an injunction*, 95 S. Ct. 1943 (1975), *quoting Livermore, Malmquist & Meehl, On the Justifications for Civil Commitment*, 117 PA. L. REV. 75, 80 (1968).

III. GUARDIANSHIP PROCEEDINGS

A. *What is at Stake?*

For the individual, guardianship results in a deprivation of personal rights and civil liberties which is devastating. The adult who is found to be in need of guardianship is reduced to the status of a child in the eyes of the law. Although there are individual differences between states,⁶¹ most statutes deprive the ward of the right to buy or sell property, to contract, to sue and be sued, to make gifts, to write checks, and generally to engage in financial transactions of any kind. The ward is also generally deprived of the right to vote, to marry, to operate a motor vehicle, and to consent to or refuse medical treatment.⁶²

It may be difficult to underestimate the psychological impact of depriving an individual of the right to manage his own property as he sees fit. Surrogate management of one's finances has been described as "the kind of intervention [which] is a basic deprivation of a right cherished in a free society: the right for an individual to self-determination."⁶³ For an elderly person struggling to maintain his independence and self-esteem in the face of forced inactivity due to mandatory retirement, the loss of control over assets accumulated during a working lifetime may be a critical blow to the individual's sense of integrity. The right to "acquire, enjoy, own and dispose of property" has received judicial recognition as a fundamental attribute of citizenship; "an essential pre-condition to the realization of other basic civil rights and liberties."⁶⁴

The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "per-

61. For a state-by-state survey of the specific legal disabilities imposed by statute, see AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 303-40, Tables 9.1-9.4.

62. See, e.g., *Winters v. Miller*, 446 F.2d.65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). In reviewing the case of an involuntarily committed Christian Scientist protesting forced medication, the court held that absent a finding of incompetency, even the mentally ill individual remains free to refuse treatment and, in dictum, stated that forced treatment is acceptable if the state is acting as *parens patriae* for someone adjudged mentally incompetent:

While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her.

Id. at 71.

63. G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 2 (1972).

64. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972).

sonal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property.⁶⁵

In addition to the loss of his right to dispose of his property and enjoy his wealth according to his own judgment, the ward stands to lose his personal liberty and his freedom to associate with persons of his own choice. The deprivation of these fundamental rights can occur in three ways.

First, guardianship of the person often gives the guardian the power to determine the ward's place of residence.⁶⁶ This means that the guardian can place the ward, against his will, in a private board and care home, nursing home, or convalescent hospital and authorize the institutional facility to require him to stay.⁶⁷ In some states this power allows the guardian to commit the ward involuntarily to a state mental hospital without recourse to the formal statutory hospitalization procedures.⁶⁸

Second, in some jurisdictions the concept of "voluntary admission" to state mental hospitals is worded so that it includes admission of a ward by his guardian.⁶⁹

Finally, although guardianship and involuntary hospitalization serve different purposes and concern different legal issues, they share a common terminology. Incompetency, or *non compos mentis*, is often used in place of mental illness. Both are used interchangeably with terms such as "insanity" and "lunacy."⁷⁰ In a few states,

65. *Id.* at 552.

66. See, e.g., CAL. PROB. CODE § 1500 (West 1956), which provides that the guardian of the person of a ward, "may fix the residence of the ward at any place in the state, but not elsewhere without permission of the court." In Missouri, the residence of the ward may be changed only when he or his family willfully change residence or when the probate court finds it in the ward's best interest. § 475.310, RSMo 1969.

67. 34 CAL. ATTY GEN. OPS. 313 (1959); cf. *Browne v. Superior Court*, 16 Cal. 2d 593 (1940).

68. "If the guardian is permitted to [circumvent normal involuntary commitment procedures] the incompetency determination assumes unusual importance in that it makes the incompetent person subject to compulsory hospitalization at his guardian's discretion and without the customary statutory safeguards." AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 261. In Missouri, involuntary commitment is predicated on obtaining certificates by two physicians that the individual to be committed is mentally deficient, and on notice to the alleged incompetent of the application for commitment. The alleged incompetent may demand a full judicial hearing. § 202.797, RSMo 1969.

69. *Id.* at 260. This is also true in Missouri. § 202.783, RSMo 1969.

70. The confusion between the two legal concepts may well have arisen because old cases and statutes used the term "insanity" indiscriminately to describe both [insanity and incompetency].

Statutory terminology today shows some improvement but the confusion pers-

hospitalization and incompetency are completely merged⁷¹ so that an order for hospitalization automatically constitutes a finding of incompetency despite the fact that many mentally ill persons are perfectly capable of signing and endorsing checks, completing tax returns, and generally managing a great many personal and financial affairs⁷² while undergoing a course of treatment. Similarly, many persons may need assistance in managing their personal or financial affairs, but may not need involuntary confinement in a mental hospital. The fact that confusion persists between guardianship and hospitalization in so many states means that a ward found unable to manage his affairs for purposes of appointing a guardian runs a substantial risk that the incompetency determination will be used subsequently as *prima facie* evidence of insanity for purposes

ists. Most of the statutes still fail to make the proper distinctions.

AMERICAN BAR FOUNDATION STUDY, *supra* note 13, at 251 (citation omitted).

71. It has been asserted that "from a medical viewpoint, there is no necessary relationship between committability and competency." AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 253 (rev. ed. 1971) [hereinafter cited as AMERICAN BAR FOUNDATION STUDY], quoting DAVIDSON, *FORENSIC PSYCHIATRY* 196 (1952).

The Group for the Advancement of Psychiatry describes "combining the need for hospitalization with a finding of legal incompetence" as one of the major defects in laws governing hospitalization of the mentally ill. It recommends that these two issues should be separated and that psychiatric patients in public and private hospitals should retain "all civil and political rights guaranteed by law unless specifically revoked by individual incompetency proceedings."

"[A] hospitalized patient may be quite capable of handling certain of his own affairs Mental disabilities are of such a variety and degree that any automatic connection between incompetency and hospitalization is without justification. Their merger may result in an unnecessary deprivation of personal and property rights."

The Committee on Legislation and Psychiatric Disorder of the Canadian Mental Health Association also recommended that "competency legislation should be other than and quite separate from legislation dealing with hospitalization of mentally disordered. This principle should hold whether or not the individual is a patient in a psychiatric facility and whether or not he is certified or committed. Their recommendation was based on an empirical investigation of the competency of hospitalized persons."

A total of approximately 1,000 admissions to three Canadian Mental Hospitals, including informal, legal, and certificated admissions, was examined by the treating physicians specifically regarding competency. About 35 per cent of the certificated or legally admitted patients and about 25 per cent of the informal admissions were considered at the time of admission incapable of handling their business affairs. The reasons for inability were not only mental disability, but the effects of physical separation or the urgency of business matters that required attention. One psychiatric hospital which treats only certified acutely ill patients and where the superintendent has discretionary powers to advise on competency has recommended no patient incompetent in the last 1,500 admissions.

GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 49-50 n. 25 (citations omitted).

72. AMERICAN BAR FOUNDATION STUDY, *supra* note 71, at 252-53.

of involuntary commitment.⁷³

Assuming that an elderly ward is institutionalized under any of these possibilities, his detention is likely to be not only indeterminate but permanent. Because of the widely held belief that senility is an incurable disease,⁷⁴ an atmosphere of "therapeutic nihilism" surrounds medical treatment of institutionalized aged persons.⁷⁵ As a result, most institutionalized elderly are doomed to receive only custodial care.

Finally, in addition to the loss of personal and economic rights, the ward bears the stigma of having been judged to be of unsound mind.⁷⁶ The stigma of incompetency has received judicial recognition as a basic interference with fundamental personal rights. In *Dale v. Hahn*,⁷⁷ the Court of Appeals for the Second Circuit discussed the importance of stigmatization in the context of a challenge to New York's *ex parte* procedure for appointing surrogate property managers for those alleged to be mentally incompetent:

73. G. ALEXANDER & T. LEWIN, *supra* note 54, reporting on a two year study of incompetency proceedings, which included a field study of over 600 case files covering a ten year period in New York, found a remarkably high correlation between the finding of incompetency and subsequent involuntary hospitalization.

. . . very few people in the entire population studied who were declared incompetent did not manage to spend at least a portion of their time in a psychiatric ward. The conclusion is obvious. Not only is a person found to be incompetent bound to be deprived of his right to manage his property, but is very likely to lose his liberty in the process.

Reported in *Hearings on Legal Problems Affecting Older Americans Before the Special Comm. on Aging*, U.S. Senate, 91st Cong., 2d Sess. 12 (1970). The Legal Research and Services for the Elderly project, under the auspices of the Legislative Research Center of the University of Michigan Law School and sponsored by the National Council of Senior Citizens, has proposed, in section 5-304(b) of a proposed model probate code, the following language in recognition of this problem: "No individual shall be committed to any mental institution solely because he has been declared incapacitated for the purpose of appointing a guardian under this Act." LEGISLATIVE APPROACHES TO THE PROBLEMS OF THE ELDERLY: A HANDBOOK OF MODEL STATUTES 126 (1971).

74. SENATE COMM. ON AGING, REPORT ON MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. REP. NO. 38-596, 92d Cong., 1st Sess. iii, 126 (1971); see generally *The Geriatric House of Death: Hiding the Dying Elderly in a Mental Hospital*, in AGING AND HUMAN DEVELOPMENT (1970).

75. M. Lawton, *The Philadelphia Story*, in *Research in Mental Health: Utilization for the Aged*, Summary of Proceedings, University of Southern California Ethel Percy Andrus Gerontology Center (April 27-28, 1970).

76. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Supreme Court held that the public classification of an individual as an alcoholic, although only a mark of illness to some, was to others such a stigma and badge of disgrace and infamy that full procedural due process rights to notice and a hearing were required prior to the public posting of such information. In *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), the Court recognized in *dicta* that stigmatization may constitute a deprivation of liberty in the constitutional sense.

77. 44 F.2d 633 (2d Cir. 1971).

Although the plaintiff requests recovery of money alleged to have been illegally spent by the [guardian], any right she may have to the money is not the critical interest sought to be protected. The important ones are, rather, those affected by the declaration that she was incompetent to handle her own affairs. The stigma of incompetency, the implication that she has some kind of mental deficiency, with attendant untrustworthiness and irresponsibility, and the consequences to her reputation and her normal human relationships with others in her community involve more than a property right, and are sufficient to support jurisdiction under § 1343.⁷⁸

B. *The Conduct of Incompetency Proceedings*

The ability of the state to deprive an individual of the fundamental liberty to go unimpeded about the ordinary affairs of life is perhaps the most devastating and far-reaching of its powers. For this reason, in criminal proceedings, the police power is tempered with the strictest of procedural safeguards. In civil incompetency determinations, the same fundamental liberties are at stake, yet such proceedings have traditionally not assured the alleged incompetent the same due process protections against arbitrary and unjustified deprivation of liberty accorded those accused of crime. Indeed, incompetency hearings in most states are held in an atmosphere of such informality that few or none of the procedural safeguards which would assure a fundamentally fair hearing are present. This raises a substantial possibility that proposed wards will be deprived of liberty and property without due process of law.

Incompetency hearings are typically conducted without giving adequate notice to the proposed ward.⁷⁹ There is widespread failure to inform him of the character of the proceedings, the nature and elements of the charges which have been made against him, and the consequences to him of a determination of incompetency.⁸⁰ The incompetency determination is often made by a judge, in the presence only of a third party petitioner and his lawyer, and with the assistance of a physician's letter.⁸¹ The ward himself is usually absent,

78. *Id.* at 636.

79. See pt. III, § C(1) of this article.

80. See pt. III, § C(1) of this article.

81. Empirical study conducted by the National Senior Citizens Law Center, a federally funded legal services back-up center concerned with the legal problems of the elderly poor. The study covered the complete Los Angeles County Central district guardianship and conservatorship filings under CAL. PROB. CODE §§ 1460, *et seq.* and 1701, *et seq.* (West 1956) for a one year period, July 1, 1973 - June 30, 1974, and included an individual examination of 1010 case files. Results of the study showed that in 84.2% of the cases, the only persons present

having been excused in the interests of his own well-being.⁸² In his absence, no lawyer or guardian *ad litem* is generally appointed to inquire into or represent his interests.⁸³ The issue of incompetency is necessarily decided by the judge after arguments from only one side, amidst relaxed rules of evidence which preclude any critical examination of the medical report. The "medical report" is usually a letter from a physician. It often says nothing more than "I have examined the proposed ward and find him to be incompetent."⁸⁴

Although there are minor individual differences between states,⁸⁵ California's statutory procedure is generally representative of the current state of the law with respect to these issues. Accordingly, the specific provisions of California procedure will be used for purposes of illustration while exploring ways in which the particulars of current procedure may be open to legal challenge.

C. *The Procedural Requirements of Due Process of Law*

Although the strictest procedural safeguards are observed in criminal proceedings, there is nothing in either the fifth⁸⁶ or the fourteenth⁸⁷ amendments which limits the applicability of the due process clause to criminal matters. The constitutional requirement that no person shall be deprived of "life, liberty or property without due process of law"⁸⁸ has always been a flexible concept. In civil

at the incompetency hearing were the judge, the petitioner and the petitioner's attorney. The case files indicated that the physician was present to testify in only 1 out of 1010 cases, or about .1% of the time.

Additional results showed that the proposed ward himself petitioned to have a guardian appointed in only 12.2% of the cases studied. Where a third party petitioned for guardianship, the proposed elderly ward was present at the incompetency hearing only 7.8% of the time. Overall, the proposed ward was represented by counsel in only 2.9% of the cases. In the absence of counsel of his own choice, the court appointed an attorney or guardian *ad litem* only once in 1010 cases examined.

80.1% of the proposed wards were over the age of 60, and only 4.4% of the petitions were denied or dismissed for reasons other than the death or disappearance of the proposed ward. [This study is hereinafter cited as National Senior Citizens Law Center Study].

The Missouri procedure provides greater protection for the alleged incompetent, since if neither he nor an attorney appointed by him appears at the proceeding, the court must appoint an attorney to represent him. § 475.075, RSMo 1969.

82. See pt. III, § C(2a) of this article.

83. See pt. II, § C(2b) of this article. *But see* note 81 *supra* for the Missouri provision.

84. National Senior Citizens Law Center Study, *supra* note 79; GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 90.

85. For a state-by-state recitation of statutory procedural provisions, see AMERICAN BAR FOUNDATION STUDY, *supra* note 71.

86. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

87. "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

88. U.S. CONST. amend. XIV.

cases, its requirements have varied according to what was appropriate to the nature of the proceeding. In *In re Ballay*⁸⁹ the court stated:

[D]ue process is flexible and calls for such procedural protections as the particular situation demands. “[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”⁹⁰

1. Notice

The fundamental requisite of due process is the right to be heard.⁹¹ Yet “this right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”⁹² Thus “an elementary and fundamental requirement of due process in any proceeding which is to be given finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁹³ With this language, the Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*,⁹⁴ established the principle that the type of notice adequate to meet the constitutional

89. 482 F.2d 648 (D.C. Cir. 1973).

90. *Id.* at 655, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). See *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958), where the Supreme Court stated that:

the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.

See also *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring):

“[D]ue process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

91. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Grannis v. Ordean*, 234 U.S. 385 (1914).

92. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

93. *Id.*

94. 339 U.S. 306 (1950).

demands of due process can only be determined by reference to the individual circumstances of the proceeding in which notice is to be given. It must be "notice . . . appropriate to the nature of the case."⁹⁵ In this respect, the Court added that "when notice is a person's due, process which is a mere gesture is not due process."⁹⁶

In the case of *Covey v. Town of Somers*,⁹⁷ the question presented was whether notice sent and received by mail was constitutionally sufficient to give notice to an individual who, although she had never been declared mentally incompetent in a legal proceeding, was generally "known to be incompetent" in the community. The case involved the judicial foreclosure of tax liens on real property. In compliance with the New York statute, notice was given by mail, by posting notification at the post office, and by publication in two local newspapers. No answer was filed and a judgment of foreclosure ensued. The basis of the subsequent challenge to the foreclosure judgment was that the notice given was inadequate under the particular circumstances of the case, and therefore violated the due process clause of the fourteenth amendment. The argument on behalf of the town of Somers was that the fourteenth amendment "does not require a state to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer."⁹⁸ To this the Court responded, citing *Mullane*, that the particular type of notice which satisfies the fundamental requirement of due process is that notice which, under all the circumstances, is reasonably calculated to inform interested persons of the proceeding and afford them an opportunity to be heard. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."⁹⁹ The Court held that because the notice in question was given to a "known incompetent" unable to understand the nature of the

95. *Id.* at 313. The *Mullane* case was a civil matter involving the question of whether notice by publication to out-of-state beneficiaries of a trust was sufficient to satisfy the fundamental fairness requirement of procedural due process in a proceeding to settle fiduciary accounts and close the trust. Although the Court noted that constructive notice by publication had often been judicially sanctioned for use in in rem proceedings for nonresident parties, the Court rejected the idea that the classification of the proceedings, as either in rem or in personam was determinative of the type of notice required. The Court held that the sufficiency of the notice is determined not by any characterization of the proceedings, but by whether it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

96. *Id.* at 315.

97. 351 U.S. 141 (1956).

98. *Id.* at 146.

99. *Id.*

proceedings and without a guardian, compliance with the otherwise valid statute did not afford constitutionally adequate notice.¹⁰⁰ While *Covey* involved nothing more than deprivation of a property right, guardianship proceedings typically involve the likelihood that the more fundamental rights of personal liberty and freedom of association, as well as an individual's dignity and self-esteem,¹⁰¹ will be infringed. In light of the fundamentality of the rights involved,¹⁰² the type of notice and its content would seem to warrant strict judicial scrutiny.

In *Lessard v. Schmidt*,¹⁰³ a three-judge federal court dealt with the question of the content of constitutionally adequate notice for one accused of being of unsound mind when a deprivation of liberty is at issue. *Lessard* held, in a civil commitment context, that:

[n]otice of date, time and place is not satisfactory. The patient should be informed of the basis for his detention, his right to jury trial, the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his . . . detention, and the substance of their proposed testimony.¹⁰⁴

Guardianship proceedings in most states are initiated when a

100. *Id.* at 146-47.

101. For a thorough exposition of the impact of incompetency and institutionalization on the individual's self-image, see E. GOFFMAN, *ASYLUMS* 354-56 (1961); SPECIAL SENATE COMMITTEE ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. REP. NO. 38-596, 92d Cong., 1st Sess. 147 (1971):

Attention must be paid to some of the factors in our society which exert a negative influence upon the mental health of older people. The first of these has to do with the generally unfavorable attitudes that are held toward aging and the elderly. The handicaps imposed by nonacceptance and loss of status in a youth-oriented society intensify the psychological, emotional, and social difficulties experienced by older individuals. Clarks and Anderson have pointed out the difficult task in adaptation faced by the aging in our society because of the fact that the role of the older individual is ill-defined and ambiguous. Faced with declining physical ability, having lost the status and sense of value that productive employment has provided, having experienced the dissolution of his family structure as children drift away in our mobile society, the older person often is faced with an identity crisis because he has lost the characteristics which are most important to his sense of personal identity and integrity. In a society in which productivity, physical prowess and beauty, and social acceptability are all qualities that are highly valued, it is not surprising that the older individual often begins to doubt his own personal worth, to become certain of his unacceptability to others and literally to "give up."

102. *Cf. Humphrey v. Cady*, 405 U.S. 504 (1972); *Dale v. Hahn*, 440 F.2d 633, 638 (2d Cir. 1971).

103. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, 94 S. Ct. 713 (1974), *amended opinion*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 95 S. Ct. 1943 (1975).

104. 349 F. Supp. at 1092.

petition alleging the proposed ward to be incompetent to manage his personal and/or financial affairs is filed in court by a relative, a friend, or any other interested person,¹⁰⁵ including the public guardian's office. A copy of the petition, along with a citation directing him to appear at the hearing, is then personally served upon the proposed ward.¹⁰⁶ In California, the petition recites the name, age, residence and closest living relative of the alleged incompetent, states that "the incompetent is a resident of this county,"¹⁰⁷ lists the assets of the alleged incompetent and, in a preprinted statement, alleges the statutory requirement:

By reason of old age, disease, weakness of mind and disability, the incompetent is unable, unassisted, to properly manage and take care of his person and property and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.¹⁰⁸

No specific facts which might link the proposed ward to incompetency are contained in the petition.

The citation¹⁰⁹ merely states that the recipient is "hereby cited and required to appear before the judge of this court . . . [date, time and place] then and there to show cause, if any, why you should not be adjudged an incompetent person, and why [petitioner] should not be appointed guardian of your person and estate according to the petition on file."¹¹⁰

This kind of notice does little to convey to the alleged incompetent what is at stake for him or what rights he has if he wishes to defend himself. There is nothing in either the petition or the citation to inform the proposed ward of the gravity of the charge made against him or of the consequences of a determination of incompetency. He is not put on notice that he will need an attorney to

105. Nine states allow the proposed ward to bring his own petition naming the guardian of his choice. California provides for this alternative in its procedure for conservatorship. CAL. PROB. CODE § 1754 (West 1973).

106. In this respect, the California procedure is better than most. Many states allow the notice to be sent by mail to the alleged incompetent and some allow notice to be left at his place of residence with a responsible person (substituted service). See, e.g., IND. CODE § 29-1-1-12 (1973). Missouri requires only that the alleged incompetent be notified by "written notice." § 475.075, RSMo 1969.

107. "Petition for Appointment of Guardian (Incompetent)," form used by Public Guardian's Office in Los Angeles County. The Missouri form is set out in § 475.060, RSMo 1969.

108. *Id.* The requirements in Missouri are that the alleged incompetent be "incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, . . . of managing his property or caring for himself or both." § 475.060(9), RSMo 1969.

109. "Citation Re Appointment of Guardian," form No. 228, Los Angeles County.

110. *Id.*

present an effective defense or, indeed, that a hearing is to be held at which he will have an opportunity to present evidence in his own behalf and to cross-examine witnesses testifying against him. He is not informed of his right to a jury trial, or of his right to appointed counsel if he cannot afford one. There is no information about who will have the burden of proof at the hearing or what the standard of proof is to be. Moreover, there is no specific delineation of the legal standard upon which incompetency is to be judged. In short, this "notice" does not seem reasonably calculated under all the circumstances to apprise the proposed ward of the nature of the charges in order to afford him a real opportunity to present his objections. In the language of *Mullane*, the process served is only "a mere gesture" toward conveying a meaningful opportunity to be heard.

2. The Hearing

The United States Supreme Court has made it clear that "when the constitution requires a hearing, it requires a fair one,"¹¹¹ "granted . . . in a meaningful manner."¹¹²

a. Presence of the Alleged Incompetent

Incompetency proceedings in most jurisdictions resemble *ex parte* administrative determinations more than they resemble adversary hearings.¹¹³ Although most jurisdictions require that the alleged incompetent be present for the hearing, 45 states and the District of Columbia allow the court to dispense with that requirement if the "best interests" of the alleged incompetent would be served thereby.¹¹⁴ California's guardianship statute is typical in this regard. It requires that the alleged incompetent be produced at the hearing. At the same time his presence is "required," his absence is excused "if he is not able to attend by reason of physical inability or by reason that the presence of such person in court would retard or impair the recovery of such person or would increase his mental debility. . . . [S]uch inability or harmful effect must be evidenced by the affidavit or certificate of a duly licensed medical practitioner. . . ."¹¹⁵

111. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

112. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

113. G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 25 (1972).

114. AMERICAN BAR FOUNDATION STUDY, *supra* note 71, at 280 (Table 8.3).

115. CAL. PROB. CODE § 1461 (West 1961).

This provision, and others like it, exposes the entire procedure to abuse in that the moving party may procure the absence of the alleged incompetent by submitting a doctor's letter (often readily available from the physician testifying as to incompetency) to the effect that such an appearance would be emotionally harmful to the proposed ward. The likelihood of such an eventuality is increased because a substantial body of medical opinion objects to exposing those allegedly of unsound mind to the rigors of an adversary hearing because of the resultant "traumatic shock."¹¹⁶

As a result, the alleged incompetent is seldom present for the hearing which determines his competency.¹¹⁷ The absence of the proposed ward is consistent with the fact that most hearings turn on medical conclusions instead of factual determinations about functional abilities.¹¹⁸ The usual practice is for the hearing to be

116. *Hearings on S. 935, A Bill to Protect the Constitutional Rights of Certain Individuals Who are Mentally Ill, To Provide for Their Care, Treatment, and Hospitalization and for Other Purposes, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 61-62, 217-18 (1963).* In *In re Ballay*, 482 F.2d 648, 663 (D.C. Cir. 1973) the court acknowledged that:

Many medical experts are of the view that substantial procedural safeguards may be detrimental to the patient. Merely being subjected to the hearing, they argue, is a traumatic experience that may aggravate the condition of certain mental illnesses. The time involved in the procedures impedes and delays treatment. Finally, a full adversary proceeding similar to a criminal trial forces many to believe they are being incarcerated and stigmatized rather than hospitalized.

(Footnote omitted). The presence of the ward at the incompetency hearing is said to be not only unnecessary, but undesirable "because it does . . . violence to his peace of mind." M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 332-33 (1952); "To allow a person due process and an adequate means to defend himself are considered in the medical model 'detrimental to his health,' and 'hard on the patient.'" Turner & Carr, *Towards an Enlightened Commitment Law*, in *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2nd Sess. 415 (1969-70)*. On the other hand, it may be at least as upsetting to be involuntarily confined or deprived of one's lifelong savings after being declared incompetent at a hearing about which one had no knowledge.

117. G. ALEXANDER & T. LEWIN, *supra* note 113, at 25. The National Senior Citizens Law Center Study, *supra* note 81, found that where there was a third party petitioner, the proposed ward was present at the hearing in only 7.8% of the cases studied.

Presence of the "incompetent" at the hearing which is to determine whether or not a guardian should be appointed may or may not be required (the right to be present is probably universally recognized), but in actual practice seldom if ever, is the person actually present The casualness with which such matters are sometimes treated, is illustrated by the fact that. . . . [California] case records revealed use of the "physical inability to attend" certificate in circumstances which indicated that *physical* inability could not possibly have been the reason for failure to attend [Yet] inquiry as to why the prospective ward was not present never took place. One court official reported that the authorities relied on the "good faith" of those filing the certificates—the petitioner's attorney ordinarily.

GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 83-84.

118. G. ALEXANDER & T. LEWIN, *supra* note 113, reporting on a two-year study of incom-

conducted in the presence of the judge, the petitioner, and the petitioner's lawyer.¹¹⁹

When the defects in notice already described are combined with the absence of the proposed ward and the lack of representation by counsel,¹²⁰ guardianship becomes a substantially *ex parte* procedure in which the court of necessity makes its decision solely on the basis of evidence submitted by the petitioner.

The *ex parte* nature of the proceeding has been defended on the ground that since the state's power as *parens patriae* is being invoked, the only issue before the court is the "best interests" of the alleged incompetent. Since no other competing interests are officially recognized, there is no need for an adversary hearing. These arguments fail to consider the fact that although informal determinations and *ex parte* procedures have been justified in some civil proceedings,¹²¹ relaxed standards of procedural due process have been called into serious question where the stakes for individuals include fundamental rights and liberties. Mr. Justice Frankfurter made this clear in *Joint Anti-Fascist Refugee Committee v. McGrath*.¹²²

petency hearings which included an exhaustive field study of over 600 cases covering a ten-year period in New York, as well as a nation-wide information-gathering and case analysis project dedicated to identifying current practice in incompetency hearings and the impact of this practice upon the aged, state that:

In practice the medical standard becomes the primary, if not the sole, basis for adjudicating incompetency. No specific inquiry is made into the way the particular aberrational condition affects the subject's ability to manage his financial resources. . . . [and] Not one transcript examined nor medical report studied revealed any attempt by the physician to detail the manner in which the patient's capacity to manage his estate had been affected by the underlying condition.

There is . . . a medical definition which often becomes the sole factor in adjudicating incompetency. When this occurs, the determination of incompetency is abrogated from the judiciary to the medical profession. Worse, the psychiatric determination is usually stated in conclusionary terms based more frequently on medical or psychiatric symptoms than upon how much in fact these symptoms affect the person's legal status and ability to manage property.

Id. at 15.

119. G. ALEXANDER & T. LEWIN, *supra* note 113, at 25.

120. See pt. III, § C (2b) of this article.

121. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 94 S. Ct. 1895 (1974), which held that the due process clause permits *ex parte* seizure of installment sales contract property by the sheriff on behalf of the lien holder without notice to the debtor or an opportunity for a hearing, pending a trial on the merits of the conflicting claims to possession of the property. "[W]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Id.* at ___, 94 S.Ct. at 1904; *but see Fuentes v. Shevin*, 407 U.S. 67 (1972).

122. 341 U.S. 123 (1951).

The heart of the matter is that democracy implies respect for the elementary rights of men . . . a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.¹²³

*Barry v. Hall*¹²⁴ involved a suit to invalidate the *ex parte* commitment of an individual alleged to be of unsound mind. The court held that when a civil commitment hearing is involved, “. . . a mere *ex parte* proceeding — has no proper place in a court of justice. It is a nullity and void as affecting those not parties to it.”¹²⁵

And in *Heryford v. Parker*¹²⁶ another involuntary commitment case, the court stated:

It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble minded or mental incompetent — which commands observance of the constitutional safeguards of due process.¹²⁷

b. Representation of the Alleged Incompetent by Appointed Counsel or Guardian *Ad Litem*

Although all jurisdictions permit an attorney to be present if a person for whom a guardianship is sought retains one at his own expense prior to the hearing, very few notify him of this right.¹²⁸ The more important question, however, is whether the state will assure legal representation to the indigent, to those otherwise unable or unwilling to retain private counsel, or on behalf of those persons whose appearance at the hearing is dispensed with.

Twenty states make no provision whatsoever with respect to appointment of a lawyer or guardian *ad litem*.¹²⁹ In most of the

123. *Id.* at 170 (Frankfurter, J., concurring).

124. 98 F.2d 222 (D.C. Cir. 1938).

125. *Id.* at 226. See 41 AM. JUR. 2d *Incompetent Persons* § 15 (1968) at 554 where it is stated that:

As a general rule, one against whom proceedings have been brought to adjudge him insane or incompetent to manage his property is entitled to a hearing as of right. He has the right to appear and defend, and to produce evidence in refutation of the statements made in the petition or information.

126. 396 F.2d 393 (10th Cir. 1968).

127. *Id.* at 396.

128. GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 85. Missouri requires that the alleged incompetent has the right to be assisted by counsel. § 475.075(2), RSMo 1969.

129. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 280-88 (Table 8.3)(rev. ed. 1971). A guardian *ad litem* may or may not be a lawyer, and he serves as an officer of the court, typically to represent the interests of infants or mental incompetents during the course of litigation which affects their interests. Serious questions have been raised

remaining states, statutory provisions say nothing about appointed counsel and allow the courts a great deal of discretion in appointing a guardian *ad litem*.¹³⁰ In practice, the alleged incompetent is almost never represented by counsel or guardian *ad litem* at the hearing.¹³¹ Because the alleged incompetent himself is seldom present, the "hearing" most often consists of a one-sided conference between the judge, the petitioner, and the petitioner's lawyer¹³² in which the interests of the alleged incompetent go entirely without representation.

The sixth amendment to the United States Constitution provides that in all criminal prosecutions the accused shall have the right to be represented by appointed counsel.¹³³ An incompetency adjudication is, of course, a civil and not a criminal matter. However, the Supreme Court has extended the sixth amendment right to counsel to civil matters which are remarkably similar in their incidents and effects to guardianship proceedings.

In *In re Gault*,¹³⁴ the Court confronted the question of whether the right to appointed counsel, as well as other fourteenth amendment procedural due process protections, applied to juvenile delin-

about the effectiveness of the guardian *ad litem* in escaping his role as officer of the court in order to act as an aggressive advocate on behalf of his client. GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 87-89. See Cohen, *The Function of the Attorney in the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966); Comment, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 51-60 (1971); Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOYOLA L. REV. 131 n. 246 (1974).

In Missouri the court must appoint an attorney to represent the alleged incompetent if no attorney appears at the alleged incompetent's request. § 475.075(3), RSMo 1969.

130. AMERICAN BAR FOUNDATION STUDY, *supra* note 127, at 280-88 (Table 8.3).

131. The Syracuse University study reported by Alexander and Lewin, *supra* note 45, showed that in only 16.4% of the cases studied was a guardian *ad litem* appointed to represent the interests of the alleged incompetent. *Id.* at 25. In the National Senior Citizens Law Center Study, *supra* note 74, it was found that in only .1% of the cases was the proposed ward represented by appointed counsel or guardian *ad litem*. Because of the failure to separate the conflicting interests involved in such a proceeding, the attorney hired by the petitioner is often said to represent the interests of the proposed ward as well. In fact, their interests may be diametrically opposed. G. ALEXANDER & T. LEWIN, *supra* note 113, at 1-5.

132. [T]he only persons to take an active role in the decision-making process—the incompetency hearing—are the petitioner and his lawyer. Since they frequently have a self-interest in the disposition or management of the incompetent's estate, they can hardly be looked to as providing any meaningful safeguard to improper adjudication of incompetency.

G. ALEXANDER & T. LEWIN, *supra* note 113, at 25.

133. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This provision is applicable to the states through the fourteenth amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

134. 387 U.S. 1 (1967).

quency proceedings, long considered to be "civil matters" for purposes of the sixth amendment right to counsel. The Court in *Gault* stated that it is not the characterization of the proceedings, but what is at stake for the individual, which determines whether constitutional guarantees normally applicable only in criminal matters apply.

A proceeding where the issue is whether a child will be found to be 'delinquent' and subjected to the loss of his liberty . . . is comparable in seriousness to a felony prosecution¹³⁵

The Court emphasized that ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . without effective assistance of counsel" ¹³⁶ In juvenile proceedings, as in the incompetency hearing, the idea of a proceeding conducted in the "best interests" of the ward has long shielded it from the normal procedural requisites of an adversary hearing.¹³⁷ The "civil" label has hidden the tremendous stakes involved for the ward in terms of loss of personal freedom and stigmatization, whether it be as "delinquent" or "incompetent." In the context of a discussion about the applicability of the privilege against self-incrimination, the *Gault* Court refused to be persuaded by:

the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."¹³⁸

The *Gault* holding made almost all the criminal procedural due process safeguards¹³⁹ applicable to juvenile proceedings. In so doing, the Court gave effect to its earlier warning that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."¹⁴⁰

135. *Id.* at 36.

136. *Id.* at 30.

137. Mr. Justice Fortas, speaking for the Court in *Gault*, stated that:

[T]he results [in juvenile proceedings] were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. . . .

Id. at 16.

138. *Id.* at 26.

139. These newly applicable procedural rights included notice which sets forth the alleged misconduct with particularity and which is given sufficiently in advance of the scheduled proceeding to allow reasonable opportunity to prepare, the right to appointed counsel and adequate notice of that right, and the privilege against self-incrimination. *Id.* at 30.

140. *Kent v. United States*, 383 U.S. 541, 555 (1966). See *In re Winship*, 397 U.S. 358 (1970).

The idea that a finding of incompetency brings beneficial rather than harmful results has perhaps been even more pernicious in the guardianship than in the juvenile area. The doctrine of *parens patriae*, the concept of "protective services" and the facade of "best interests" have been used to justify procedural informality, failure to apply criminal evidence rules, failure to appoint counsel, and a "civil label-of-convenience" all of which have served to conceal the competing interests involved.¹⁴¹ Alexander and Lewin,¹⁴² prominent commentators on the subject of protective services for the elderly, have argued that:

[T]his kind of intervention is a basic deprivation of a right of an individual to self-determination. It is important to recognize that however benevolent the intention of those who would seek to substitute other decision-makers for the aged, persons deprived of the right to decide for themselves will have lost the fairly basic attribute of citizenship. Consequently, it seems more appropriate to view the question of how the law should intervene not as a question of maximizing benefit to the potential ward but of reducing to a minimum the deprivation of that person's rights.¹⁴³

141. An elderly individual, having collected considerable funds over a lifetime of savings, may begin to show signs of senility, the inevitable deterioration of old age, as well as a change in consumption patterns. Relatives interested in receiving inheritances may then be able to secure their expectations of inheritance by obtaining the imposition of involuntary guardianship, curtailing the aged's ability to spend what he has amassed. The effectiveness of guardianship for their purposes of estate conservation is enhanced by procedures which favor family interests and offer little real protection to the individual seeking to avoid the imposition of guardianship upon himself.

Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly the Freedom to Spend?*, 73 YALE L.J. 676, 677 (1964).

142. G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* (1972).

143. *Id.* at 2. Alexander and Lewin continue their argument as follows:

From this perspective, one might better ask in whose interest is a surrogate manager of property appointed? There is one sense in which the notion that the surrogate is imposed on an individual solely in his own interests is probably sound. It is doubtless true that courts could find property managers for most people who, because of superior experience and skill, would better manage the property than their wards. This is merely a specific application of the fact that there are usually people of greater skill and capacity than any given person. Without even considering whether the legal process is perfect enough to substitute a better decision maker in most cases, about which we could have some doubt, it is easy to reject the notion of benefit to a person occasioned by providing such paternalistic oversight. A person may, of course, always voluntarily obtain a skilled manager for his property; if one is involuntarily imposed on him, one should be skeptical of the benefit of such appointment to the potential ward. Especially in the case of the aged, one can reject the facile answer often given in other cases that a surrogate can preserve property

In the context of criminal proceedings, the United States Supreme Court has repeatedly defined a "meaningful hearing" so as to require assistance of counsel. "The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel," so that "the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process."¹⁴⁴

In *Gideon v. Wainwright*,¹⁴⁵ the Court declared that the right to appointed counsel is so fundamental to the American scheme of justice as to be incorporated into the due process clause of the fourteenth amendment and is thus binding upon the states.

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel

which his ward will later be able to use. To the extent that conditions of the aged are likely to be the result of general deterioration of mental processes, it seems unlikely that the property management function will often revert to the ward. Although his wealth may increase, unless he retains the power to spend his money to maximize his own enjoyment, the ward's affluence would hardly seem likely to be perceived by him as a benefit. . . .

Id. at 2-3.

Elsewhere, Alexander and Lewin note another important point:

Obviously . . . the ward is not the only person concerned with the maintenance of his wealth. Those who are potential beneficiaries of the ward's affluence take a natural interest in its waste; the state has an interest in preventing its citizens from so reducing their financial integrity as to become public charges. What is important about these interests is that they are adverse to the interest of the ward. The present process, with its focus on benefit to the ward, inadequately and inarticulately deals with such interests. In consequence, beneficiaries find themselves in the cynical position of being forced to plead in court for surrogate management premised on benefit to the object of the proceeding rather than, candidly, benefit to themselves. . . . Unfortunately, when the underlying self-interest of the petitioner is probed he appears in a very bad light in such court proceedings. Equally unfortunate, when this issue is not explored, potential beneficiaries may be awarded an interest in the ward's property which the court would find untenable were it determined from the perspective of protecting the beneficiaries' interests rather than the ward's. A better procedure would be to attempt legislatively to identify legitimate interests of others and to protect them expressly in law rather than to protect them circuitously through incompetency proceedings. . . .

. . . .

Recasting the problem of surrogate management in adversary terms leads to one other important result. The self-interest of the surrogate manager becomes a problem of moment. At present, the law prefers near relatives to strangers as surrogate managers. Yet near relatives are most likely to have their own financial expectations in their ward's estate and thus be driven by duty to their ward and [by] self-interest in opposite directions. Any authorized expenditure reduces their own potential inheritance. . . .

Id. at 3-4.

144. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

145. 372 U.S. 335 (1963).

is provided for him. This seems to be an obvious truth.¹⁴⁶

In the more recent case of *Argersinger v. Hamlin*,¹⁴⁷ the Court substantially expanded the situations under which a right to appointed counsel is constitutionally required. Although *Argersinger* involved a criminal code misdemeanor, the Court did not expand the right to counsel in *Argersinger* on the basis of the classification of the offense as misdemeanor or felony. Whether the case involved a traffic ticket or a felony, what was determinative was whether the individual stood to lose his liberty as a result of the proceeding. In its holding, the Court declared itself to be in agreement with the Supreme Court of Oregon in *Stevenson v. Holzman*:¹⁴⁸ "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel. . . ." ¹⁴⁹ This same theme has been prevalent in civil cases which have expanded the right to appointed counsel. In *Denton v. Commonwealth*,¹⁵⁰ the court stated:

Although lunacy inquests are not concerned with criminal acts they may result in depriving the defendant of his liberty and his property. This deprivation should be obtained only by the due process of law under constitutional guarantees.

We have therefore concluded that when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution.¹⁵¹

In *Heryford v. Parker*,¹⁵² application was made by a mother to have her minor child committed to a state school for the feeble-minded. The Wyoming procedure provided that a hearing be held on such an application but that the defendant's presence could be dispensed with if, in the judge's opinion, an appearance would be injurious to him. The statute further provided for appointment of a guardian *ad litem* to represent the minor, but only if he had no parent or guardian. Present at the hearing were the prosecuting attorney, the mother, and the certifying psychologist. At no time during the hearing was the minor represented by retained or appointed counsel, nor was he represented by a court-appointed guardian *ad litem*. A habeas corpus petition was later brought alleg-

146. *Id.* at 344.

147. 407 U.S. 25 (1972).

148. 254 Ore. 94, 458 P.2d 414 (1969).

149. 407 U.S. 37-38.

150. 383 S.W.2d 681 (Ky. 1964).

151. *Id.* at 682 (citations omitted).

152. 396 F.2d 393 (10th Cir. 1968).

ing that the minor had been constitutionally entitled to assistance of counsel at the hearing. The state asserted that the standards for due process erected in *Gault* were not required because "*Gault* was concerned with correction or rehabilitation of juveniles, while our proceedings are concerned solely with civil commitment for teaching and training the mentally deficient."¹⁵³ In his opinion, Chief Judge Murrah compared the situation of an alleged mental incompetent to the juvenile delinquency procedure involved in *Gault*:¹⁵⁴

[L]ike *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to [have] the guiding hand of legal counsel at every step of the proceedings¹⁵⁵

The cumulative effect of these decisions is to establish clearly that labeling a procedure as "civil" will not justify a denial of due process to those whose liberty may be curtailed or forfeited by the "civil process." Because of the deprivation of individual liberty inherent in the nature of guardianship,¹⁵⁶ the same "reason and reflection" which led the Court to deem counsel essential to a fair trial in *Gideon v. Wainwright*,¹⁵⁷ would forcibly suggest that counsel is essential to the guarantee of due process in guardianship hearings as well. As the Court in *Powell v. Alabama* stated:

Even the intelligent and educated layman has small and sometimes no skill in the science of law He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that

153. *Id.* at 395.

154. 387 U.S. 1 (1967).

155. *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

156. See pt. III, § A of this article.

157. 372 U.S. 335 (1963).

be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.¹⁵⁸

Finally, the indispensability of legal counsel in civil commitment proceedings has been empirically documented. An Ohio civil commitment study has shown a high correlation "between the presence of legal counsel and the decision not to hospitalize the patient."¹⁵⁹

c. Trial by Jury

Most jurisdictions recognize the right to jury trial on the issue of competency either in case law¹⁶⁰ or by statute.¹⁶¹ However, because the alleged incompetent so seldom has the assistance of counsel, the right to a jury trial, even where provided by statute, is somewhat illusory, and in actual practice jury trials very rarely occur.¹⁶²

The Supreme Court has held, in *McKeiver v. Pennsylvania*,¹⁶³ that a jury trial is not essential to a fundamentally fair hearing in juvenile delinquency proceedings. *McKeiver*, however, is arguably inapplicable to guardianship matters. The need for a jury trial is greater in incompetency proceedings because the trier of fact is called upon to decide what behavior constitutes incapacity to care for one's self or one's property. Since such a judgment is normatively based, a jury of laymen applying prevailing community standards is almost indispensable to assure a fair hearing.

In those states which acknowledge a right to jury trial in civil involuntary commitment proceedings, but not in incompetency proceedings, an equal protection argument can be made in the following manner: the prospective mental patient and the prospective ward are similarly situated in terms of the fundamental rights at stake, since both face involuntary confinement; if the state fails to show a compelling purpose behind such a distinction, then it is an arbitrary one.¹⁶⁴

158. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

159. Wenger & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. OF HEALTH & SOC. BEHAVIOR 66, 69 (1969). See also Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 438 (1971).

160. GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 84. In California, for instance, the right has been developed through case law. *LeJeune v. Superior Court*, 218 Cal. App. 2d 696, 32 Cal. Rptr. 390 (1963).

161. AMERICAN BAR FOUNDATION STUDY, *supra* note 127, at 280-88 (Table 8.3).

162. GEORGE WASHINGTON UNIVERSITY MENTAL COMPETENCY STUDY, *supra* note 49, at 84.

163. 403 U.S. 528 (1971).

164. This argument has been given some moment by *Baxstrom v. Herold*, 383 U.S. 107

d. The Exclusion of Hearsay Evidence

In guardianship incompetency hearings, hearsay evidence is frequently admitted in the form of letters from physicians. The doctor will certify that the potential ward's attendance at the hearing would be detrimental or he will certify that the proposed ward is "incompetent," "insane," or "unable to care for himself." The problem with this, as previously noted,¹⁶⁵ is that although incompetency is theoretically a legal disability which should be measured by *functional inabilities* (to care for oneself, manage money, etc.), it has become largely a medical disability measured in medical terms. As a result, a physician's expert medical opinion as to the potential ward's mental incompetency is more often than not determinative of the legal issue as well.¹⁶⁶

(1966), and by a recent California Supreme Court case, *In re W.*, 5 Cal. 3d 296, 486 P.2d 1201 (1971). On equal protection grounds the court held, citing *Baxstrom*, that since the state's involuntary mental commitment law extended the right to jury trial to persons subject to confinement in a state mental hospital, the same right could not be denied to persons subject to other civil procedures leading to other types of involuntary confinement.

The right to a jury trial in an action which may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is . . . fundamental. Its fundamental nature is reflected by the absolute right to jury trial accorded by the Sixth and Seventh Amendments to the United States Constitution and by article I, section 7 of the California Constitution in all criminal trials and in those civil actions in which such a right was available at common law. . . . [In *Duncan v. Louisiana*, 391 U.S. 145 (1968)], the court recognized that "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government" and that "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (391 U.S. at 155-56) To the person who is threatened with involuntary confinement, these considerations are equally important whether the threat of confinement originates in a civil action or a criminal prosecution.

In extending the right to trial by jury to other classes of persons subject to civil commitment proceedings, the California Legislature has recognized that the interests involved in civil commitment proceedings are no less . . . precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction. We conclude that in the absence of a compelling state purpose for the distinction between the class of persons subject to commitment . . . and to other classes of persons subject to involuntary confinement, the right to jury trial is a requirement of both due process of law and equal protection of the law.

Id. at 307.

165. See pt. II, § C of this article.

166. Alexander & Lewin, in the Syracuse University field study of incompetency hearings, *supra* note 143, report that:

The legal definition is [a] vague [one]. . . . In an effort to determine if the legal standard as expressed in the statute and in case decisions was altered in practice, the research team examined court and medical records and interviewed numerous participants in the process. We learned that the local courts have not devised any standard or specific legal test of incompetency beyond that enumerated in the statute. Although the issue of competency is treated as one of fact, the courts too

Because the medical judgment is so often dispositive of the issue before the court, the opportunity to confront and cross-examine that physician is essential if the alleged incompetent is to be accorded a fair hearing. To admit hearsay evidence of an opinion dispositive of the ultimate issue may be to deny the proposed ward the procedural due process protection guaranteed by the fourteenth amendment.

In *Lessard v. Schmidt*,¹⁶⁷ a three-judge federal court recently held that the admission of hearsay evidence in a civil commitment proceeding where an individual's liberty was at stake violates the individual's constitutional rights, and cited *In re Gault*¹⁶⁸ for the proposition that the admission of hearsay evidence is constitutionally suspect even in a civil proceeding if fundamental rights are at stake.¹⁶⁹

Where standard exclusionary rules forbid the admission of evidence, no sound policy reasons exist for admitting such evidence in an involuntary mental commitment hearing. Indeed, as noted throughout this opinion, the seriousness of the deprivation of liberty and the consequences which follow an adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual's liberty is in jeopardy. As Justice Brandeis noted in an often quoted statement: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent

often accepted medical generalities and did not consistently compel the parties to prove the extent to which the incompetent's management and executive functions were impaired. . . . [C]onsequently, triers of fact tend to be somewhat mesmerized by the testimony of experts with medical training

. . . .
The question of incompetence from an estate management standpoint is a legal one. . . . In theory medical testimony should be useful only to identify the underlying causes of the "legal condition" or, if possible, to etiologically explain how the physical and mental condition operates to impair estate management ability. Both nationally and in New York physicians are called upon to perform the first function—that is, to label the underlying physical or mental condition. They are not, however, properly used to explain the causative factors behind the illness or disabling condition. On the contrary, they either give descriptions of the illness, leaving the judiciary to work out a determination of competency, or (more improperly) substitute their judgement for the law on the question of competency by labeling the underlying condition and then testifying in conclusionary terms as to whether in their opinion the subject is or is not competent to manage his affairs.

Id. at 16, 18.

167. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, ___ U.S. ___, 94 S. Ct. 713 (1974), *amended opinion*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 95 S. Ct. 1943 (1975).

168. 387 U.S. 1 (1967).

169. *Id.* at 11 n. 7.

. . . the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."¹⁷⁰

e. Proof Beyond a Reasonable Doubt

Because the guardianship hearing is invariably treated as a civil proceeding, current state statutes permit judges to make a finding of incompetency upon a mere preponderance of the evidence.¹⁷¹ The United States Supreme Court has held, in *In re Winship*,¹⁷² that proof beyond a reasonable doubt is required to prove every fact necessary in juvenile delinquency proceedings, noting that proof beyond a reasonable doubt "is a prime instrument for reducing the risk of convictions resting on factual error."¹⁷³ "[E]xtreme caution in fact-finding," is necessary, the Court emphasized, because of "the possibility that [the individual] may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."¹⁷⁴ In *Winship*, the Court announced what had been implicit in *Gault*,¹⁷⁵ that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards"¹⁷⁶

The Court in *Winship* reached its conclusion despite its finding that an adjudication of delinquency did not deprive the juvenile of his civil rights and that such proceedings were confidential. In *Lessard v. Schmidt*,¹⁷⁷ the court noted the *Winship* findings¹⁷⁸ in requiring proof beyond a reasonable doubt in civil commitment proceedings:

The argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. We therefore hold that the state must prove beyond a reasonable doubt all facts necessary

170. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1303, quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

171. In many states, the statutory language fails to specify any standard at all. See, e.g., CAL. PROB. CODE § 1751 (West 1972) which allows a conservator to be appointed for the person and/or property of a ward if the court is "satisfied by sufficient evidence of the need therefor."

172. 397 U.S. 358 (1970).

173. *Id.* at 363.

174. *Id.* at 365.

175. 387 U.S. 1 (1967).

176. *In re Winship*, 397 U.S. 358, 365-66 (1970).

177. 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded for a more specific injunctive order, ___ U.S. ___, 94 S. Ct. 713 (1974), amended opinion, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 95 S. Ct. 1943 (1975).

178. *Id.* at 1095.

to show that an individual is mentally ill . . .¹⁷⁹

Affirming that proof beyond a reasonable doubt is the required standard in the civil commitment context, the court in *In re Ballay*¹⁸⁰ emphasized that the "preponderance of the evidence" standard could be justified in those civil cases "where the stakes are frequently economic and where 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.'" ¹⁸¹

"On the other hand," the court pointed out, "where the various interests of society are pitted against restrictions on the liberty of the individual,"¹⁸² where the consequences of mistaken commitment are so drastic,¹⁸³ and where the very nature of the evidence presented involves vague, shifting and subjectively defined terms such as "mental illness,"¹⁸⁴ a more demanding standard of proof is required.¹⁸⁵

Guardianship proceedings involve individual rights and interests no less fundamental than those involved in juvenile and civil commitment proceedings. The threat of involuntary confinement,¹⁸⁶ the loss of civil rights,¹⁸⁷ the stigma of incompetency,¹⁸⁸ the indeterminate nature of the adjudication,¹⁸⁹ the uncertain and subjective

179. *Id.*

180. 482 F.2d 648 (D.C. Cir. 1973).

181. *Id.* at 663, citing *In re Winship*, 397 U.S. 358, 371 (1970).

182. *Id.* at 662.

183. [W]e reiterate that our concern is with possible involuntary hospitalization of an individual who is not mentally ill. . . . The mental condition of one whose mind is so deranged as to require imprisonment for his own and others' good is indeed pitiable. But the mental attitude of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law.

Id. at 664 (footnotes omitted).

184. One does not have to echo the skepticism uttered by Brian, C.J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time.

Id. at 664, citing *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

185. "While a more rigorous standard of proof may not allay infirmities in substantive statutory elements it certainly may . . . partially offset them by reducing the risk of factual error." 482 F.2d at 667.

186. See pt. III, § A of this article.

187. See pt. III, § A of this article.

188. See pt. III, § A of this article.

189. See pt. III, § A of this article.

content of the "incompetency" label,¹⁹⁰ and the enormous consequences of an error in fact finding, all compel the conclusion that the only appropriate standard of proof in such a proceeding is proof beyond a reasonable doubt.

f. A Limited Definition of Incompetency

When fundamental rights are at stake, one who is potentially liable to lose those rights cannot be forced to guess at the meaning and content of the behavior which the law describes.¹⁹¹ Statutory language is constitutionally "void for vagueness"¹⁹² if the description of the conduct that will invoke the legal sanction is so indefinite as to fail to give fair warning of what particular behavior will subject the individual to a loss of rights.¹⁹³ Statutes are also open to attack for vagueness if they fail to provide adequate standards for adjudication.

The primary issues involved are whether the provisions of a . . . statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.¹⁹⁴

Most statutes providing for guardianship proceedings list a number of medical problems, any one of which will serve as the triggering event for a judicial inquiry as to mental incompetency.

190. See pt. I, § F of this article.

191. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-70 (1972). This is so whether the case arises from a civil or criminal context.

While the doctrine of vagueness has been employed primarily in cases challenging criminal statutes, civil sanctions have also been struck down when authorized by overly vague statutes. Moreover, even when the state as *parens patriae* has imposed a deprivation in an effort to further the best interests of the individual, the requirement of clear statutory standards has been held to apply.

Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1253-54 (1974) (footnotes omitted).

192. The doctrines of statutory overbreadth and vagueness overlap considerably. They are often referred to in the aggregate as "the vagueness doctrine." Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U.P.A. L. REV. 67 (1960). Other authorities use "vagueness" to refer to statutory indefiniteness which causes procedural due process problems, and "overbreadth" to refer to statutory indefiniteness which raises substantive due process problems. *Landry v. Daley*, 280 F. Supp. 938, 951 (D.C. Ill. 1968). The latter approach will be adopted for purposes of this article; overbreadth will be discussed in part IV, § A of this article.

193. *Landry v. Daley*, 280 F. Supp. 938 (D.C. Ill. 1968); Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1253-58 (1974).

194. *Landry v. Daley*, 280 F. Supp. 938, 951 (D.C. Ill. 1968) (footnotes omitted).

These include illness, injury, chronic alcoholism, drug addiction, mental weakness, and old age.¹⁹⁵

(a) Fair Notice

Fair notice is not a compelling problem for purposes of statutory vagueness in guardianship legislation because incompetency is currently used as a shorthand expression for a condition or status into which persons enter involuntarily. Since the condition is not a product of the proposed ward's volition, adequate notice of the exact nature of the condition would be to no purpose. Similarly, although the widespread use of old age as a determinant of mental incompetency would seem to raise serious constitutional problems of overbreadth,¹⁹⁶ since old age is unavoidable, fair warning is not a relevant consideration.¹⁹⁷

(b) Standards for Adjudication

For guardianship purposes, the term "incompetency" is as often equated with insanity¹⁹⁸ as it is with old age.¹⁹⁹ Since incompetency hearings are decided largely on the basis of medical diagnoses rather than functional incapacities,²⁰⁰ statutory enumeration of a series of medically identifiable disease syndromes, including old age, serves to enlarge the importance of the opinion of the medical expert

195. See, e.g., CAL. PROB. CODE § 1751 (West 1956) which provides in relevant part that: [T]he superior court, if satisfied by sufficient evidence of the need therefor, shall appoint a conservator of the person and property or person or property of any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property

196. See pt. IV, § A(1) of this article, where overbreadth is dealt with in the context of substantive due process limitations on the *parens patriae* power.

197. Although there is a lack of definiteness about what particular age would be considered "old" or "advanced" age, this problem is mitigated by the fact that 65 years has become the generally accepted legal boundary of old age. Social Security Act of 1935, 42 U.S.C. § 401 *et seq.*; but see Older Americans Act of 1965, 42 U.S.C. § 3001, *et seq.* (60 years).

198. See note 52 and accompanying text *supra*.

199. An increasing number of states have enacted statutes which specifically recognize old age as a possible factor causing incompetency to manage personal and property matters, thus requiring the appointment of a guardian or conservator. The statutes enumerate conditions such as "old age," "senility," "extreme old age," "physical and mental weakness on account of old age," or "mental infirmities of old age," as the requirements for appointment of guardians in such cases.

. . . .

No less than twenty-six states make specific reference to old age, and five refer to senility in their statutes on [commitment and incompetency].

G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT*, 17, 29 (1972).

200. See pt. II, § C of this article.

in these proceedings.

As a medical concept, however, "incompetency" leaves the courts to function in the absence of any legal standard to guide their decisions. As a synonym for advanced age, "incompetency" is so broad and indefinite a label that it fails to serve as an appropriate legal standard to separate those who are able from those who are unable to evaluate their own need for protection or treatment. As a result, courts are left to function without standards for adjudication in an area where the fundamental civil liberties of the individual are at stake.²⁰¹ Consequently, the current definition and use of the term

201. It might be argued by the state that since guardianship requires a prior determination of mental incompetency, there is nothing "involuntary" about the imposition of a guardianship. Instead of imposing the will of a third party over that of the ward, the state is merely nominating a substitute decisionmaker to function in the absence of the ward's ability to make decisions for himself. Furthermore, since the incompetent lacks mental capacity, he cannot be "deprived" of fundamental rights, because he is incompetent to appreciate their loss. These arguments receive some support from those state court decisions which continue to speak about the mentally incompetent person as one who "has ceased to be a man" or who "has no will of his own." Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1211 (1974). Because of these facts (the state might argue) such proceedings do not involve a deprivation of fundamental rights worthy of strict scrutiny under the due process clause.

These arguments falter on a number of grounds: First, both the argument concerning the "involuntariness" of the proceeding, and the argument concerning the ward's inability to appreciate the loss of his rights fail to consider the appropriate scope of inquiry in a guardianship hearing. "Incompetency" in such a context legitimately refers only to a series of functional incapacities with respect to management of the estate, the provision for daily living needs, and the ability to evaluate the need for protection or treatment. There is no suggestion that such a finding impairs the capacity to form intent or the ability to have desires. Indeed, the fact that there are such a large number of formal legal adjudications of incompetency when more informal methods of family accommodation are available indicates that those ultimately declared incompetent probably have very strong feelings about their physical freedom and their property rights, as well as a keen appreciation of their loss. The large number of incompetency determinations can be appreciated by referring to the National Senior Citizens Law Center Study, note 81 *supra*. The informal methods of arriving at the same result include verbal agreements, trusts, gifts, wills and powers of attorney.

Second, assuming for a moment that the granting of a guardianship cannot be described as "involuntary" because of the incompetency of the ward, it certainly cannot be described as "voluntary" either, as an incompetent would be equally incapable of waiving fundamental rights.

Third, both arguments are tainted by the assumption that the ward was incompetent prior to the judicial determination of that fact. The consequences of such an approach would require courts to assume in every case that which is to be proved, the effect being that all proposed wards would be assumed incompetent until proven otherwise.

Finally, in the area of diminished mental capacity, the courts have moved in precisely the opposite direction suggested by the arguments. Those with lesser powers of comprehension are entitled at least to equal protection of their fundamental rights, and, in some cases, courts have set up stricter requirements for depriving individuals with mental disabilities of their fundamental rights. See *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 1257 (E.D. Pa. 1971). In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court considered the rights of a 17-year-old deaf mute with the mental level of a pre-school child. He could

“incompetency” is open to challenge as being unconstitutionally “vague” for procedural due process purposes.

IV. THE LIMITS OF PARENS PATRIAE

When is state intervention in an individual’s life justified? Who is the proper arbiter of an individual’s well-being? John Stuart Mill, in a much-quoted portion of his classic work *On Liberty*, argues that:

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.²⁰²

Compulsory treatment²⁰³ of those who pose no danger to society²⁰⁴ is the most alarming aspect of guardianship proceedings. What are the limits on the state’s powers, acting in the “best interests” of the individual, to impose “protective services” upon those persons who may not perceive them to be a benefit?

A. *Substantive Due Process*

Judicially imposed guardianship wreaks at least as much havoc with fundamental rights as does criminal punishment.²⁰⁵ For this reason, the benevolent intention of the state does not shield its use of the *parens patriae* power from the requirements of substantive due process,²⁰⁶ which generally requires²⁰⁷ that state actions be rea-

not read, write, or virtually otherwise communicate. The doctor’s report showed that his condition precluded his understanding the nature of the charges against him, and that even if he were not a deaf mute, he would be incompetent to stand trial. The prognosis was “rather dim.” 406 U.S. at 719. The Supreme Court held that Jackson, in being involuntarily confined until competent to stand trial, was, because of the dim prognosis, deprived of equal protection of the laws and due process of law. Applying a “rule of reasonableness,” the Court spoke about the “substantial injustice in keeping an unconvicted person in . . . custody to await trial where it is plainly evident his mental condition will not [improve].” 406 U.S. at 735.

202. J. S. MILL, *ON LIBERTY* 11 (1930).

203. The “beneficial” services offered by guardianship are compulsory; they are not only offered but imposed often when the recipient does not desire assistance.

204. It may be argued that but for the guardianship, the ward would become a burden on the state’s welfare rolls and a public nuisance, but such social defense justifications are clearly incidental to the state’s primary purpose which is the protection and care of the individual.

205. See pt. III, § A of this article.

206. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (alternative grounds); *In re Gault*, 387 U.S. 1, 16-21 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973).

sonably related to permissible state goals. Moreover, where state actions affect fundamental liberties, the state interest to be served must be a compelling one,²⁰⁸ and the means adopted must be the least restrictive consistent with accomplishment of the state's purpose.

These requirements have not yet been judicially applied to guardianship, largely because of the dearth of litigation concerning declarations of incompetency in guardianship matters.²⁰⁹ Nevertheless, it might be beneficial to speculate about the impact of such constitutional requirements on guardianship procedure if and when litigation brings these issues before the courts.

1. Overbreadth

Recent decisions in the civil commitment area suggest that it would be improper to force treatment upon a non-dangerous individual capable of making his own treatment decision. *Winters v. Miller*²¹⁰ involved a civil rights action brought by an involuntarily committed Christian Scientist protesting forced medication. The court held that absent a legal determination of incompetency, the mentally ill individual remains free to refuse treatment,²¹¹ and noted more generally that the state's *parens patriae* power to act as substitute decision-maker for purposes of imposing compulsory treatment also hinges on a formal adjudication of incompetency.²¹²

207. The substantive requirement of due process means societal fairness at a given point in time. It requires a logical and fair connection between the stated purpose of the law and the measures employed for its attainment and it presupposes a valid governmental interest in prohibiting or regulating the subject matter of the law.

N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 317 (1971). See *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

208. *Roe v. Wade*, 410 U.S. 113, 155 (1973); cf. *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

209. Alexander and Lewin in the Syracuse University field study, note 199 *supra*, report that "in all of the [600] cases studied there was not one single case in which an appeal was brought [after] a finding of incompetence." HEARINGS BEFORE THE SPECIAL SENATE COMMITTEE ON AGING, LEGAL PROBLEMS AFFECTING OLDER AMERICANS, S. REP. NO. 52-601, 91st Cong., 2d Sess. 12 (1970). In *Jackson v. Indiana*, 406 U.S. 715, 737 (1972), Mr. Justice Blackmun remarked, with respect to involuntary commitment to mental institutions, that "[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." The lack of litigation in guardianship matters is traceable in large part to the fact that incompetency hearings continue to be heard on an *ex parte* basis and the ward usually goes unrepresented by counsel.

210. 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

211. *Id.* at 68-71.

212. *Id.* at 71.

In *Lessard v. Schmidt*,²¹³ another civil commitment case involving involuntarily imposed treatment, the court noted that:

Persons in need of hospitalization for physical ailments are allowed the choice of whether to undergo hospitalization and treatment or not. The same should be true of persons in need of treatment for mental illness unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness.²¹⁴

Similar reasoning also should allow those allegedly in need of "protective services" to decline assistance absent a showing of mental incompetency to make that decision for themselves.

If the state's use of *parens patriae* to require compulsory treatment for the non-dangerous is constitutionally valid only if the individual is mentally incompetent²¹⁵ to decide for himself about the wisdom of undergoing treatment, then the definition and use of the term "incompetency" (to distinguish between individuals whose decision to decline protection or treatment must be accepted from those whose decision may be overridden) takes on constitutional significance. Since fundamental rights are at stake, the specificity of the term "incompetency" and the precision with which it describes those within its ambit should be required to withstand strict judicial scrutiny.

The source of the vagueness doctrine is the procedural due process²¹⁶ right to fair notice and ascertainable standards for adjudica-

213. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, 94 S. Ct. 713 (1975), *amended opinion*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 95 S. Ct. 1943 (1975).

214. 349 F. Supp. at 1094. The court did not find it necessary to make this language part of the holding only because it interpreted the Wisconsin statute in question to require a finding of dangerousness to self or others. With respect to dangerousness to self, the court stated in a footnote that "the considerations which permit society to detain those who because of mental illness are likely to harm others do not necessarily apply to potential harm to oneself." *Id.* at 1093 n. 24. The court went on to suggest that the commitment power could not reasonably be invoked even to prevent a rational individual from attempting suicide. *Id.*

215. [This] appears to be required by the due process clause. Since the state interest in acting as *parens patriae* is premised on the need for the state to act to protect the well-being of its citizens when they cannot care for themselves, the imposition of involuntary commitment would seem necessary to vindicate that interest only when an individual is incapable of making his own evaluation of his need for psychiatric treatment. By contrast, compulsory hospitalization of persons with the mental capacity to determine the desirability of obtaining care in accordance with their personal values would interfere with individual autonomy and physical liberty without any assurance that the state, as a substitute decision maker, would better ascertain the best interest of the individual.

Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1213-14 (1974) (footnotes omitted).

216. See pt. III, § C (2f) of this article.

tion. In "overbreath," on the other hand,

The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. Frequently, the resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement.²¹⁷

Twenty-six states make reference to old age as a statutorily recognized cause of mental incompetency.²¹⁸ If this language creates or supports an atmosphere where old age itself is a shibboleth for incompetency, serious constitutional problems of overbreadth may be raised. The doctrine of overbreadth stems from the constitutional guarantee of substantive due process. If the wording used is so broad that it covers not only those whom the state has a legitimate interest in protecting, but also those with whom the state has no right to interfere, then the wording is constitutionally defective.²¹⁹ Similarly, if the statutory language leaves governmental authorities without standards limiting their discretion in applying the law,²²⁰ and leaving open the possibility that the law will be applied in an arbitrary and discriminatory manner,²²¹ the language is also objectionable as overbroad.

The use of old age as a determinant of mental incompetency serves to put the elderly as a class in jeopardy of incurring involuntary guardianship and threatens to deprive the mentally competent as well as the mentally incompetent elderly of constitutionally protected rights. In so doing it reaches beyond those whom the state has a legitimate interest in protecting to cover those with whom there is no legitimate reason to interfere. Moreover, the absence of standards in such a criterion provides an opportunity for guardianship to be employed by interested parties in an arbitrary and discriminatory manner. The likelihood of these abuses is enhanced because the incompetency hearing usually focuses upon establishing the existence of a disease syndrome (in this case apparently old age), instead of inquiring about the proposed ward's functional abilities.

217. *Landry v. Daley*, 280 F. Supp. 938, 951 (D.C. Ill. 1968).

218. G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 29 (1972).

219. *Landry v. Daley*, 280 F. Supp. 938 (D.C. Ill. 1968).

220. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). *But cf. Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

221. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 179 (1972).

Old age is not a disease. Neither is it synonymous with mental weakness.²²² The continuing use of old age as a triggering event for the loss of fundamental rights stigmatizes the entire class of elderly persons, and imposes a built-in handicap for aged individuals facing incompetency hearings. Indeed, by singling out the elderly, such provisions may negate for them any presumption of competency which might otherwise accompany persons wishing to object to the imposition of guardianship. The utilization of such a sweeping category would seem to be unrelated to any legitimate state purpose.

Finally, apart from the problems inherent in the use of the term "old age," the current use of "incompetency" itself is probably constitutionally overbroad. "Incompetency" is almost never used in practice as a tool for conducting an inquiry into an individual's ability to evaluate his own needs for protection or treatment. Since the state's only legitimate interest in the proceeding hinges upon a determination of the individual's capacity to engage in the decision-making process in very particular areas, incompetency determinations would seem to fall short of the requirements of substantive due process.

2. The Least Restrictive Alternative

The state may argue that imposition of "protective services" at the expense of fundamental rights is balanced by a compelling interest in preserving the health and life of its individual citizens. Assuming this to be so, the state still may not adopt means to those ends which involve a more extensive deprivation of rights than is necessary to protect the individual in question.

The applicability of the doctrine of the "least restrictive alternative"²²³ as a constitutional requirement in proceedings involving

222. See note 2 and accompanying text *supra*; SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. Rep. No. 38-596, 92d Cong., 1st Sess. 163 (1971).

Many studies are now showing that the intelligence of older persons as measured is typically underestimated. For the most part, the observed decline in intellectual functioning among the aged is attributable to poor health, social isolation, economic plight, limited education, lowered motivation, or other variables not intrinsically related to the aging process. Where intelligence scores do decline, such change is associated primarily with tasks where speed of response is critical.

223. The best known formulation of the least restrictive alternative doctrine is contained in *Shelton v. Tucker*, 364 U.S. 479 (1960), which involved an Arkansas law requiring teachers to disclose the organizations to which they belonged. The Court recognized that the state had a legitimate interest in information bearing on a teacher's occupational competence. Nevertheless, the statute in question was held unconstitutional, in part because: even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties

compulsory protection and treatment of the elderly was suggested in *Lake v. Cameron*.²²⁴ The facts in *Lake* are worthy of some exposition because Mrs. Lake's circumstances may be similar to those of other elderly persons deemed to be appropriate recipients of "protective services" in the form of guardianship. Catherine Lake was sixty years old. In September 1962, a policeman found her wandering about the streets of the District of Columbia, where she lived, and took her to the District of Columbia General Hospital. Commitment proceedings were commenced under provisions of the District of Columbia Code providing for hospitalization of mentally ill persons dangerous to themselves. Mrs. Lake protested being held against her will and filed a petition for habeas corpus. The court transferred her to St. Elizabeth's Psychiatric Hospital for observation in connection with the pending commitment proceedings. In due course, she was judged to be "of unsound mind" and committed to St. Elizabeth's. Her habeas corpus petition was dismissed.

At the commitment hearing, two psychiatrists testified that she was mentally ill, that she was suffering from "chronic brain syndrome" associated with aging and that she "demonstrated very frequently difficulty with her memory."²²⁵ "Occasionally, she was unable to tell . . . where she was or what the date was."²²⁶ Both psychiatrists testified that Mrs. Lake could not adequately care for herself. At a later hearing, psychiatrists testified that Mrs. Lake was suffering from a "senile brain disease," "chronic brain syndrome, with arteriosclerosis with reaction."²²⁷ The psychiatric testimony ac-

when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same basic purpose.

Id. at 488.

224. 364 F.2d 657 (D.C. Cir. 1966).

225. *Id.* at 658.

226. *Id.*

227. *Id.* The medical literature indicates that "senility," "cerebral arteriosclerosis," "chronic brain syndrome," "senile brain disease" are all used interchangeably as labels for observed behavioral changes associated with growing old. The "behaviors" most commonly associated with aging include memory loss, absentmindedness and emotional instability. As for what happens in the brain during the process of aging to cause such behavior, physiological psychologists are not sure. "There is probably no other area of biological inquiry that is underpinned by so many theories as is the science of gerontology. One reason for this is due to the lack of sufficient fundamental data in the field." Hayflick, *Biomedical Gerontology: Current Theories of Biological Aging*, 14 *THE GERONTOLOGIST* 454 (1974). All theories seem to concur in the conclusion that the behavioral problems are due to organic (physical) changes in the brain which accompany the aging process. Theories range from simple-sounding ones like hardening of the arteries (arteriosclerosis) which, it is said, reduces the supply of blood to the brain, to more complex theories which posit that aging causes deterioration of DNA

knowledged that she was not dangerous to others and would not intentionally harm herself, but found that she was prone to "wandering away and being out exposed at night or any time she is out."²²⁸

The District of Columbia Court of Appeals held that such an individual is not a proper subject for indeterminate commitment without a full exploration of all other possible alternatives available for her care and treatment in the community. "Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection."²²⁹

Although the decision in *Lake v. Cameron* was based on a District of Columbia statute²³⁰ giving the court discretion to consider alternatives to indeterminate hospitalization for someone found comittable because of mental illness, the case has nevertheless been hailed nationwide by groups with an interest in the legal problems of the elderly as "a magna carta for the aged"²³¹ and "a landmark in the defense of impaired older people."²³² The wide acclaim accorded *Lake v. Cameron* is due partly to the language of the opinion, which strongly implied a substantive due process restriction on the state's *parens patriae* commitment of those persons dan-

and impairs RNA synthesis at the molecular level. *Id.* at 454; see BUSSE & PFEIFFER, ORGANIC BRAIN SYNDROMES IN METNAL ILLNESS IN LATER LIFE 91, 93 (1973):

The 1969 edition of a Psychiatric Glossary . . . indicates that dementia is "an old term denoting madness or insanity; now used to denote organic loss of intellectual function" Webster's dictionary defines dementia as "an incipient loss of reason." This broadening of the definition is the current trend in medicine, as the term is being increasingly utilized to designate any intellectual decline of organic cause whether it be mild, moderate or severe.

The vague referents of such medical terms leaves open the the possibility that old age may be equated with mental disease. "[E]ven the dictionary definition equates senility with old age." SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. REP. NO. 38-596, 92d Cong., 1st Sess. II (1971). The term "senility" has been characterized by at least one health professional in the field of aging as nothing more than a "wastebasket term" used as a catchall for lack of a better word in a field where too little research has produced a prevailing ignorance about the process of aging. Dr. Charles H. Kramer in SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY, S. REP. NO. 38-596, 92d Cong., 1st Sess. II (1971).

228. 364 F.2d at 657-58.

229. *Id.* at 660.

230. If the court . . . finds that "a person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or the public.

Lake v. Cameron, 364 F.2d 657, 659 (1966).

231. See, e.g., NATIONAL COUNCIL ON THE AGING, THE LAW AND THE IMPAIRED OLDER PERSON: PROTECTION OR PUNISHMENT i, iii (1966).

232. *Id.* at ii.

gerous only to themselves,²³³ and partly because of the interest which Judge Bazelon took in the problems surrounding involuntary commitment of elderly persons lacking financial resources.²³⁴

Lake v. Cameron is also significant because it constitutes judicial recognition that the blanket term "mental illness" may no longer serve to extinguish fundamental liberties without a further inquiry into what it means in terms of functional abilities, and what alternatives will least impinge upon the individual's civil rights while at the same time satisfying the needs of the state.²³⁵ Finally, the *Lake* opinion requires courts to focus upon the behavior of the individual rather than the medical classification of his problem, and makes possible a long-overdue distinction between old age and mental illness.

233. While expressing no opinion on the result if no alternatives to commitment are available in the community, the court, in a footnote, nevertheless implies that serious constitutional questions arise at that point:

Such questions might be whether so complete a deprivation of appellant's liberty basically because of her poverty could be reconciled with due process of law and the equal protection of the law.

Lake v. Cameron, 364 F.2d 662 n.19 (1966).

234. The fact that Judge Bazelon required these problems to be comprehensively briefed is apparent from footnotes throughout the opinion. For example:

Dr. Dale C. Cameron, Superintendent of Saint Elizabeths Hospital, has said that "only 50% of the patients*** hospitalized required hospitalization in a mental institution" and "for many older patients, the primary need was found to be for physical rather than psychiatric care." At the hearing before the Joint Subcommittee on Long-Term Care of the Special Senate Committee on Aging . . . [t]he National Association of State Mental Health Program Directors commented on the elderly who "are forgetful, mildly confused, and need various degrees of nursing care or domiciliary care which should be provided in approved nursing homes or private care homes. They should not be required to live in state mental hospitals in 60 to 100 bed wards with gang bathrooms, and loss of all individuality and personal dignity, even though this type of 'human warehousing' is cheaper than care in nursing homes.

Any infirm person, but especially the aged infirm, should be kept as near to home as possible, where family, friends and familiar surroundings offer the best possible link with his usual life."

Id. at 660-61 n.9 (citations omitted).

235. The court suggested alternatives which should be explored when the state seeks to impose a guardianship:

The Court may consider, *e.g.*, whether the appellant and the public would be sufficiently protected if she were required to carry an identification card on her person so that the police or others could take her home if she should wander, or whether she should be required to accept public health nursing care, community mental health and day care services, foster care, home health aide services, or whether available welfare payments might finance adequate private care. Every effort should be made to find a course of treatment which appellant might be willing to accept.

Id. at 661 (footnotes omitted).

In light of *Lake v. Cameron* and its progeny,²³⁶ it might be argued that statutory provisions for guardianship which do not provide for legal disabilities graduated according to an individual's functional disabilities are unconstitutional. Absent a statutory system of graduated disabilities, it would seem to be incumbent upon the state or the private petitioner to provide a full exploration of alternative community resources which would provide protection and care for the individual without the need for guardianship. Where a state statutory scheme makes neither requirement, it would seem that fundamental liberties are unconstitutionally infringed. An exploration of available alternatives would serve the state's interest while imposing fewer deprivations on the individual.

Although expanded use of the least restrictive alternative doctrine would limit the deprivation of liberties imposed upon future wards, it might also produce more wards. Since the proceedings would be less drastic in their consequences, more persons might be thought appropriate for some type of limited state intervention to protect their well-being. This raises the larger possibility that, in the interests of correcting, rehabilitating, treating, or "protecting" those members of society thought to be in need, such methods might become a broader source of continuing state supervision, surveillance, and intervention in the lives of private citizens.²³⁷

The limits on the expansion of the therapeutic state, like the definition of deviant or "treatable" behavior, must lie in society's changing concept of what is reasonable at a particular time and place. The courts have a jury system which reflects prevailing community standards. Jurors seem more able to make such decisions than the medical profession.

The courts have been reluctant to resurrect substantive due process because of popular abhorrence of the spectre of "judicial

236. The same court reaffirmed its decision about the applicability of the doctrine of least restrictive alternative to involuntary confinement for purposes of treatment in *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969). *Lessard v. Schmidt*, 349 F. Supp. 1078 (1972), *vacated and remanded for a more specific injunctive order*, 94 S. Ct. 713 (1974), *amended opinion*, 379 F. Supp. 1376 (1974), relying on *Lake*, compelled the state to establish the unsuitability of numerous alternatives to involuntary full-time hospitalization before commitment could be ordered. The alternatives required to be considered included:

voluntary or court-ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic, and home health aide services.

349 F. Supp. at 1096. See generally Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972).

237. An excellent analysis of this problem may be found in N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971).

legislation." However, substantive due process seems to be the best judicial tool available to deal with the enormous difficulties raised by the growth of the therapeutic state. For the courts to fail to act is not to avoid a decision, it is to allow the boundaries of acceptable behavior and judgments about the limits of enforced therapy to be made irresponsibly by those ill-equipped for such a critical and far-reaching social endeavor.

3. The Right to Treatment

Simply stated, the "right to treatment" means that if an individual is to be deprived of fundamental rights because of his need for treatment, treatment must in fact be provided. If treatment is not forthcoming, the justification for involuntary confinement disappears.²³⁸ Continued incarceration is then arbitrary, unreasonable, and unrelated to any legitimate state interest.²³⁹

Although first judicially recognized as a statutory obligation,²⁴⁰ the "right to treatment" has been given limited recognition as a constitutional requirement. In *Wyatt v. Stickney*,²⁴¹ a class action initiated by guardians of patients civilly committed to an Alabama public mental institution, a federal district court first articulated the constitutional standard:

To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane and therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.²⁴²

The constitutional requirement announced in *Wyatt* was buttressed by the Court of Appeals for the Fifth Circuit in *Donaldson v. O'Connor*,²⁴³ a civil rights action brought by a patient involuntar-

238. At base, the "right to treatment" rests on the substantive due process requirement that the means adopted by the state to achieve its purposes be reasonably related to those purposes. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

239. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

240. In *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), the court held that the District of Columbia civil commitment statute which provided that every patient was entitled to "humane care and treatment," created a statutory right to treatment. Judge Bazelon also implied that, absent a statute requiring care and treatment, a "right to treatment" might be predicated on a constitutional basis. *Id.* at 453.

241. 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, modified in part sub. nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

242. 325 F. Supp. at 785.

243. 493 F.2d 507 (5th Cir. 1974). *Wyatt v. Stickney* was pending on appeal with the Fifth Circuit when that court decided *Donaldson*. *Donaldson*, meanwhile, was appealed to

ily civilly committed to a Florida state mental hospital. After nearly fifteen years of confinement, Kenneth Donaldson brought suit against his attending physicians, alleging that they had deprived him of his constitutional right to receive treatment or be released from the hospital. A jury found that Donaldson had not been dangerous to himself or others, and that during his years of involuntary confinement, he had received little or no psychiatric care or treatment. The court of appeals, affirming a judgment in favor of Donaldson, held that:

Where . . . the rationale for confinement is the "*parens patriae*" rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided.²⁴⁴

When the United States Supreme Court reviewed *Donaldson* on appeal,²⁴⁵ however, the Court did not agree with the Fifth Circuit that *Donaldson* raised the "far reaching question whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals."²⁴⁶ Relying on the jury findings that Donaldson was not dangerous to himself or others, that he could have survived safely on his own, and that, if mentally ill, he had not received treatment, the Court held simply that "a finding of 'mental illness' alone cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement [if he is] dangerous to no one and can live safely in freedom."²⁴⁷ The Court characterized the case as raising a "single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty."²⁴⁸

Significantly, the Supreme Court found it unnecessary to decide whether there is or is not a constitutional right to treatment.

the Supreme Court, and decided June 26, 1975. *O'Connor v. Donaldson*, 43 U.S.L.W. 4929 (U.S. June 26, 1975).

244. 493 F.2d at 521.

245. *O'Connor v. Donaldson*, 43 U.S.L.W. 4929 (U.S. June 26, 1975).

246. *Donaldson v. O'Connor*, 493 F.2d at 509.

247. *O'Connor v. Donaldson*, 43 U.S.L.W. 4929, 4933.

[T]he issue before the Court [is] a narrow one. We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the state on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness. For the jury found that none of the above grounds for continued confinement were present in Donaldson's case.

Id.

248. *Id.* at 4932.

Specifically, the Court did not decide three important issues: "whether mentally ill persons dangerous to themselves or others have a right to treatment upon compulsory confinement by the State, . . . whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment,"²⁴⁹ and whether the State may custodially confine an individual not dangerous to others but incapable of living safely on his own. In rendering its decision, the Court vacated the Fifth Circuit's wide-ranging opinion and expressly noted that its action "deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law in the case."²⁵⁰

The narrowness of the Supreme Court's decision in *O'Connor v. Donaldson* provides an opportunity to reevaluate the "right to treatment" as a constitutional doctrine. There are two problems inherent in such a doctrine. First, it assumes that the state can constitutionally require the involuntary confinement of nondangerous persons for therapeutic purposes.²⁵¹ It then stipulates that because the incarceration is for therapeutic purposes, therapy must in fact be provided. By declaring that involuntary confinement is unjustified without treatment, there is an implication that involuntary confinement with treatment is justified.²⁵² Treatment becomes the *quid pro quo* received by the individual in exchange for his liberty. Thus the "right to treatment" argument seems to ignore a prior question: can the state constitutionally impose such an exchange upon a nondangerous individual because of his need for treatment?

Second, a constitutional "right to treatment" may be an illusory protection for the individual against arbitrary and unlimited state action depriving him of fundamental rights. With the current trend toward the diversion of criminal behavior from punishment to treatment programs, and the overwhelming variety of behaviors now classifiable as mental illness,²⁵³ the "right to treatment" is po-

249. *Id.*

250. *Id.* at 4934 n.12.

251. See part II, § A(3) of this article and notes 41-42 *supra*.

252. Mr. Justice Stewart pointed this out writing for the Court in *O'Connor v. Donaldson*:

The [appellate] court . . . expressed the view that, regardless of the grounds for involuntary civil commitment, a person confined against his will at a state mental institution has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Conversely, the court's opinion implied that it is constitutionally permissible for a State to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness renders him dangerous to himself or others.

43 U.S.L.W. at 4932 (citations omitted).

253. See part II, § C of this article and note 47 *supra*.

tentially the source of a much broader state intervention in the lives of private citizens. Under such circumstances, the "right to treatment" may be viewed as a dubious benefit by the nondangerous individual who has been classified as mentally ill and who wishes to refuse treatment and retain his liberty.²⁵⁴

B. *Involuntary Custodial Confinement of the Elderly*

Implicit in the Court of Appeals decisions in both *Wyatt v. Aderholt*²⁵⁵ and *Donaldson v. O'Connor*²⁵⁶ is the important assumption that "the purpose of involuntary hospitalization is treatment and not mere custodial care."²⁵⁷ This assumption must proceed from the fact that the confinement in both cases was in mental hospitals because it is certainly not required by the inherent nature of the *parens patriae* concept. To the contrary, there is support in tradition²⁵⁸ and logic²⁵⁹ for the proposition that the state may involuntarily confine an incompetent individual, even where there is no hope that his condition could be cured or even improved, if humane custodial care would be in his best interests.²⁶⁰ Elderly persons who are

254. See Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969).

255. 503 F.2d 1305 (5th Cir. 1974).

256. 493 F.2d 507 (5th Cir. 1974).

257. *Id.* at 518.

258. N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 65-70 (1971).

259. [T]he . . . belief that custodial care is an impermissible use of the *parens patriae* power seems unwarranted. As with other relevant factors, the untreatable patient's potential need for indefinite confinement for his own protection should be considered in balancing the costs and benefits of imposing various types of care. The danger of substantial physical harm created when an untreatable mental disorder impairs the individual's ability to provide for his basic needs might well be sufficient to justify action under the *parens patriae* power, although there are alternative modes of providing protective care which may be preferable to hospitalization of the untreatable.

Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1222 (1974) (footnotes omitted).

260. The Court of Appeals for the Fifth Circuit has acknowledged the existence of a *parens patriae* justification for involuntary confinement independent of the right to treatment. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), *aff'g and modifying in part* *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). In *Wyatt*, the Governor of Alabama argued before the Fifth Circuit that the reason for the commitment of the mentally retarded persons in question was not to provide treatment but was (1) to care for mentally handicapped persons unable to care for themselves and (2) to relieve the burden imposed upon the families and friends of the mentally disabled. For these reasons, it was argued that the provision of custodial care was constitutionally adequate to justify continued confinement. The court held that, even accepting the Governor's premise that "need for care" was a constitutionally adequate justification for confinement, a "need for care" implied that the state had an affirmative obligation to provide certain minimum quality "treatment." The court went on

to state that minimum quality care at least included a "humane psychological and physical environment," that the situation in the Alabama institutions in question consisted primarily of the storage of persons, which involved neither care nor custody, and that, for purposes of a "humane environment," it was irrelevant whether the right involved was viewed as a facet of a "right to treatment" or a "right to care."

Addressing itself to the Governor's argument that the justification for confinement could be found in relieving family, friends, and guardians from the burdens of caring for the mentally handicapped, the court pointed out that involuntary commitment involved "massive curtailments" of individual liberties. Against the fundamental personal interests involved, the state's interest in relieving members of the community of the "burden" of caring for the mentally handicapped, although a "rational" state interest, was so trivial that it could not possibly justify the deprivations of liberty involved. However, in *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973), the court implied that no amount of custodial care will justify a deprivation of liberty: "Without some form of treatment the state justification for acting as *parens patriae* becomes a nullity." *Id.* at 659.

The *Ballay* opinion can be read to support an argument that the untreatable elderly may not be involuntarily confined under the *parens patriae* power even though they may need humane custodial care:

Consider the individual who is untreatable in the present state of medical science. Perhaps all that can be done for him under institutional tutelage is to care for his physical needs and/or subdue him through use of drugs. Unless the right to treatment be interpreted to include ineffective treatment, an anomaly in itself, the *parens patriae* rationale would seemingly fail and indeterminate institutionalization would necessarily be a purely custodial function and justifiable only by other considerations.

Id. at 659-660 (citations omitted).

In a footnote, the *Ballay* opinion makes specific reference to the plight of the untreatable elderly in this regard:

A common example, discussed at some length in the 1963 Senate Hearings, concerns elderly persons suffering from senility or hardening of the arteries. In response to Senator Ervin's question as to whether persons with such an affliction could be treated ("cured") in any meaningful sense, Dr. Cameron, then superintendent of Saint Elizabeths Hospital, first conceded that such conditions can affect sanity and, presumably, that these individuals could be committed under the proposed law. He also noted that persons possessing these disabilities did form a part of the population at Saint Elizabeths. He then responded compoundly. First, he argued that an individual diagnosed as "senile dementia" was not always within that category at all but rather depressed and therefore treatable. This, of course, relates not to the desirability of committing these individuals but rather to the inherent uncertainty in diagnosing mental illness, a topic which will be explored more thoroughly later. Second, he pointed out that some such individuals suffered primarily from a physical malady, the mental illness being caused primarily by and therefore secondary to such malady. Although these patients required physical medical treatment, some were currently in Saint Elizabeths because of inadequate facilities elsewhere. The problem was frequently aggravated by "the fracture of the home, the social situation which can no longer provide for them." Finally, Dr. Cameron conceded that part of the population at Saint Elizabeth's was composed of those encompassed by Senator Ervin's question: "The point I am driving at is this: There is substantial percentage among the elderly patients for whom, in the absence of some announced illness, treatment consists largely of seeing that they have adequate food, that they are assisted in keeping clean, and things of that kind."

While it is indeed deplorable that alternative facilities are unavailable, that these persons exist and need help does not strengthen the argument that treatment can serve as a justification for involuntarily committing one who is untreatable.

Id. at 659 (citations omitted).

declared mentally incompetent in guardianship proceedings because of untreatable mental disorders which have impaired their ability to provide for their basic needs might be confined, for their own best interests, to custodial care facilities. A legitimate state purpose, under those circumstances, would be the protection and care of the individual, and his custodial confinement would be reasonably related to that end.²⁶¹

Are the mental disorders associated with old age truly untreatable? Although the popular opinion seems to be that they are,²⁶² a growing body of more recent medical opinion disagrees.²⁶³ If mental incapacity in elderly persons is treatable, then substantive due process may require more than custodial care to balance the loss of fundamental liberties involved, irrespective of how the state charac-

261. In *Wyatt v. Stickney*, the court declared that the nature of the right to treatment was the right "to receive such individual treatment as will give . . . a realistic opportunity to be cured or to improve his or her mental condition." 325 F. Supp. at 784. In *Donaldson v. O'Connor*, however, the Fifth Circuit interpreted the right to mean "the provision of rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." 493 F.2d 507, 522. See also *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

262. [Doctors] are critical of the way in which "senility" is used by caregivers and others. One psychiatrist has pointed out that even the dictionary definition equates "senility" with old age. In practical everyday terms, confusion over the term can lead to unfortunate consequences for the elderly. An admitting physician may regard an older person as "merely senile" and therefore not in need of any treatment: his ailment is just something that comes from "growing old." If admitted, the patient may suffer from another problem: because he is "senile" he may receive only minimal care or none at all.

SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. Rep. No. 38-596, 92d Cong., 1st Sess. 11 (1971).

Statistics on the age of mental hospital populations show how widespread this bias has become. Although they represent only 10% of the population, persons over 65 comprise about 30% of the patients in mental hospitals in the United States. SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS IN AGING, 1969, S. Rep. No. 91-875, 91st Cong., 2nd Sess. 250 (1970).

263. One crucial reason for the under-utilization of community mental health facilities by the elderly is the lack of interest and therapeutic pessimism of both the "gatekeepers" and referral sources (general practitioners, clergymen) and mental health personnel. In turn, such pessimism derives from inadequate education and experience in working with the emotionally-troubled elderly. There are a limited number of psychiatrists, psychologists, social workers, and others, who have developed skills and experience in the evaluation, care, and treatment of the elderly psychiatric patient. When operating under appropriate conditions, such workers report impressive beneficial results.

Robert W. Gibson reported upon a survey of 49 private psychiatric hospitals concerning the treatability of older patients. Some 6,400 patients over 65 had been admitted from 1960 through 1964. Approximately 75 percent of these patients improved sufficiently to return to their homes within two months.

SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, *supra* note 262, at 126.

terizes its goals. Furthermore, any attempt by the state to justify merely custodial care under such circumstances would fail because custodial care for a treatable aged individual would not truly serve the person's "best interests" and therefore would not be reasonably related to a legitimate state goal. What may be required, in this respect, is an individual determination in each case as to the treatment and care options which are appropriate in light of the specific circumstances and needs of each elderly individual. In this way the costs of a deprivation of rights would be balanced against the benefits which treatment and/or care might hold for each particular person.

If courts employ the "best interests" doctrine, elderly persons should seldom, if ever, be involuntarily institutionalized. There is mounting evidence that involuntary confinement of aged persons is extremely detrimental to their welfare.²⁶⁴ The mortality rate for institutionalized aged persons is staggering,²⁶⁵ and is substantially higher than for the non-institutionalized elderly.²⁶⁶ Moreover, the high incidence of institutional mortality has been ascribed more to the poor quality of institutional care²⁶⁷ and to the psychological

264. [A] point that is important in maintaining the sense of values and integrity on the part of the aging is preserving their right and opportunity to make decisions affecting their welfare and behavior to the greatest extent possible. For too long it has been the practice of significant individuals, children, physicians, clergymen, social agencies, to make decisions concerning the lives of older people independent of the individual's ability to decide for himself or his wishes concerning his future. While it is true that in many instances an older individual is no longer capable of making important decisions concerning himself, this fact should be established before the right is taken away from him and he is denied this most essential mark of his own integrity and self-sufficiency. This observation is supported by the often reported fact of the high incidence of mortality among older individuals who are placed against their wills in institutions. It would seem that this final insult is one that many older individuals find impossible to bear and which results in loss of interest, withdrawal, depression, and eventual death.

Id. at 148-49.

265. Mortality is higher in institutional populations than in the general population. Taken as a group and excluding those acutely ill persons who die in the first three months after admission to a psychiatric hospital, about 25% are dead within the first year, over 40% by the end of the second year, over 50% are dead by the end of the third year and the percent dead after four, five, six and seven years is 65%, 73%, 79% and 82% respectively. The death rate is higher for males than females and is exceptionally high for persons who have severe chronic brain syndrome as determined by psychiatric or psychological tests or by a high degree of physical functional impairment or incontinence.

Id. at 139-40.

266. *Id.*

267. Institutional care is usually regarded as a prelude to death by applicants and their families rather than as a new, useful, experience in community living. . . . Unfortunately, most homes, especially proprietary nursing homes, do not

impact of institutionalization,²⁶⁸ than it has to the poor health of the entering patient. In fact, there is now reliable evidence that large numbers of aged persons who with minimal assistance could remain independent are routinely committed to institutional facilities against their will.²⁶⁹

Errors in distinguishing the treatable from the untreatable aged²⁷⁰ have drastic consequences for those persons who are misclassified as untreatable. A fatalistic expectation of irreversible mental disability among the elderly²⁷¹ increases the likelihood of misclassification. Because of these facts, the state, and private petitioners under the aegis of the state, should have to carry a heavy burden of persuasion that institutionalization of an elderly ward, especially for purposes of custodial care, is in any sense in his "best interests." There is some evidence that elderly persons are worse off when provided with protective services than when they are left alone to manage for themselves.²⁷² If an individual's chances of encountering

have the potential for becoming self-contained communities and are by no means a part of the large community. Therefore, they do become points at which old persons with little or nothing to do, senses, minds and emotions blunted by drugs, simply wait for death.

Entrance into residence of such poor quality tends to downgrade the individual's image of himself, his disability may become greater and there may be development or exaggeration of psychological and emotional disorder.

Id. at 139.

268. *Id.*

269. In 1963 the California State Legislature appropriated funds to the State Department of Mental Hygiene to set up a geriatric screening project intended to screen elderly persons on the brink of commitment to state mental hospitals. Geriatric commitments to state hospitals from San Francisco alone at that time numbered almost 500 a year. The project was commenced in cooperation with the Langley-Porter Neuropsychiatric Institute amidst evidence that a common cause of commitment for the elderly was "acute brain syndrome," a mental disorder caused primarily by malnutrition, untreated diabetes, decompensated heart disease, and other illnesses reversible with proper food and medical treatment. Further evidence indicated that although only 9% of the persons in California state mental hospitals were dangerous, 83% had been admitted involuntarily. The dramatic results of the screening were as follows:

Three hundred and fifty-two persons were screened by the Project in 1967. Of that number only three were committed and all three had previous records of commitment. 26% were placed in nursing homes, 10% in boarding homes, 11% in general hospitals for systemic diseases and 52% were maintained with supportive services, in their homes.

Id. at 70.

270. For evidence bearing on the general unreliability of psychiatric judgments about mental states, see Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

271. SPECIAL SENATE COMM. ON AGING, MENTAL HEALTH CARE AND THE ELDERLY: SHORTCOMINGS IN PUBLIC POLICY, S. Rep. No. 38-596, 92d Cong., 1st Sess. 29 (1971).

272. The Benjamin Rose Institute has conducted a study of 164 elderly persons who were referred from community agencies in Cleveland, Ohio, as being in need of protective

harm are even roughly comparable in either case, then the option which involves a deprivation of fundamental rights probably cannot be justified. In short, the substantial benefit to the individual necessary to justify use of the *parens patriae* power to effect a deprivation of basic liberties may be found lacking when guardianships in their present form are imposed upon the elderly.

Aged persons should have a "bill of rights" defining their constitutional right to liberty where the state seeks to require their custodial confinement for purposes of protection and care. Such confinement should be permissible only if five conditions are simultaneously present:

1. The individual has been declared mentally incompetent to determine the advisability of seeking or refusing treatment, and
2. Less restrictive alternatives to total institutionalization have been fully explored and found to be inadequate to protect and maintain the individual, and
3. The individual is unable to live safely in freedom either by himself or with the assistance of willing and responsible family members or friends,²⁷³ and
4. The individual is untreatable, and
5. Institutionalization is in the individual's best interests.

V. CONCLUSION

Although considerable criticism has been directed at the institution of guardianship as it currently exists, it has not been the purpose of this article to deny that many older persons have need of assistance in managing their personal or financial affairs. Neither has the purpose been to attack the concept of guardianship as a

services. The subjects were divided into an experimental group and a control group. The experimental group was provided a full panoply of protective services, including fiduciary and guardianship services, nursing evaluation and consultation, medical evaluation, psychiatric consultation, direct financial assistance, home aids, legal consultation, and placement in a protective setting. The control group received "standard treatment for the community." Subsequent interviews showed a substantially higher rate of early institutionalization and death in the experimental group (34% institutionalized, and 25% dead after one year, versus 20% institutionalized and 18% dead in the control group).

273. This condition addresses itself to the traditional "dangerousness to self" justification for invoking the state's *parens patriae* power. There are, of course, limitless boundaries to what may be considered at any one time to be "dangerous to oneself." The Supreme Court in *O'Connor v. Donaldson* acknowledged the problem of overbreadth in such a standard, and commented on it in the involuntary commitment context as follows:

Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally "dangerous to himself" if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends.

43 U.S.L.W. at 4933 n.9.

formal procedure to meet the needs of persons unable to manage for themselves.

“Protective services,” however, may be a misleading term when such services are imposed involuntarily. Courts have recognized in related areas of the law that irrespective of the benevolent intentions motivating those acting for the state, there is a strong punitive element²⁷⁴ involved when the individual is involuntarily deprived of fundamental rights, and that such measures, however characterized, must be accompanied by the strictest of procedural safeguards. Those safeguards should now be extended to the substantial number of elderly persons who are faced with guardianship proceedings every year.²⁷⁵

A central purpose of this article has been to approach the problem of providing assistance to the elderly from a new perspective. The prevailing view has been that the real issue in “protective services for the elderly” is the problem of those aged persons who desperately need institutional care but who cannot obtain it because of inadequate community resources. Such a problem certainly exists. On the other hand, such lamentations have been made on behalf of the elderly for quite a number of years now, at the highest levels, and with little noticeable effect upon the quality of their lives.²⁷⁶ The elderly have been pitied and grieved over by almost everyone, including kindly probate judges trying to save them from themselves.²⁷⁷ The time has come to acknowledge that our paternalistic

274. Measures which subject individuals to the substantial and involuntary deprivation of their liberty are essentially punitive in character, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interferences with liberty for only the most clear and compelling reasons.

In re Ballay, 482 F.2d 648, 667 (1973).

275. See National Senior Citizens Law Center Study, note 81 *supra*.

276. Noting the fact that in spite of all the good intentions, little or no progress had been made over the years on most of the problems confronting the elderly, Sen. Edward M. Kennedy remarked, at the 1971 White House Conference on Aging, that “I . . . hope that at the conclusion of this conference there will be a commitment . . . not for more studies but for action . . . We still have not completed the agenda left to us by the last White House Conference on Aging 10 years ago.” SPECIAL SENATE COMM. ON AGING, 1971 WHITE HOUSE CONF. ON AGING, S. DOC. NO. 92-53, 92d Cong., 1st Sess. 145 (1971).

277. Thomas Szasz, M.D., Professor of Psychiatry at the State University of New York, had the following to say at a symposium held at Syracuse University on problems of the elderly:

The incessant emphasis on helping the aged this morning reminded me of several humorous warnings about the dangerousness of “friends.” One warning is rather an unflattering definition of a Hungarian—to the effect that if you have one for a

concern for the elderly is demeaning and psychologically damaging, at least as it is currently manifested in the institution of guardianship.

The "best interests" doctrine assumes an unfortunate subject who is unable to help himself.²⁷⁸ It seeks to "help" and in so doing tends to confirm the person helped in an inferior position.²⁷⁹ Instead of negating the individual and his responsibility for himself, as we now do, it would be more productive to concentrate on treating the proposed ward as a whole person²⁸⁰ capable of captaining his own destiny, and identifying his own interests, until the contrary is proved. This could be accomplished in part by discontinuing the beneficent charade that now passes for a guardianship hearing, and by replacing it with the only time-tested protection for the rights and interests of the individual when the power of the state is used to limit or redefine them: a full adversary hearing.

friend, you don't need an enemy. The other, more familiar, is the proverb: "Protect me from my friends; I'll take care of my enemies." Since 9:00 a.m. we have heard about nothing but the friends of the aged. If they have so many friends, why are they in such dire straits? I would suggest to you that you have met the enemy—they are the protectors of the aged.

Szasz, *Symposium on the Aging Poor*, 23 SYRACUSE L. REV. 45, 78 (1972).

278. The benevolent philosophy of the *parens patriae* process, notes Anthony Platt, often disguises the fact that the offender is regarded as a "non-person" who is immature, unworldly, and incapable of making effective decisions with regard to his own welfare and future. N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 348 (1971) (footnote omitted).

279. This statement has been made by conservatives about the "welfare state" for a long time. Unlike most welfare programs, however, guardianship is not primarily a voluntary undertaking for the recipient. No application is required, and acceptance of benefits is mandatory.

280. In a recent article, Kenneth Karst has argued that the dignity of being recognized as a person is itself a basic right, a constitutionally protected "fundamental interest." Emphasizing that the dignity of being recognized as a person is highly dependent upon legal and rhetorical symbolism, including the way one is addressed, Karst quotes from Morris, *Persons and Punishment*, 52 THE MONIST 475, 493 (1968): "This right to be treated as a person is a fundamental right belonging to all human beings by virtue of their being human. It is also a natural, inalienable, and absolute right." Karst comments:

Morris argues that the right to be treated as a person implies a right to a "punishment model" of treatment for anti-social behavior, as distinguished from a "therapy model." Punishment assumes that the offender is responsible; therapy is demeaning in its suggestion that the offender "cannot help" his or her acts, any more than an animal can. The value at stake in Morris' discussion is only secondarily "the right to punishment." It is more basically the right to be treated as one who is free to make independent choices.

Karst, *A Discrimination So Trivial: A Note on Law and the Symbolism of Women's Dependency*, 49 LOS ANGELES BAR BULL. 449, 503 (1974).