Fordham Law Review

Volume 49 | Issue 3 Article 9

1980

Guardianship: Time for a Reassessment

Roger B. Sherman

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

 Part of the Law Commons

Recommended Citation
Roger B. Sherman, *Guardianship: Time for a Reassessment*, 49 Fordham L. Rev. 350 (1980).
Available at: https://ir.lawnet.fordham.edu/flr/vol49/iss3/9

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Guardianship: Time for a Reassessment

Cover Page Footnote

B.A. 1973, Colby College; J.D. 1977, Syracuse University College of Law. Mr. Sherman was a Law Clerk to Thomas E. Delahanty and David A. Nichols, Supreme Judicial Court of Maine, 1977-1979, Assistant Attorney General of Maine, 1979-1980; he is now associated with the firm of Hochberg & Schultz, Boston, Massachusetts.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol49/iss3/9

GUARDIANSHIP: TIME FOR A REASSESSMENT

*ROGER B. SHERMAN**

INTRODUCTION

A revolution is afoot in the area of mental health. Courts have recognized that the mentally ill and the mentally retarded in state institutions have a right to treatment.[1] Substantial due process protections have reinforced previously loose and informal commitment procedures,[2] and under the concept of the "least restrictive alternative," institutionalization can only be used as a last resort.[3] Moreover, these victories are not likely to be shortlived for many of these rights have been codified in several jurisdictions.[4]

---

* B.A. 1973, Colby College; J.D. 1977, Syracuse University College of Law. Mr. Sherman was a Law Clerk to Thomas E. Delahanty and David A. Nichols, Supreme Judicial Court of Maine, 1977–1979, Assistant Attorney General of Maine, 1979–1980; he is now associated with the firm of Hochberg & Schultz, Boston, Massachusetts.

1. *See* Rouse v. Cameron, 373 F.2d 451, 455 (D.C. Cir. 1966) (in civil commitments the need for a right to treatment may exceed the need for procedural protections); Evans v. Washington, 459 F. Supp. 483, 484 (D.D.C. 1978) (the mentally retarded, committed to institutional care, have a "constitutional right to habilitative care and treatment"); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1315-16 (E.D. Pa. 1977) (commitment of the mentally retarded is constitutionally justified only if habilitation is provided), *aff'd in part, rev'd in part, and remanded en banc,* 612 F.2d 84 (3d Cir. 1979), *cert. granted,* 100 S. Ct. 2984 (1980); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976) (the state must return some benefit for the deprivation of liberty involved in commitment), *aff'd,* 601 F.2d 240 (5th Cir. 1979); Welsch v. Likins, 373 F. Supp. 487, 491-500 (D. Minn. 1974) (commitment of the mentally retarded gives rise to a right to treatment under due process), *aff'd in part, vacated in part, and remanded,* 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 387, 390-91 (M.D. Ala. 1972) (civil commitment of the mentally ill gives rise to a constitutional right to habilitation), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See also* notes 160-67 *infra* and accompanying text.

2. *See* A.B.A., *State Laws Governing Civil Commitment,* 3 Mental Disability L. Rep. 206, 206-14 (1979) (tabulation of relevant statutes). *See also* notes 70, 81 *infra* and accompanying text.

3. *See* Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966) (the court should inquire into less restrictive courses of treatment). *See also* notes 123-27 *infra* and accompanying text.

4. Statutes provide a right to a hearing with counsel following involuntary commitment for mental illness. *See, e.g.,* D.C. Code. Encycl. §§ 21-525, 21-527 to -545 (West 1967); Md. Ann. Code art. 59, § 13 (1979); Va. Code. § 37.1-67.1 (1980). Similarly, a statutory right to treatment for the mentally ill and the mentally retarded has been created. *See, e.g.,* Md. Ann. Code art. 59, § 3A (1979); Va. Code § 54-325.2:1 (1980).

These sweeping changes have largely bypassed one aspect of mental health law, the area of guardianship. Guardianship is a legal relationship in which one individual, the guardian, becomes a "substitute decisionmaker" for another, the ward.[5] The relationship commences following a hearing in which the would-be ward is declared "incompetent" to manage his personal affairs, his property, or more commonly, both person and property.[6] The consequences of being declared incompetent are serious. The ward may lose his right to vote, marry, contract, convey property, and engage in a business or a profession.[7] In view of these deprivations, it would seem that the appointment of a guardian would necessitate a hearing with a panoply of due process protections. In fact, the hearing is usually *ex parte* and lasts but a few minutes.[8]

Surprisingly, the procedural and substantive inadequacies of guardianship have aroused little concern from either commentators or the law reform movement.[9] This Article will outline the procedural safeguards that should exist at a guardianship hearing.[10] By use of the least restrictive alternative theory, it will argue that the guardian should be permitted to perform only those functions that the ward is clearly incapable of performing.[11] Finally, constitutional considerations should require the guardian to develop a treatment plan for his

---

5. *See* Vargyas, *Guardianship*, in 1 Legal Rights of Mentally Disabled Persons, P.L.I. Course Handbook Series No. 114, at 339, 341 (1979); 39 Am. Jur. 2d *Guardian and Ward* § 1 (1968); 39 C.J.S. *Guardian and Ward* § 2 (1976). In the context of this Article, the definition of guardianship will be restricted to the "legal relationship" imposed upon alleged incompetent adults, rather than a guardianship established to care for minors.

6. *See* A.B.A. Comm. on the Mentally Disabled, Guardianship & Convervatorship 3-4 (1979) [hereinafter cited as Guardianship & Conservatorship]. This source contains extensive state by state tabulations of current guardianship statutes. *Id.* at 9-73.

7. *See* notes 43-47 *infra* and accompanying text.

8. *See* R. Allen, E. Ferster & H. Weihofen, Mental Impairment and Legal Incompetency 83 (1968) [hereinafter cited as Mental Impairment and Legal Incompetency].

9. Only one direct attack has been launched at guardianship to date. A class action suit challenged the procedures for the appointment of a guardian, and asserted the right to the minimum number of restrictions on personal and property rights if a guardian was found necessary. Justice v. Superior Court, No. 79-1524 (D.D.C. June 27, 1979) (complaint dismissed), *vacated and remanded*, No. 79-1818 (D.C. Cir. June 24, 1980). The complaint is reprinted in 1 Legal Rights of Mentally Disabled Persons, P.L.I. Course Handbook Series No. 114, at 379 (1979) [hereinafter cited as Legal Rights]. Although a number of treatises and model statutes address the deficiencies of guardianship, only one article thoroughly discusses and advocates substantial procedural reforms. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215 (1975).

10. *See* pt. II *infra*.

11. *See* pt. III(A) *infra*.

ward designed to overcome the deficiency that necessitated the appointment of a guardian, or at the least, to ameliorate his condition.[12]

I. Principles and Practices of Guardianship

A. *Background*

Guardianship has its roots in early western civilization.[13] It became firmly established in the Anglo-Saxon legal tradition with the enactment of De Prerogativa Regis in the fourteenth century.[14] Guardianship was a duty of the sovereign and was exercised through the Lord Chancellor. It extended to the "idiot" who had no understanding—the mentally retarded, and the "lunatic" who had understanding but no reason—the mentally ill.[15] In theory, the King was granted custody of and responsibility for the incompetent's person and lands. He could keep the profits from the idiot's land, but he could manage the lunatic's property only until the disabled individual regained his sanity.[16] Although there was concern for the well-being of the ward, the impetus and primary purpose of guardianship was to preserve the property of the incompetent.[17] In this country, the equity court assumed full jurisdiction and responsibility for the person and property of incompetents, who were described as "wards of chancery."[18] As the superior guardian, it delegated the duty of safeguarding and promoting their interests to a guardian who was deemed an officer of the court.[19]

---

12. *See* pt. III(B) *infra*.

13. In Egypt and ancient Greece, mentally disabled individuals were considered to be afflicted by demons who could be exorcised by incantation or occasionally by torture. By the fourth century B.C., this view was displaced by that of Hippocrates who suggested that these disabilities were a natural phenomenon. Guardianship appears to have emerged under Roman law. At first, it was merely an edict that the family of the disabled should protect his person and property. Under the Justinian Code, a procedure was established whereby a magistrate appointed a guardian whose duties and responsibilities were similar to those of a guardian under today's laws. During the middle ages, these humanitarian advances receded, and the disabled were once again treated by exorcism. This time, however, the emphasis was on torture rather than magic. S. Brakel & R. Rock, The Mentally Disabled and the Law 1-2 (rev. ed. 1971) [hereinafter cited as The Mentally Disabled and the Law].

14. 17 Edw. 2, c. 9 (1324).

15. The Mentally Disabled and the Law, *supra* note 13, at 3.

16. In practice, the Chancellor delegated the Crown's responsibility to a committee that vouchsafed the custody of the incompetent, managed his property, and periodically accounted to the chancery court. *Id.* at 250.

17. Accordingly, guardianship was used only for the disabled who had assets. *Id.* at 3.

18. *See* Dexter v. Hall, 82 U.S. (15 Wall.) 9 (1872); McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846); Watson v. Watson, 183 Ky. 516, 209 S.W. 524 (1919); Commonwealth *ex rel.* Crombie v. McKinniss, 317 Pa. 60, 176 A. 22 (1935); Annot., 14 A.L.R. 295, 307 (1921).

19. Grayson v. Linton, 63 Idaho 695, 125 P.2d 318 (1942).

B. *Current Practice*

1. Individuals Subject to Guardianship

Although the prerequisites for determining guardianship vary among the states,[20] most jurisdictions employ a two part analysis.[21] The first identifies the type of disability that potentially subjects the individual to an incompetency hearing. All states include mental illness and mental retardation.[22] The majority include physical disabilities and senility, while a minority have provisions for alcoholism and drug addiction.[23] In addition to the enumerated infirmities, many jurisdictions provide that a person may be declared incompetent "for any other cause or incapacity."[24] Second, the disability must prevent the individual from properly caring for either his property or his person.[25]

2. The Guardianship Hearing

Guardianship proceedings are characteristically informal. Some states have no provision for the proposed ward to attend the hearing.[26] Others provide that the individual is entitled to attend,[27] while a third category requires that the alleged incompetent shall attend if able, unless attendance would be injurious to his health.[28] In practice, however, the individual rarely is present.[29]

---

20. *See* Guardianship & Conservatorship, *supra* note 6, Table I, at 11-17.

21. *Id.* at 3.

22. *Id.*, Table I, at 11-17.

23. *Id.*

24. For example, see Mo. Ann. Stat. § 475.010(3) (Vernon Supp. 1980), which defines a person subject to guardianship as "any person who is incapable by reason of insanity, mental illness, imbecility, idiocy, senility . . . or other incapacity, of either managing his property or caring for himself or both." *Id. See also* Guardianship & Conservatorship, *supra* note 6, Table I, at 11-17; The Mentally Disabled and the Law, *supra* note 13, at 266.

25. *See* Guardianship & Conservatorship, *supra* note 6, at 3.

26. Approximately one third of the states are in this category. *See* Guardianship & Conservatorship, *supra* note 6, Table IV, at 27-32. It is unclear whether individuals in these states could attend if they so desired. *But see* Mental Impairment and Legal Incompetency, *supra* note 8, at 83 ("right to be present is probably universally recognized").

27. About one-half of the states have provisions for the alleged incompetent to attend the hearing. *See, e.g.*, Alaska Stat. § 13.26.105 (1972); Kan. Stat. Ann. § 59-3013 (1976); Mo. Rev. Stat. § 475.075(2) (1959); Neb. Rev. Stat. § 30-2619(b) (1979). *See also* Guardianship & Conservatorship, *supra* note 6, Table IV, at 27-32.

28. *See, e.g.*, Ind. Code Ann. § 29-1-18-19 (Burns Supp. 1979); N.Y. Mental Hyg. Law § 77.07(b) (McKinney 1978); Okla. Stat. Ann. tit. 58, § 851 (West Supp. 1980); Pa. Stat. Ann. tit. 20, § 5511(a)(ii) (Purdon 1975). For a state by state listing, see Guardianship & Conservatorship, *supra* note 6, Table IV, at 27-32.

29. When a third person petitioned for guardianship, the alleged incompetent was present in court less than 8% of the time. Hortsman, *supra* note 9, at 235 n.81. *See also* Mental Impairment and Legal Incompetency, *supra* note 8, at 83.

A majority of states do not provide for the appointment of counsel.[30] In some jurisdictions, the court may appoint a guardian ad litem,[31] while other states provide that an attorney may appear on behalf of the proposed ward.[32] Conspicuously missing from most of these statutes, however, is a guarantee that the alleged incompetent has a right to court-appointed counsel if he cannot afford one.[33] Rarely, in practice, is the alleged incompetent represented by either attorney or guardian ad litem.[34]

In the vast majority of the cases the hearings are *ex parte*. The only persons present, therefore, are the prospective guardian, his attorney, and the probate judge.[35] Given the absence of an adversary, the court may dispense with the requirement of a hearing altogether. If there is a hearing, it may, at best, last only a few minutes.[36] Although the statutes require that an incompetent be functionally dis-

---

30. *See* Guardianship & Conservatorship, *supra* note 6, Table IV, at 27-32.

31. *See, e.g.*, Ala. Code § 26-2-42(b) (1975); Cal. Prob. Code § 1607 (West 1956); D.C. Code Encycl. § 21-1502(B) (West 1967); R.I. Gen. Laws § 33-15-9 (1969). *See also* Guardianship & Conservatorship, *supra* note 6, Table IV, at 27-32. A guardian ad litem has traditionally been viewed as an officer of the court appointed to represent the interests of an infant or incompetent in litigation. *See* State *ex rel.* Keating v. Bingham, 233 Ind. 504, 121 N.E.2d 727 (1954). There is some confusion as to whether a guardian ad litem is to be an advocate for his client's position, similar to an attorney, or whether he is to exercise his independent judgment in representing his client's interests. *See* notes 86-92 *infra* and accompanying text. *Compare* Stanton v. Sullivan, 62 R.I. 154, 4 A.2d 269 (1939) (guardian ad litem is not an attorney for infant but officer appointed by court to assist it in protecting interests of infant) *with* de Montigny v. de Montigny, 70 Wis. 2d 131, 233 N.W.2d 463 (1975) (guardian ad litem is an attorney for the children and their interests).

32. *See, e.g.*, Conn. Gen. Stat. Ann. § 45-70(c) (West Supp. 1980); Del. Code Ann. tit. 12, § 3914(b) (1979); N.C. Gen. Stat. § 35-1.16(a) (Supp. 1976); Ohio Rev. Code Ann. § 2111.02 (Page 1976); Iowa, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, Oklahoma, South Dakota, and Vermont have no provision for representation at the guardianship hearing. *See* Guardianship and Conservatorship, *supra* note 6, Table IV, at 27-32.

33. Florida is one exception to this rule and provides for the appointment of counsel for the indigent alleged incompetent. Fla. Stat. Ann. § 744.331(4) (West Supp. 1980).

34. One study found that a guardian ad litem was appointed in about 15% of the cases. G. Alexander & T. Lewin, The Aged and the Need for Surrogate Management 25 (1972) [hereinafter cited as The Aged and the Need for Surrogate Management]. Another concluded that the proposed ward was represented by counsel in 3% of the proceedings. Horstman, *supra* note 9, at 235 n.81.

35. The petitioner, his attorney, and the judge were the only persons present in 84% of guardianship hearings. Horstman, *supra* note 9, at 235 n.81.

36. One leading commentator states that "[t]he hearing contemplated by the notice sometimes takes place, sometimes does not take place, and sometimes, although it occurs, is so perfunctory as not to be a hearing in any meaningful sense." Mental Impairment and Legal Incompetency, *supra* note 8, at 82. *See also* Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 Clearinghouse Rev. 451, 454 (1978).

abled,[37] the court rarely requires such evidence. Instead, the court confines itself to a determination of the individual's mental capacity, and the only evidence offered on that issue is typically a brief letter from a physician stating that the individual is incompetent.[38] The physician is not present in court, and if he were, there would be no one to cross-examine him. Consequently, the courts must accept this as the only probative evidence of incapacity and, therefore, will consistently find the individual incompetent and appoint a guardian.[39]

3. Scope of Guardianship

Theoretically, a finding of incompetency need not lead to the full deprivation of personal and property rights associated with guardianship. Most jurisdictions permit the appointment of a guardian of the person, or a guardian of the estate—sometimes called a conservator—or both.[40] Moreover, approximately one-third of the states now provide for the appointment of a limited guardian.[41] As opposed to the traditional plenary guardian, a limited guardian is assigned only those duties that a ward is incapable of exercising.[42]

For the most part, however, a finding of incompetency leads to a significant deprivation of personal and property rights. An incompetent's ability to transact business is circumscribed. Many states revoke the professional or occupational license of an individual under guardianship.[43] In the majority of jurisdictions, a prior adjudication of in-

---

37. *See* Guardianship & Conservatorship, *supra* note 6, Table I, at 11-17.

38. *See* Mental Impairment and Legal Incompetency, *supra* note 8, at 89-90. One survey found that a physician testified in only one out of 1,000 cases. Horstman, *supra* note 9, at 235 n.81. By relying on medical evidence, the courts have turned a legal question into a medical one. *Id.* at 225-30. This problem has occurred in other areas of the law that involve an individual's mental condition. *See* United States v. Brawner, 471 F.2d 969, 975-79 (D.C. Cir. 1972) (the insanity defense). *See generally* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1964); Symposium, *United States v. Brawner*, 1973 Wash U.L.Q. 17.

39. Horstman, *supra* note 9, at 235 n.81 (less than 5% of the petitions were dismissed on the merits).

40. Alabama does not recognize the person/property distinction. Kentucky, Louisiana, Massachusetts, New Jersey, and Oklahoma do not have provisions for the separate appointment of a personal guardian or conservator; one individual automatically serves as both. *See* Guardianship & Conservatorship, *supra* note 6, Table II, at 18-21. Some courts have held, however, that a guardian could not be appointed for the estate alone. *See* Annot., 9 A.L.R.3d 774, 791 (1966).

41. *See* Guardianship & Conservatorship, *supra* note 6, Table II, at 18-21.

42. *See* Fla. Stat. Ann. § 744.303 (West Supp. 1980). For a tabulation of states that provide limited guardianship provisions, see Guardianship & Conservatorship, *supra* note 6, Table II, at 18-21.

43. A sampling of these professions and occupations includes: architects, Idaho Code § 54-305.1(d) (1979); barbers, Ky. Rev. Stat. § 317.590(1)(a) (1977); certified public accounts, Idaho Code § 54-217(12) (1979); chauffeurs, Iowa Code Ann. §

competency raises a rebuttable presumption that the person lacks sufficient capacity to contract or convey, thereby rendering his transactions either void or voidable.[44] Although an incompetent individual is not prohibited from making a will, it may be extremely difficult to demonstrate that this individual had the requisite testamentary capacity.[45] Personal rights are equally curtailed. An incompetent can neither sue nor be sued except through a guardian.[46] Similarly, the law frequently prohibits him from operating a motor vehicle, voting, holding public office, or marrying.[47]

321.177(7) (West Supp. 1980); dentists, N.M. Stat. Ann. § 61-9-14(2) (1978); funeral directors and embalmers, Ill. Ann. Stat. ch. 111½, § 73.20(e) (Smith-Hurd 1977); insurance agents, Alaska Stat. § 21.27.020 (1966); nurses, Ill. Ann. Stat. ch. 91, § 35.46(3) (Smith-Hurd 1966); physical therapists, W. Va. Code § 30-20-110(b)(5) (1980); physicians, Ala. Code § 34-24-35(23) (1975); public officers, Tenn. Code Ann. § 8-48-101(7) (1980); social workers, Cal. Bus. & Prof. Code § 9028(c) (West 1975); veterinarians, Hawaii Rev. Stat. § 471-10(b)(5) (1976). For a complete state by state listing of the various professions and occupations that a person under guardianship may not practice, see The Mentally Disabled and the Law, *supra* note 13, at 326.

44. Although the majority rule is that an adjudication of incompetency raises only a rebuttable presumption of incapacity at a subsequent date, a sizeable minority of jurisdictions hold that such a finding is a conclusive determination of lack of capacity. *See* Annot., 68 A.L.R. 1309, 1314 (1930). *Compare* Brisacher v. Tracey-Collins Trust Co., 277 F.2d 519 (10th Cir. 1960) (majority rule) *and* People v. Prosser, 56 Cal. App. 454, 205 P. 869 (1922) (same) *with* Jackson v. Van Dresser, 188 Tenn. 384, 219 S.W.2d 896 (1949) (minority rule) *and* Horton v. Lothschutz, 43 Wash. 2d 132, 260 P.2d 777 (1953) (same). The majority position has been declared to be the "better view." *See* Mental Impairment and Legal Incompetency, *supra* note 8, at 260-63; 2 S. Williston, A Treatise on the Law of Contracts § 257 (3d ed. 1959). The older view was that contracts of mental incompetents were void. *See* Reeves v. Hunter, 185 Iowa 958, 171 N.W. 567 (1919). The more modern approach calls them voidable at the instance of the incompetent party. *See* Perper v. Edell, 160 Fla. 477, 35 So. 2d 387 (1948); Mental Impairment and Legal Incompetency, *supra* note 8, at 275-76. *See generally*, Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 Tex. L. Rev. 554 (1943). The incompetent is, however, responsible for the cost of necessaries furnished to him. 2 S. Williston, *supra*, § 255.

45. The test for testamentary capacity differs from that for appointment of a guardian. *See* United States Bank of Am. v. Saville, 416 F.2d 265, 269 (7th Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970); 1 W. Page, Wills § 12.42 (W. Bowe & D. Parker eds. 1960). Nevertheless, the appointment of a guardian is highly probative on the issue and is said to establish a prima facie case against testamentary capacity. *See In re* Estate of Fossa: Clark v. Raffetto, 210 Cal. App. 2d 464, 26 Cal. Rptr. 687 (1962); *In re* Estate of Gaffney: Bradford v. Dollansky, 218 Or. 362, 345 P.2d 396 (1959); Mental Impairment and Legal Incompetency, *supra* note 8, at 283-93; 3 W. Page, *supra*, § 29.70. For a state by state description of who may make a will, see The Mentally Disabled and the Law, *supra* note 13, at 322.

46. In some states, the guardian brings the action in the name of the incompetent. *See* Century Credit Co. v. Jones, 196 Pa. Super. Ct. 210, 173 A.2d 768 (1961). Under the federal rules, the guardian sues in his own name. Fed. R. Civ. P. 17(a). For a discussion of cases construing and applying the federal rule, see Annot., 68 A.L.R.2d 752 (1959).

47. An incompetent may be prohibited from voting by constitutional provision, Kan. Const. art. 5, § 2, and/or statute. Ariz. Const., art. VII, § 2; Ariz. Rev. Stat.

II. GUARDIANSHIP—PROCEDURAL ASPECTS

The significant deprivations inherent in being placed under guardianship merit greater procedural protections than currently exist. In the absence of remedial state statutes,[48] the question of the prospective ward's right to these procedural protections depends on the mandates of due process.[49] A person under guardianship suffers severe restrictions and deprivations of his property and liberty.[50] These deprivations result from a finding of incompetency by a probate court. Because these probate court proceedings are authorized and conducted pursuant to legislative enactment, there is "state action" sufficient to trigger application of the due process clause.[51] "Once it is determined that due process applies, the question remains what process is due." [52] Beyond the criminal realm, the requirements of due process are flexible and are determined by balancing the private

---

Ann. § 16-101.5 (1975). The provisions dealing with competency for public office are virtually the same as those for competency to vote and typically state that the individual must be a qualified elector. S.C. Const., art. II, § 3; *id.* art VI, § 1. For a state by state analysis of the prohibitions on voting, holding public office, jury service, or operating a motor vehicle, see The Mentally Disabled and the Law, *supra* note 13, Table 9.4, at 333-39. For a similar analysis concerning prohibitions on marriage, see *id.*, Table 7.1, at 240-43. *See also* Mental Impairment and Legal Incompetency, *supra* note 8, at 260-369.

48. See the Model Statute proposed in Guardianship & Conservatorship, *supra* note 6, at 78-167, which provides for extensive procedural safeguards including the right to counsel, jury trial, proof beyond reasonable doubt, and periodic review.

49. U.S. Const. amend. XIV, § 1.

50. *See* notes 43-47 *supra* and accompanying text.

51. The "state action" requirement of the fourteenth amendment is the equivalent of action " 'under color' of [state] law" found in 42 U.S.C. § 1983 (1976). United States v. Price, 383 U.S. 787, 794-95 n.7 (1966). There is no precise formula for determining the quantum of state action that gives rise to a cause of action. Each case depends upon the particular facts and circumstances involved. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-24 (1961). One recurring set of circumstances in which color of state law has not been found and that presents a surface similarity to the state involvement in guardianship proceedings is the self-help repossession cases under the Uniform Commercial Code or other similar statutes. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). The courts have held that, notwithstanding the existence of state statutes authorizing self-help, private individuals acting pursuant thereto do not act under color of state law. Although the same could arguably be said of private guardians, the distinction is that the statutory authorization for self-help is merely duplicative of valid, existing, private remedies. *See* Shirley v. State Nat'l Bank, 493 F.2d 739, 741-42 (2d Cir.), *cert. denied*, 419 U.S. 1006 (1974); Annot., 32 A.L.R. Fed. 431, 437-38 (1977). By contrast, there is no common law, non-statutory method for an individual to be appointed guardian, other than by resort to the courts. *See* notes 14-18 *supra* and accompanying text.

52. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

interest involved, the risk of its erroneous deprivation through the current procedures, and the burden that the additional procedures would entail.[53]

Because of the severe limitations that guardianship imposes on personal and economic freedom, an individual has a significant interest in not being placed under guardianship unless he is truly incapable of managing his affairs. Moreover, an individual under guardianship bears the stigma of having been labeled incompetent.[54] This can be devastating to an individual's sense of personal dignity,[55] especially to those, such as the elderly, who once had keen minds and were productive citizens.

The state, under its parens patriae power, has a legitimate concern in protecting the interests of those who are incapable of taking care of themselves.[56] As opposed to civil commitments, however, in which the state has an additional police power interest in confining those mentally ill individuals who are dangerous,[57] the sole justification for guardianship is to assure the well being of the ward. In discharging its responsibility, therefore, the state has an interest in not erecting too many obstacles to the appointment of a guardian.

More onerous procedures for appointment of a guardian may not be socially desirable, and this consideration would weigh against a wholesale extension of due process protections.[58] Private guardians

53. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (termination of social security disability benefit payments); Goss v. Lopez, 419 U.S. 565, 577-79 (1975) (public school suspension); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole revocation).

54. For cases in which stigmatization was an important factor in deciding whether due process was required, see Goss v. Lopez, 419 U.S. 565, 574-75 (1975); Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *But see* Parham v. J. R., 442 U.S. 584, 601 (1979) ("what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness"); Addington v. Texas, 441 U.S. 418, 429 (1979) ("[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma").

55. The Aged and the Need for Surrogate Management, *supra* note 34, at 2; Horstman, *supra* note 9, at 231. *See also* Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 Wm. & Mary L. Rev. 569, 607 (1972).

56. *See* Vargyas, *supra* note 5, at 342.

57. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1222-45 (1974) [hereinafter cited as *Developments*].

58. In Parham v. J.R., 442 U.S. 584 (1979), the Court held that parents could "volunteer" their children to a mental institution virtually without any due process safeguards for the minors. One factor that influenced the Court against requiring a plenary hearing was the state's significant interest in not imposing unnecessary procedural obstacles that may discourage the families of the mentally ill from seeking psychiatric assistance. *Id.* at 605. A significant distinction, however, between *Parham* and the guardianship context is that, in *Parham*, the parents of the child, as the child's natural guardian, presumptively act in the child's best interest. *Id.* at 602-03. By contrast, until a person is appointed guardian, the law does not presume that there is any affinity between the prospective guardian and ward.

are typically compensated out of the ward's estate for undertaking their responsibilities.[59] When the ward's estate is substantial, a more formalized hearing may not deter the prospective guardian from petitioning for guardianship. The recent emergence of public guardianship provisions permitting the state to become guardian, however, indicates that currently there are not sufficient numbers of individuals willing to become guardians.[60] When the ward has a meager estate, a more complicated or adversarial procedure may well deter the would-be guardian from petitioning. This in turn would require the state to assume the burden and expense of public guardianship. In those jurisdictions without public guardianship provisions, the disabled individual might not be provided the benefit and protection of a guardian.[61]

Another factor to be considered in deciding what process is due is the likelihood of erroneous deprivation of an individual's personal liberty through the procedures employed. One study concluded that over 95% of the guardianship petitions resulted in the appointment of

---

59. In most states, a guardian receives "reasonable" compensation. *See, e.g.*, Tenn. Code Ann. § 34-810 (1977); Vt. Stat. Ann. tit. 14, § 2847 (1974). In Alabama, the compensation of a guardian is a fixed percentage of the ward's estate. Ala. Code § 26-5-16 (1975). *See also* Guardianship & Conservatorship, *supra* note 6, Table V, at 33-37; 39 Am. Jur. 2d *Guardian and Ward* § 186 (1968).

60. Thirteen states have provisions for the appointment of a public guardian. *See* Guardianship & Conservatorship, *supra* note 6, Table V, at 33, 36-37. These statutes typically provide that a public guardian shall not be appointed if a suitable private guardian is available and willing to assume the responsibilities. *See, e.g.*, Ala. Code § 26-2-50 (1975); Cal. Welf. & Inst. Code § 8006 (West Supp. 1980). Me. Rev. Stat. Ann. tit. 18, § 3649 (Supp. 1980). Generally the public guardian is funded by either the county, *e.g.*, Ariz. Rev. Stat. Ann. § 14-5601B (1975), or the state. *E.g.*, Ill. Ann. Stat. ch. 91½, § 735 (Smith-Hurd Supp. 1980-81). *See* Guardianship & Conservatorship, *supra* note 6, Table V, at 36-37. For an evaluation of public guardianship in Minnesota, the first state to have such a provision, see Levy, *Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota*, 49 Minn. L. Rev. 821 (1965). *See also* Hodgson, *Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, 37 Alb. L. Rev. 407, 410-23 (1973).

61. No social policy considerations weigh in favor of depriving an incapacitated individual of the protections of guardianship. In those states with public guardianship provisions, however, it may be more beneficial from the ward's perspective to be under public rather than private guardianship. Public guardianship protects the ward's property from the excessive costs of private guardianship. In addition, because a public guardian is usually a social service agency, it may be in a better position professionally than a private guardian to assess the ward's needs and avoid overprotection. *See* Mental Impairment and Legal Incompetency, *supra* note 8, at 106-07. On the other hand, because a public guardian has custody of many wards, some individuals may inadvertently slip into the interstices, a situation less likely to occur with a private guardian. *See* Parham v. J. R., 442 U.S. 584, 619 (1979) (when a state ward was committed to a mental hospital, the Court acknowledged risk of the child being " 'lost in the shuffle' ").

a guardian.[62] In the civil commitment context, studies have found that stricter procedural requirements decreased the number of commitments.[63] If this reduced number of civil commitments more accurately reflects the number of individuals who should be committed, then judicially increased procedural safeguards would have a similar beneficial effect in the guardianship sphere.

A. *Notice*

Virtually every jurisdiction requires that notice be given to the allegedly incapacitated individual and his family.[64] Most jurisdictions require notice seven to fourteen days prior to the hearing.[65] Frequently, however, the individual is simply sent a notice of the hearing[66] and is not advised of the serious legal consequences of an adjudication of incompetency. Even when a copy of the petition accompanies the notice of hearing, the alleged incompetent is still not effectively apprised of the underlying facts because the petition, in inscrutable legalese, merely recites the statutory requirements.[67]

To meet the requirements of due process, notice given to interested parties must be reasonably calculated under all the circumstances to apprise them of the pending action and of their opportunity to be heard.[68] Notice must particularize the specific acts or conduct that form the basis of the suit.[69] Accordingly, in commitment proceedings, courts have required notice of the purpose of the proceedings, the alleged facts that form the basis for the proposed commitment, and the possible consequences of an adverse determination.[70] There is no reason why these requirements should not also

---

62. *See* note 39 *supra*.

63. *See* Cyr, *The Role and Functions of the Attorney in the Civil Commitment Process: The District of Columbia's Approach*, 6 J. Psych. & L. 107, 115-18 (1978); Zander, *Civil Commitment in Wisconsin: The Impact of* Lessard v. Schmidt, 1976 Wis. L. Rev. 503, 553. *Compare* Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study*, 1968 Wash. U.L.Q. 485, 540 (2 of 1700 cases resulted in patient's release) *with* Perlin, *Representing Individual in the Commitment and Guardianship Process*, in Legal Rights, *supra* note 9, at 497, 510 (20% committed).

64. Alabama, South Dakota, and in some instances, Texas, however, do not have statutory notice provisions. *See* Guardianship & Conservatorship, *supra* note 6, Table III, at 23-26.

65. *Id.* at 5.

66. *Id.*, Table III, at 23-26.

67. Mitchell, *supra* note 36, at 453-54.

68. *See* Armstrong v. Manzo, 380 U.S. 545, 550-51 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

69. *See In re* Gault, 387 U.S. 1, 33 (1967); Wagner v. Little Rock School Dist., 373 F. Supp. 876, 881 (E.D. Ark. 1973).

70. *See* Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich.

apply to guardianship proceedings. Moreover, unless notice is written in clear language, it should not be considered sufficient to inform allegedly incompetent individuals of the nature and the purpose of the hearing.[71]

B. *Right to Counsel*

It is imperative that counsel be appointed for all individuals facing guardianship.[72] The prospective ward is frequently disabled and incapable of adequately protecting his interests during the course of a guardianship hearing. As noted earlier, a majority of states permit representation by counsel or guardian ad litem, although in most jurisdictions there is no mechanism for appointment of counsel as a matter of course.[73] There may, however, be a constitutional right to counsel, grounded in due process, in guardianship hearings. As interpreted, the sixth amendment guarantees all indigent defendants the right to appointed counsel at the critical stages of criminal proceedings.[74] Relying on the due process clause, the Supreme Court in *In Re Gault*[75] extended the right to appointed counsel to juvenile delinquency hearings. Rejecting the criminal-civil distinction, the Court examined the substance of delinquency proceedings and concluded that, notwithstanding the benign motives of the state in confining the juvenile, basic fairness dictated that the juvenile be entitled to legal representation because he was subjected to a possible loss of liberty.[76]

1974). *See also* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (requiring the names of all persons who may testify at hearing for commitment and the substance of their proposed testimony), *vacated on other grounds and remanded per curiam*, 414 U.S. 473 (1974).

71. *See* Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 Cal. L. Rev. 816, 821-22 (1974).

72. Guardianship & Conservatorship, *supra* note 6, Model Statute § 31(1)(a)(ii), at 134; Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health, *Mental Health and Human Rights* (Feb. 15, 1978), *reprinted in* 20 Ariz. L. Rev. 49, 76-77 (1978). *But see* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978).

73. *See* notes 30-34 *supra* and accompanying text. In those jurisdictions that provide for the appointment of counsel, courts have liberally construed the provisions to protect the rights of alleged incompetents. *See* Trapnell v. Smith, 131 Ga. App. 254, 205 S.E.2d 875 (1974); State *ex rel.* Koch v. Vanderburgh Probate Court, 246 Ind. 139, 203 N.E.2d 525 (1965); Annot., 87 A.L.R.2d 950 (1963).

74. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors for which defendant faces possibility of confinement); Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies). This right to counsel attaches at every "critical stage" of a criminal proceeding. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (pretrial lineup).

75. 387 U.S. 1 (1967).

76. *Id.* at 34-42.

Courts applying the *Gault* rationale to individuals facing other grievous losses of liberty have concluded that the right to appointed counsel attaches to neglect or dependency proceedings that could result in either the removal of the child from parental custody[77] or the permanent termination of parental rights,[78] to adoption proceedings that may result in the involuntary termination of parental rights,[79] and to proceedings to review foster care status.[80] The right to counsel has also been extended to the related area of involuntary commitment proceedings because of the possibility of indefinite commitment and the associated stigmatization.[81] Similarly, the loss of liberties, both personal and economic, and the stigmatization associated with guardianship are significant losses. That the state, as parens patriae, is acting out of concern for the alleged incompetent neither diminishes nor legitimates these deprivations.

One significant difference, however, is that, in cases that have applied the *Gault* rationale, there is usually a state appointed prosecuting attorney.[82] When the state, through its legal counsel, marshals its knowledge and expertise against an individual standing alone, courts understandably view the situation as fundamentally unfair if counsel is not appointed to represent the individual. If, however,

---

77. *See* Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); *In re* B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); *In re* Welfare of Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975).

78. *See* Crist v. New Jersey Div. Youth & Family Servs., 135 N.J. Super. 573, 343 A.2d 815 (Super. Ct. App. Div. 1975); *In re* Welfare of Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

79. *See In re* Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973).

80. *See In re* K., 82 Misc. 2d 983, 372 N.Y.S.2d 381 (Fam. Ct. 1975). For other contexts and cases reviewing the right to counsel in proceedings involving a possible loss or termination of parental rights, see Annot., 80 A.L.R.3d 1141 (1977).

81. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds and remanded per curiam*, 421 U.S. 957 (1975); *In re* Quesnell, 83 Wash. 2d 224, 517 P.2d 568 (1978)(en banc); State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109 (W. Va. 1974); *see* Dorsey v. Solomon, 435 F. Supp. 725 (D. Md. 1977); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot and remanded*, 431 U.S. 119 (1977). *But see* Parham v. J.R., 442 U.S. 584 (1979). *See generally* Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction*, 5 Seton Hall L. Rev. 64 (1973); Annot., 87 A.L.R.2d 950 (1963).

82. *See* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); *In re* Welfare of Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

there is no prosecuting attorney, the scales are not inexorably tilted against the individual and counsel, therefore, is not as necessary.[83]

Initally, this factor militates against recognition of a constitutional right to appointment of counsel because the prospective ward generally faces, not a state prosecutor, but a private individual who may or may not be represented by an attorney. If, however, the right to counsel is granted to adjust the inherent imbalance of experience and expertise between the parties and not simply because of the presence of the state attorney, the same imbalance must be recognized when a disabled person faces a healthy petitioning party. The absence of a prosecuting attorney should not be a reason to deny prospective wards a right to counsel.

The appointment of counsel would inevitably discourage some individuals from petitioning for guardianship. This would be particularly true in an adversarial hearing at which the attorney opposes appointment of a guardian. In other situations, however, the appointment of a guardian would be a certainty, and the hearing would focus on the less controversial issues of the extent of guardianship and the development of a prescriptive treatment plan.[84] This hearing would seldom be adversarial, and counsel would probably be welcomed. In any event, the ward's inability to effectively advocate for himself, coupled with his need to have his interests vigorously represented, are compelling reasons to require appointment of counsel and outweigh any adverse effect upon the number of individuals willing to petition for guardianship.[85]

If counsel is required at guardianship proceedings, the question arises as to his proper role. In the related civil commitment area, a controversy exists between those who believe that an attorney should represent his client's best interests and those who believe that counsel should advocate his client's position, regardless of the inherent wisdom of that position.[86] The former view arises from a number of

---

83. The Supreme Court, noting the absence of a prosecutor, has held that representation by counsel was not required. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation). *But see* Brunetti, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 Sw. L.J. 684, 693-95 (1975) (arguing that individual facing commitment is entitled to representation by counsel, notwithstanding that majority of states do not require state prosecutor).

84. *See* pt. III *infra*.

85. *But see* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978). The court in *Rud* held that counsel was not constitutionally required at guardianship proceedings because relaxed procedural and evidentiary rules did not require skills of legal counsel; the liberty interest at stake was "less significant" than other proceedings in which the presence of an attorney has been mandated; and finally, the costs associated with mandatory appointment of counsel would undermine one of the essential purposes of the proceeding—the protection of the incompetent's limited resources. *Id.* at 679.

86. Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 Miss. L.J. 43, 89-90 (1974); Cohen,

factors characteristic of both commitment and guardianship hearings. First, because his client's sanity is an issue, an attorney may believe that his client is unable to decide rationally what is in his best interest.[87] Moreover, an attorney may feel awkward in advocating his client's wishes because the client appears or acts in a bizarre manner.[88] Finally, because the ostensible purpose of the proceeding is to help his client, he may believe that he need not actively oppose the petition.[89]

These apparent justifications are fundamentally at odds with the historic role of counsel as a zealous advocate for his client.[90] When the issue has been litigated in the commitment context, the courts have held that the presence of a guardian ad litem is insufficient to satisfy the requirement of representation by counsel and have ruled that counsel, if requested, must take an adversary position.[91] The role of an attorney should be the same in guardianship hearings.[92]

C. *Review*

The statutes of virtually every state have procedures to terminate guardianship, which can be invoked by the disabled person and others interested in his welfare.[93] Only ten states, however, require regular court review of private guardianships and conservatorships.[94]

The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424 (1966); Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination*, 51 Marq. L. Rev. 1 (1967); Litwack, *supra* note 71, at 838-39; *Developments*, *supra* note 57, at 1288-91; Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 Yale L.J. 1540 (1975) [hereinafter cited as *The Role of Counsel*].

87. *See The Role of Counsel*, *supra* note 86, at 1542.

88. Litwack, *supra* note 71, at 827-31.

89. *See In re* Quesnell, 83 Wash. 2d 224, 232-35, 517 P.2d 568, 574-75 (1973) (en banc); Perlin, *supra* note 63, at 497-505.

90. *See* Anders v. California, 386 U.S. 738, 744 (1967); Powell v. Alabama, 287 U.S. 45, 71 (1932); ABA Canons of Professional Ethics No. 7.

91. *See* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds and remanded per curiam*, 414 U.S. 473 (1974); *In re* Quesnell, 83 Wash. 2d 224, 517 P.2d 568 (1973) (en banc); State *ex rel.* Memmel v. Mundy, 75 Wis. 2d 276, 249 N.W.2d 573 (1977).

92. Counsel for an allegedly incapacitated individual must "represent zealously that individual's legitimate interests." Guardianship & Conservatorship, *supra* note 6, Model Statute § 33, at 141. *See also* Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625 (1979).

93. *See, e.g.*, Alaska Stat. § 13.26.125(b) (1972); Mich. Comp. Laws Ann. § 330.1637 (Supp. 1979); N.J. Stat. Ann. § 3A:6-43 (West 1953 & Supp. 1979). For a complete list, see Guardianship & Conservatorship, *supra* note 6, Table VI, at 38-41.

94. Arizona, California, Connecticut, Florida, Idaho, Indiana, Iowa, Michigan, Nevada, and North Carolina provide for periodic review of guardianship. *See* Guardianship & Conservatorship, *supra* note 6, Table VI, at 38-41.

In general, these statutes require the guardian to file reports on the condition of his ward and the need for continued guardianship.[95] Only Arizona unequivocally requires the guardian to re-petition for guardianship through a formal proceeding at periodic intervals.[96]

Periodic review is essential. Although some individuals completely regain their competency, restoration proceedings seldom occur.[97] Periodic review would ensure that guardianship would continue only as long as necessary. Other benefits would also accrue. Although current procedures require a guardian to file periodic accountings, these reports are confined solely to the ward's financial status.[98] The court cannot determine from an accounting if the needs of the ward are being met.[99] A periodic review would ensure that, as the ward's condition changes, the court would be able to reassess the continued necessity of restrictions already imposed and the appropriateness of the treatment plan.[100] It would also give the court the opportunity to determine if the guardian has been diligent in the performance of his duties. Periodic review deserves, and has received, vigorous endorsement.[101]

In addition, a constitutional right to a periodic review may exist. In an analogous context, the Supreme Court has emphasized that commitment to a mental institution must be justified by a legitimate state interest, and when the reasons for confinement no longer exist, the individual must be released.[102] Proceeding on this assumption, courts have reasoned that, because the state has the initial burden of justifying commitment, it must periodically demonstrate that the reasons for commitment still exist.[103]

A division of opinion exists, however, on whether the state can require the patient to request a rehearing.[104] The better view re-

---

95. *Id.*

96. Ariz. Rev. Stat. Ann. § 36-547(B) (1974 & Supp. 1980).

97. Mental Impairment and Legal Incompetency, *supra* note 8, at 93, 247.

98. *See, e.g.*, Cal. Prob. Code §§ 1550, 1553 (1956 & Supp. 1979); Mass. Ann. Laws ch. 205, § 1.5 (Michie/Law Co-op 1969 & Supp. 1980).

99. Mental Impairment and Legal Incompetency, *supra* note 8, at 92-93, 246-47.

100. If the ward's condition has improved, a less restrictive form of guardianship might be devised. For a discussion of the ward's right to limited guardianship, see pt. III(A) *infra*.

101. *See* Guardianship & Conservatorship, *supra* note 6, Model Statute § 15 & Comment, at 101-03.

102. *See* O'Connor v. Donaldson, 422 U.S. 563, 574-75 (1975); Jackson v. Indiana, 406 U.S. 715, 738 (1972).

103. *See* Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976), Fasulo v. Arafeh, 173 Conn. 473, 378 A.2d 553 (1977).

104. *Compare* Fasulo v. Arafeh, 173 Conn. 473, 378 A.2d 553 (1977) (periodic review must be initiated by the state) *with* Dorsey v. Solomon, 435 F. Supp. 725 (D. Md. 1977) (the criminally insane have no right to periodic review), *modified*, 604 F.2d 271 (4th Cir. 1979) *and* Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976) (the patient can be required to initiate review).

quires the party seeking to continue the commitment to initiate the review. Without this periodic reassessment, many individuals who no longer require commitment would remain institutionalized due to a limited knowledge of the release procedures—a problem exacerbated by their mental condition.[105] The justification for confinement having ceased, their continued commitment would be unconstitutional without a knowing and intelligent waiver of the right to a review.[106] This waiver would be unlikely in view of their mental condition. An equal protection argument may also be asserted. The lack of a periodic review unlawfully differentiates between an individual prior to commitment, who has a full panoply of procedural protections before his liberty can be restricted, and the individual after commitment, who enjoys these protections only if he takes the additional step of requesting a review.[107] These arguments apply with equal force to those subjected to guardianship and compel the conclusion that periodic review initiated by the guardian is necessary to continue guardianship.

The question arises as to the form of the periodic review. Conceptually, it should entail all the formalities of the initial hearing.[108] Nevertheless, the knowledge that an annual judicial proceeding would be necessary may discourage many would-be guardians from petitioning for guardianship. A balancing of interests suggests that the guardian be required, at the least, to file detailed periodic reports with the court and the ward's attorney, with the understanding that either has the right to request a formal hearing.

III. GUARDIANSHIP—SUBSTANTIVE ASPECTS

A. *Least Restrictive Alternative*

In approximately two thirds of the states, the ward is placed under plenary guardianship[109] and loses significant personal rights.[110] The remaining states provide a form of limited guardianship that permits the ward to retain a degree of self-determination.[111] The probate court, however, may be under no statutory compulsion to appoint a limited guardian if the incapacitated person does not need a plenary

---

105. *See* Fasulo v. Arafeh, 173 Conn. 473, 378 A.2d 553 (1977); *Developments*, *supra* note 57, at 1397-98.

106. Waiver of constitutional rights must be knowing, intelligent, and voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Johnson v. Zerbst, 304 U.S. 458 (1938).

107. *See Developments*, *supra* note 57, at 1387.

108. *Id.* at 1394.

109. For a complete list, see Guardianship & Conservatorship, *supra* note 6, Table II, at 18-21.

110. *See* notes 43-47 *supra* and accompanying text.

111. *See* Guardianship & Conservatorship, *supra* note 6, Table II, at 18-21.

guardian because many of the statutes provide that the court "may" appoint a limited guardian.[112]

The intrusiveness and inflexibility of plenary guardianship provisions have been criticized.[113] Numerous individuals under guardianship are capable of handling many of the decisions that fall to the guardian. Yet, given the all or nothing wording of most statutes, the need for some assistance translates into a total abrogation of the disabled individual's rights. This total divestiture of self-management, in turn, increases dysfunction.[114] In essence, plenary guardianship becomes a self-fulfilling prophecy. Moreover, the serious deprivations of rights associated with plenary guardianship discourage some from seeking "guardianship on behalf of individuals who need only moderate protection."[115] In practice, therefore, full guardianship is both overinclusive and underinclusive. A remedy lies in limited guardianship provisions that set forth the guardian's specific duties and responsibilities and reserve all other rights to the incapacitated individual.[116]

A constitutional basis for granting the guardian only those duties that the ward is plainly incapable of performing depends upon the applicability of the least restrictive alternative principle. The most renowned formulation appears in *Shelton v. Tucker*,[117] in which the Supreme Court stated that

> [e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly

112. *See, e.g.*, Fla. Stat. Ann. § 744.303(1) (West Supp. 1980); Idaho Code § 56-239(d) (Supp. 1980); Me. Rev. Stat. Ann. tit. 18, § 3512 (Supp. 1980).

113. The Aged and the Need for Surrogate Management, *supra* note 34, at 3, 137; The Mentally Disabled and the Law, *supra* note 13, at 264; Regan, *supra* note 55, at 608.

114. *See* The Aged and the Need for Surrogate Management, *supra* note 34, at 137.

115. International League of Societies for the Mentally Handicapped, Symposium on Guardianship of the Mentally Retarded 11 (1969). "[I]mportant and appealing policy goals are in tension in the guardianship area. The first policy goal is protection against exploitation of mentally [disabled] citizens. The second goal is freedom of the mentally [disabled] citizen, with opportunity to develop as an independent member of the community. Extreme protection can sometimes be more onerous than moderate exploitation." Kindred, *Guardianship and Limitations Upon Capacity*, in The President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law 62, 66 (1976) (footnote omitted).

116. See the Model Statute proposed in Guardianship & Conservatorship, *supra* note 6, at 101-03, which provides that the court impose the least restrictive alternative necessary to enable the partially disabled person to meet the essential requirements of his physical health or safety and to manage his financial resources. *Id.* Model Statute § 15, at 101-03. A model statute is also proposed in The Aged and the Need for Surrogate Management, *supra* note 34, at 141. It provides for a sliding scale of interference with an individual's right to manage his personal affairs. In particular, this model act creates three categories of impairment and an appropriate surrogate manager for each. *Id.* at 144-53. *But see* Uniform Probate Code (no provision for appointment of limited guardian).

117. 364 U.S. 479 (1960).

> stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[118]

The Court has applied the least restrictive alternative analysis to invalidate laws that have restricted the rights to vote,[119] to travel,[120] and to procreate.[121] It recently used this principle to strike down a zoning ordinance with an overly restrictive definition of "family."[122]

Although the Court has yet to consider the doctrine in the mental health context, lower courts have extensively applied this doctrine. It first emerged in *Lake v. Cameron*,[123] in which the Court of Appeals for the District of Columbia construed a statute to require investigation of less drastic alternatives than involuntary commitment to a mental institution. The same court raised the statutory right to one of constitutional dimensions in *Covington v. Harris*,[124] a case involving an intra-hospital transfer. A plethora of subsequent cases have held that the massive curtailment of liberty inherent in the very nature of civil commitment requires a showing that involuntary hospitalization is the least restrictive alternative consistent with the needs of the person to be committed.[125] This analysis has also been applied to the

---

118. *Id.* at 488. The least restrictive alternative had its genesis in cases dealing with the commerce clause. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513-17 (1924); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254 (1964).

119. O'Brien v. Skinner, 414 U.S. 524, 533-35 (1974) (Marshall, J., concurring); Carrington v. Rash, 380 U.S. 89, 95-97 (1965).

120. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267-70 (1974); Vlandis v. Kline, 412 U.S. 441, 451-52 (1973).

121. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 642-49 (1974). *See generally Developments, supra* note 57, at 1245-48.

122. Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

123. 364 F.2d 657, 660-61 (D.C. Cir. 1966).

124. 419 F.2d 617, 623-25 (D.C. Cir. 1969).

125. *See* J.L. v. Parham, 412 F. Supp. 112, 139 (M.D. Ga. 1976), *rev'd on other grounds sub nom.* Parham v. J. R., 442 U.S. 584 (1979); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974); Welsch v. Likins, 373 F. Supp. 487, 501-02 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977); Lessard v. Schmidt, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated on other grounds and remanded per curiam*, 414 U.S. 473 (1974); Dixon v. Attorney Gen., 325 F. Supp. 966, 973-74 (M.D. Pa. 1971). *But see* Eubanks v. Clarke, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977); Stamus v. Leonhardt, 414 F. Supp. 439, 452-53 (S.D. Iowa 1976); Davis v. Watkins, 384 F. Supp. 1196, 1203 (N.D. Ohio 1974); State v. Sanchez, 80 N.M. 438, 441, 457 P.2d 370, 373 (1969), *appeal dismissed*, 396 U.S. 276 (1970); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 165-66, 305 N.E.2d 903, 905, 350 N.Y.S.2d 889, 892 (1973).

commitment of the mentally retarded.[126] Indeed, the principle is so well established that it has been incorporated into the commitment statutes of many states.[127]

The disadvantage of reliance upon the least restrictive alternative is that its application by the Supreme Court has been less than uniform. Even in the prototypical first amendment context, the Court has vacillated in its use.[128] Moreover, the Court specifically rejected the doctrine as a means of ameliorating the conditions of confinement of pretrial detainees in *Bell v. Wolfish*.[129] In *Bell*, the Court refused to consider the doctrine because it was not alleged that any of the conditions of confinement were unduly restrictive of any express constitutional guarantee other than the rudiments of due process.[130] Guardianship, by contrast, is an encroachment on such recognized and fundamental personal liberties as the rights to marry[131] and to vote.[132] Although not as significant, the right to hold and convey property,[133] the right to contract,[134] and the right to engage in the practice of a

---

126. *See* Halderman v. Pennhurst State School & Hosp. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216-17 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); Saville v. Treadway, 404 F. Supp. 430, 437 (M.D. Tenn. 1974); Wyatt v. Stickney, 344 F. Supp. 387, 396 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

127. *See, e.g.*, Hawaii Rev. Stat. § 334-60 (1976 & Supp. 1979); Me. Rev. Stat. Ann. tit. 34, § 2251(7) (1964); Mass. Ann. Laws ch. 123, § 8 (Michie/Law Co-op. 1972 & Supp. 1980); Minn. Stat. Ann. § 253A.02 (West 1971 & Supp. 1980); Tenn. Code Ann. § 33-604(d) (Supp. 1980); Utah Code Ann. § 64-7-36(6) (Supp. 1979), Va. Code § 37.1-67-3 (Supp. 1980).

128. *See* L. Tribe, American Constitutional Law § 12-30, at 722-23 (1978); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 465 (1969) ("rhetoric of less drastic means does not provide a trustworthy guide to what the Court is actually doing with the concept"). *Compare* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose") *with* United States v. Robel, 389 U.S. 258, 267 (1968) (not "our function to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review.").

129. 441 U.S. 520 (1979). Lower courts had applied the *Shelton* principle by enjoining onerous prison conditions that were not the least restrictive means of ensuring the presence of pretrial detainees at trial. *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974); Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1192-93 (E.D. Ark. 1971).

130. Bell v. Wolfish, 441 U.S. 520, 534 (1979).

131. Zablocki v. Redhail, 434 U.S. 374 (1978).

132. Hill v. Stone, 421 U.S. 289 (1975).

133. Arkansas Stove Co. v. State, 94 Ark. 27, 125 S.W. 1001 (1910); Carolina Beach Fishing Pier, Inc. v. Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

134. *See* Florida Accountants Ass'n v. Dandelake, 98 So. 2d 323 (Fla. 1957) (en banc); Blount v. Smith, 12 Ohio St. 2d 41, 231 N.E.2d 301 (1967). In contrast, some

business or occupation[135] are all curtailed by appointment of a guardian.[136] Every facet of a ward's life is subject to regulation and control by the guardian. Guardianship is a massive curtailment of the right to privacy, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[137]

The least restrictive alternative is similar in approach to strict scrutiny under the equal protection clause; both subject legislation burdening fundamental rights to active and critical analysis.[138] Strict scrutiny is also triggered by legislation involving a suspect classification, such as race,[139] alienage,[140] and national origin.[141] A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[142] Several courts have either expressly or implicitly indicated that mental retardation constitutes a suspect classification;[143] this determination could logically be ex-

---

courts have suggested that freedom of contract is not a fundamental constitutional right. *See* United States Fidelity & Guar. Co. v. Parsons, 147 Miss. 335, 112 So. 469 (1927); State v. Gateway Mortuaries, Inc., 87 Mont. 225, 287 P. 156 (1930).

135. Dent v. West Virgnia, 129 U.S. 114 (1889); Weill v. State, 250 Ala. 328, 34 So. 2d 132 (1948).

136. Unlike the rights to marry and vote, the regulation of contracts, property, and business occupations do not invoke strict scrutiny analysis under the equal protection clause. *See* Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978).

137. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

138. Fundamental rights include the right to marry, Zablocki v. Redhail, 434 U.S. 374 (1978), the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), first amendment interests, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), the right to a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956), the right to travel interstate. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972); President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law 490 (1976) [hereinafter cited as The Mentally Retarded Citizen].

139. Loving v. Virginia, 388 U.S. 1 (1967). *See generally* Gunther, *The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

140. Graham v. Richardson, 403 U.S. 365 (1971). *See generally* Gunther, *supra* note 139, at 1.

141. Oyama v. California, 332 U.S. 633 (1948). *See generally* Gunther, *supra* note 139, at 1.

142. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

143. *See* Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975); *In re* G. H., 218 N.W.2d 441, 446-47 (N.D. 1974); *cf.* Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (handicapped students "are not a suspect class [but] they do exhibit some of the essential characteristics of suspect classes"), *aff'd*, 557 F.2d 373 (3d Cir. 1977). *But see* Frontiero v. Richardson 411 U.S. 677, 686 (1973);

tended to the other groups subject to guardianship. Thus, the powerlessness of incompetents as a class, coupled with the wholesale curtailment of fundamental liberties resulting from guardianship, are potent reasons to apply the least restrictive alternative. If applied, it would have the beneficent effect of depriving the ward of only those rights that he is plainly incapable of exercising.[144]

B. *Right to Treatment*

Another major substantive deficiency in guardianship is that, in a clear majority of jurisdictions, the guardian, although under a duty to maintain the person and property of the ward, is not required to secure treatment or habilitation.[145] Most states leave the decision to the guardian,[146] by providing that he shall arrange for such services "whenever appropriate."[147] Only a handful of jurisdictions compel the guardian to provide services that will maximize the ward's self reliance.[148]

It can be safely assumed that most individuals under guardianship could become more independent if they received proper treatment and education. The situation of the mentally retarded, many of whom are subject to guardianship, is a useful paradigm. For most of this century, mentally retarded persons were viewed as incapable of intellectual growth. As objects of custodial care, they were at best pitied;

New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762-63 (E.D.N.Y. 1973); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Law. 855 (1975).

144. *But see* Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 126-30 (3d Cir. 1979) (Seitz, J. dissenting) (questioning whether least restrictive alternative is the appropriate approach to determine the degree of freedom to be accorded mentally retarded residents of state institution), *cert. granted*, 100 S. Ct. 2984 (1980).

145. Habilitation is a process employing education techniques or treatment programs designed to enable a mentally retarded individual to acquire and maintain life skills, which allow "him to cope more effectively with the demands of his own person and his environment and to raise the level of his physical, mental, and social efficiency." Wyatt v. Stickney, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Although habilitation usually refers to the treatment of the mentally retarded, it can describe an education or treatment plan for any disabled individual subject to guardianship. Thirty-six states have no provisions requiring the private guardian to "secure habilitation" for the ward. *See* Guardianship & Conservatorship, *supra* note 6, Table V, at 33-37.

146. Guardianship & Conservatorship, *supra* note 6, Table V, at 33-37.

147. *See, e.g.*, Alaska Stat. § 13.26.150(a)(2) (Supp. 1980); Idaho Code § 15-5-312(2) (1979); Or. Rev. Stat. § 126.137(1)(b) (1979); Utah Code Ann. § 75-5-312(1)(b) (1978).

148. Only ten states require "habilitation." *See* Guardianship & Conservatorship, *supra* note 6, Table V, at 33-37.

often they were regarded as subhuman, diseased, or a menace to society.[149] As a result, they were frequently shunted into large public institutions and segregated from society. This outdated view has been replaced by a developmental model of mental retardation that recognizes that every mentally retarded person has potential for growth, learning, and development, regardless of age or degree of retardation.[150] With appropriate treatment and habilitation,[151] it has been suggested that almost all mentally retarded individuals can be economically productive, at least in a sheltered employment context.[152]

In recent years the rights of the mentally retarded have been widely advocated.[153] Congress has responded by enacting major legislation on their behalf. The Developmentally Disabled Assistance and Bill of Rights Act[154] and the Education for All Handicapped Children Act of 1975[155] expressly recognize that mentally retarded adults and children have a right to treatment, habilitation, and education designed to maximize their developmental potential. To protect these rights, Congress requires the states, as a condition of receiving federal funding under these programs, to develop individual plans for each of their disabled citizens receiving services under these Acts.[156]

Similar legislation focusing on the problems of other disabled classes subject to guardianship would undoubtedly increase their self reliance and independence.[157] It has been urged that an individual

---

149. *See* Legal Rights, *supra* note 9, at 131; Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124, 132-36 (1976); Roos, *The Law and Mentally Retarded People: An Uncertain Future*, 31 Stan. L. Rev. 613 (1979).

150. *See* Mason & Menolascino, *supra* note 149, at 136-47; Roos, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 Syracuse L. Rev. 1059, 1065-66 (1972); Roos & McCann, *Major Trends in Mental Retardation*, Int'l J. of Mental Health, Spring 1977, at 3, 6-7.

151. Behavior modification has successfully helped mentally retarded persons develop to their full potential. *See generally* Risley & Baer, *Operatant Behavior Modification: The Deliberate Development of Behavior*, in 1 Review of Child Development Research 283 (B. Caldwell & H. Ricciuti eds. 1973); Watson, *Behavior Modification of Residents and Personnel in Institutions for the Mentally Retarded*, in Residential Facilities for the Mentally Retarded 201 (A. Baumeister & E. Butterfield eds. 1970).

152. "[A]pproximately 95% of retarded persons have the potential of being economic assets to society." Roos, *Basic Facts About Mental Retardation*, in Legal Rights, *supra* note 9, at 127, 132.

153. *See* The Mentally Retarded Citizen, *supra* note 138, at 66-70 (if adequate community services are developed, guardianship should be rarely needed).

154. 42 U.S.C. §§ 6010-6012 (1976).

155. 20 U.S.C. §§ 1401-1461 (1976).

156. 20 U.S.C. § 1412 (1976); 42 U.S.C. § 6011 (1976).

157. For a description of the experience of the Veterans Administration in providing their wards with financial guidance, see The Aged and the Need for Surrogate Management, *supra* note 34, at 136.

treatment plan designed to assist the ward in regaining his competency or, at the least, maximizing his potential, be prepared and instituted for each person under guardianship.[158] Treatment and habilitation would, of course, depend upon the availability of financial resources to purchase these services. When the ward does not personally have these resources, however, a guardian could draw on numerous federal programs that provide funds and services to the disabled.[159]

The right to treatment and habilitation of a person subject to guardianship may have a constitutional basis. The generalized concept of a constitutional right to treatment first emerged twenty years ago in an influential article[160] and has since been widely endorsed.[161] The first judicial intimations of this right were in *Rouse v. Cameron*,[162] in which Chief Judge Bazelon noted that involuntary hospitalization of the mentally ill without treatment may be unconstitutional.[163] Since *Rouse*, the right to treatment has received judicial recognition in decisions dealing with the involuntary confinement of the mentally

---

158. *See* Guardianship & Conservatorship, *supra* note 6, Model Statute, at 78-167. Under the Model Statute, the guardian, with the assistance of a professional disabilities resources officer and the disabled individual, if possible, should design a plan to fulfill the ward's requirements for physical health or safety and to develop or regain his capacity to manage his affairs. *Id.* §§ 17-18, at 105-16. The plan must then be submitted for court approval. *Id.* § 17(2)(b), at 106.

159. Individuals under guardianship are frequently eligible for supplemental security income (SSI) under 42 U.S.C. § 1381a (1976). SSI benefits are available to disabled individuals—an individual "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months." *Id.* § 1382c(a)(3)(A). Disabled individuals under 65 who receive SSI funds are required to participate in vocational rehabilitation services. *Id.* § 1382d(c). See 29 U.S.C. § 720 (1976), which authorizes grants to states for vocational rehabilitation services to disabled individuals. The Act provides for individualized rehabilitation programs. *Id.* § 722. These programs may include vocational and training services, physical and mental restoration services, and rehabilitation teaching services. *Id.* § 723. Significant services are also available to the disabled under Subchapter XIX and Subchapter XX. 42 U.S.C. §§ 1396, 1397 (1976). Both seek to assist individuals in achieving self sufficiency. *See also* Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1976) (providing habilitation services to the mentally retarded).

160. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

161. *See* Bazelon, *Implementing the Right to Treatment*, 36 U. Chi. L. Rev. 742 (1969); Burris, *The Right to Treatment*, 57 Geo. L.J. 673 (1969); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108 (1972); Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. Chi. L. Rev. 755 (1969); *Developments*, *supra* note 57, at 1316-33; Note, *The Nascent Right to Treatment*, 53 Va. L. Rev. 1134 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 Yale L.J. 87 (1967).

162. 373 F.2d 451 (D.C. Cir. 1966).

163. *Id.* at 455.

ill,[164] the mentally retarded,[165] and juvenile delinquents.[166] These decisions have been based upon either due process,[167] equal protection,[168] or the eighth amendment prohibition of cruel and unusual punishment.[169]

An equal protection argument has seldom been used to gain a right to treatment because it requires one group to receive services not being provided to a similarly situated group. In the leading case, *Mills v. Board of Education*,[170] mentally retarded children were denied the public education available to non-retarded children. The court found that this discrimination violated the equal protection clause.[171] In the zoning context, it has similarly been argued that municipalities should allow group homes for the disabled to be located in residential districts because they are the practical equivalent of a biologically related family.[172] Section 504 of the Rehabilitation Act of 1973 codifies this equal protection notion.[173] Equal protection,

---

164. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

165. Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

166. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

167. *See* Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977).

168. *See* Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

169. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

170. 348 F. Supp. 866 (D.D.C. 1972).

171. *Id.* at 875. *See also* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

172. *See* Timberlake v. Kenkel, 369 F. Supp. 456, 465-66 (E.D. Wis. 1974), *vacated and remanded mem.*, 510 F.2d 976 (7th Cir. 1975); Note, *Group House of Port Washington v. Board of Zoning and Appeals: Encroachment of Community Residences into Single Family Districts*, 43 Alb. L. Rev. 539, 562 (1979).

173. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), provides in pertinent part that "[n]o otherwise qualified handicapped individual . . .

however, is concerned with preventing discrimination rather than granting substantive rights.[174] It is not an effective vehicle for grounding a right to treatment for individuals under guardianship.

The eighth amendment prohibition of cruel and unusual punishment[175] has been a more fruitful source for a right to treatment. Relying on *Robinson v. California*,[176] which held that incarceration for drug addiction violated the eighth amendment because it was punishment for status rather than crime, courts have found that detention of mentally retarded individuals[177] or juvenile delinquents[178] without treatment is impermissible punishment for status. Other courts have concluded that the eighth amendment right to protection from harm while in state custody[179] encompasses the right to humane living conditions at state institutions[180] and the right to be free from physical risks, injuries, and abuse.[181] The eighth amendment's application to guardianship, however, was foreclosed by *Ingraham v. Wright*,[182] in which the Supreme Court limited eighth amendment protection to those convicted of crime.[183]

---

shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination." *Id.* The Act has been used to require that urban mass transit equipment be accessible to handicapped persons, United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977), to prohibit exclusion of handicapped children from regular public schools, Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634 (S.D. Tex. 1978), and to challenge the relocation of a medical center from an inner city to the outlying suburbs. NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979).

174. *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

175. U.S. Const. amend. VIII.

176. 370 U.S. 660 (1962).

177. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1316 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980); Welsch v. Likins, 373 F. Supp. 487, 496-97 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977).

178. Martarella v. Kelley, 349 F. Supp. 575, 599 (S.D.N.Y. 1972).

179. U.S. Const. amend. VIII; *see* Logan v. United States, 144 U.S 263 (1892).

180. *See* Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978); Scott v. Plante, 532 F.2d 939, 947 (3d Cir. 1976); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973).

181. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1320-21 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert granted*, 100 S. Ct. 2984 (1980); Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). *See also* Knecht v. Gillman, 488 F.2d 1136, 1139-40 (8th Cir. 1973).

182. 430 U.S. 651 (1977).

183. The question of the applicability of eighth amendment protection to the mentally ill or mentally retarded in closed insitutions remains open. *Id.* at 669 n.37.

A right to treatment based upon due process considerations holds more promise for the person under guardianship. Due process is a nebulous and flexible term that has been used to justify a right to treatment.[184] Essentially, the theory has either a procedural or a substantive basis. The procedural, or the quid pro quo, approach argues that commitment to a mental institution or a reformatory is neither accompanied by the full due process rights that attend a criminal proceeding nor limited to a fixed period as with a criminal sentence. When the rights and limitations of the criminal system are not observed, a necessary quid pro quo for the deprivation of freedom is a right to treatment.[185] If accepted by the courts, the quid pro quo theory would provide a rationale for a right to treatment in guardianship, which has minimal procedural protection and is of an indefinite duration. The theory, however, is flawed. Although the Supreme Court has referred to rehabilitation as a justification for lack of procedural safeguards in the juvenile justice system,[186] it has not been a consistent theme in its due process cases. Frequently, a departure from criminal procedural safeguards is justified by balancing the interests of the individual and society,[187] rather than legal bartering. Moreover, by transforming procedural concerns into substantive standards, the state could discharge its obligation to provide treatment simply by amending the apposite procedures.[188]

A stronger argument is founded on the substantive due process claim. Under this approach, the legislative means must be rationally related to the ends sought.[189] The Supreme Court employed this standard in evaluating the indefinite commitment of a criminal defendant who lacked the capacity to stand trial.[190] In the civil commit-

---

184. *See generally* Spece, *Preserving the Right to Treatment: A Critical Asssessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978).

185. Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973); Martarella v. Kelley, 349 F. Supp. 575, 599-600 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1363-64 (D.R.I. 1972); *see* Donaldson v. O'Connor, 493 F.2d 507, 522-25 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

186. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 540-41 (1971); *In re* Winship, 397 U.S. 358, 359 & n.1 (1970); *In re* Gault, 387 U.S. 1, 22 n.30 (1967).

187. *See* Donaldson v. O'Connor, 422 U.S. 563, 585-86 (1975) (Burger, C.J., concurring); note 53 *supra* and accompanying text.

188. Donaldson v. O'Connor, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring); *see Developments*, *supra* note 57, at 1325 n.39.

189. Due process was initially used to strike down legislation in the economic realm. *See* Nebbia v. New York, 291 U.S. 502, 524 (1934); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). Although abandoned in the field of economics, it has been used to protect individual rights against governmental intervention. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

190. Jackson v. Indiana, 406 U.S. 715, 718 (1972).

ment of the mentally retarded and the mentally ill, courts have reasoned that if the purpose of confinement is treatment and treatment is not forthcoming, the rational relation between means and ends is missing, thereby rendering the commitment invalid.[191] Judge Johnson, then Chief Judge of the District Court for the Middle District of Alabama, wrote that "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[192]

The applicability of this theory to guardianship turns upon the perceived purpose of guardianship. Historically, it was used to protect property rather than to provide humane care or treatment.[193] Nevertheless, as parens patriae, the state was also required to promote the interests and welfare of the ward.[194] These interests would be materially advanced by providing a habilitation or treatment program designed to lessen dependency. When this purpose is combined with the notion of the least restrictive alternative, a right to treatment emerges.[195]

The right to treatment cases have arisen when an individual's physical liberty is curtailed by confinement to an institution. Therefore, it may be contended that, because guardianship does not involve a deprivation of physical liberty, a ward enjoys no constitutional right to treatment. In *Lora v. Board of Education*,[196] however, the court found a due process right to treatment for students who were reassigned to special day schools from regular public schools, notwithstanding the lack of institutional confinement.[197] If a deprivation of basic liberties is sufficient to trigger this right, then the ward is entitled to the treatment and habilitation that he plainly deserves.

CONCLUSION

Guardianship reform is long overdue. The lax procedures surrounding appointment of a guardian are simply not consistent with the more formalized safeguards integrated into the civil commitment

191. Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1315-16 (E.D. Pa. 1977), *aff'd in part, rev'd in part and remanded en banc*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980); Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd in part, vacated in part and remanded*, 550 F.2d 1122 (8th Cir. 1977).

192. Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971).

193. *See* note 17 *supra* and accompanying text.

194. *See* Witter v. County Comm'rs, 256 Ill. 616, 622-23, 100 N.E. 148, 150 (1912); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909); *Developments*, *supra* note 57, at 1190, 1207-10.

195. *See* Wyatt v. Aderholt, 503 F.2d 1305, 1313 (5th Cir. 1974).

196. 456 F. Supp. 1211 (E.D.N.Y. 1978), *vacated and remanded on other grounds*, 623 F.2d 248 (2d Cir. 1980).

197. *Id.* at 1275.

process. Furthermore, the view that guardianship is primarily a method for preserving the ward's estate must be tempered by the realization that guardianship imposes severe restrictions on the liberty of the incompetent. It is not only unconscionable, but unlawful, to impose a blanket guardianship without tailoring the specific restrictions to a ward's demonstrated needs and devising a prescriptive treatment plan designed to help the ward gain greater independence. Affording procedural safeguards for the guardianship hearing, limiting the number of restrictions placed on the ward to an absolute minimum necessary for his well-being, and providing decent treatment to maximize his developmental potential seem to be highly desirable goals. Until such time as they are incorporated into guardianship statutes, however, the Constitution provides the source for attaining these goals.