

**PROTECTING WHO FROM WHAT,  
AND WHY, AND HOW?: A  
PROPOSAL FOR AN INTEGRATIVE  
APPROACH TO ADULT PROTECTIVE  
PROCEEDINGS**

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*The two main avenues by which the law intervenes to protect incapacitated individuals under the doctrine of parens patriae are guardianship proceedings and civil commitment proceedings. Although both proceedings share the same goal of safeguarding the well-being of the protected person, they encompass different historical bases, structures, and procedures. In this article, Jennifer L. Wright examines adult protective proceedings in an effort to maximize the therapeutic potential of the proceedings, achieve their common goal, and still ensure the essential*

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rights of the protected individual. Professor Wright argues that after empirically examining the effects of adult protective proceedings on both respondents and protected persons, there are many ways in which current statutes fail to achieve the underlying values that justify the existence of adult protective proceedings. As a result, Professor Wright recommends that adult guardianship and *parens patriae* civil commitment proceedings should be integrated. Professor Wright concludes this article by proposing a statutory scheme that incorporates these necessary values and goals.

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## I. Introduction

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or men-

tal and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.<sup>1</sup>

“It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation.”<sup>2</sup>

One of the most basic principles of the American legal system is that people must be free to choose their own conception of the good and to pursue it, so long as their actions do not adversely affect the similar freedom of others or the well-being of society as a whole.<sup>3</sup> This principle is foundational across all areas of the law. The universal general rule is that no one may substitute his or her judgment of what is in an adult’s best interests or restrict an adult’s choices in pursuing those interests, unless such restriction is justified by protection of others or of society.<sup>4</sup> The one exception to the general rule that the autonomy of adults must be preserved arises when adults, due to some mental impairment or deficit, lack the capacity to act autonomously.<sup>5</sup> If autonomous choice is impossible, then the law, under the doctrine of *parens patriae*, may intervene to protect the well-being of the incapacitated individual.<sup>6</sup> The lack of capacity does not authorize any and all arbitrary intervention in the

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1. JOHN STUART MILL, *On Liberty*, in THREE ESSAYS 1, 18 (Oxford Univ. Press 1963).

2. *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (quoting *Suzuki v. Yunn*, 617 F.2d 173, 176–78 (9th Cir. 1980)).

3. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” *Id.* “Before the turn of the century, this Court observed that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

4. ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW 64–65 (2001).

5. *Id.* at 66–67.

6. A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 20 (1997); Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1549 (1975) [hereinafter *The Role of Counsel*]. “This prerogative of *parens patriae* is inherent in the supreme power of every state . . .” *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890).

life of the incapacitated individual. In order for intervention to be justified under *parens patriae*, the actions taken must be designed to enhance or preserve the well-being of the individual.<sup>7</sup>

The two main avenues by which the law intervenes to protect incapacitated individuals under the doctrine of *parens patriae* are guardianship proceedings and civil commitment proceedings.<sup>8</sup> These different types of proceedings were developed from somewhat different historical bases and are characterized by different structures and procedures.<sup>9</sup> Both kinds of *parens patriae* proceedings are aimed at the same goal: the protection of the well-being of adult individuals who are unable to make autonomous choices to determine and protect their own well-being.

In this article, I argue that adult guardianship and *parens patriae* civil commitment proceedings should be integrated and rationalized, to maximize their therapeutic potential and to achieve their common goals, while protecting the essential autonomy rights of the individuals who find themselves involved in such proceedings. Part II briefly traces the historical development of these two very different bodies of law. Part III examines in detail the bases upon which both kinds of adult protective proceedings justify their intrusion upon the autonomy of the protected person.<sup>10</sup> I examine the goals of adult protective

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7. See Johns, *supra* note 6, at 20. "Whether the ward is incompetent or incapacitated should not be our only concern . . . . Of equal or even greater importance is the question whether the . . . intervention realistically offers the proposed ward a positive benefit that ultimately will make her subjectively happier or at least will prevent further mental deterioration." Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1886 (1992).

8. Civil commitment, discussed in Part II *infra*, can be based upon danger the respondent presents to others as well as upon the respondent's inability to protect his or her own well-being. I will follow the lead of many other scholars in the field by referring to the latter basis of civil commitment as "*parens patriae* civil commitment," while referring to civil commitment based upon the protection of others as "police power civil commitment."

9. MARSHALL B. KAPP, *GERIATRICS AND THE LAW: UNDERSTANDING PATIENT RIGHTS AND PROFESSIONAL RESPONSIBILITIES* 104-09 (3d ed. 1999).

10. As in many other contexts, language usage in the field of adult protective proceedings is caught up in the battle of values and methods. In this article, I will use the term "protected person" to refer to an adult individual who has been civilly committed or placed under a guardianship, and the term "respondent" to refer to an individual who is involved in legal proceedings to determine whether that individual should be civilly committed or placed under a guardianship. This distinction can be crucial because the legal presumption of capacity and competence to make decisions applies fully to respondents, but may or may not apply to protected persons.

proceedings and the similarities and differences among the procedures by which those goals are pursued. Part IV uses the concepts and framework of therapeutic jurisprudence to analyze the potential for adult protective proceedings to achieve or to thwart the goals of protection of individual autonomy and of preservation of the well-being of the respondent or protected person. I argue that it is crucial to examine empirically the effects of adult protective proceedings on both respondents and protected persons in order to evaluate a given statutory regime and to determine whether and how to reform such a regime. I indicate that there are many ways in which current statutes fail to achieve the underlying values that justify the existence of adult protective proceedings and inflict unacknowledged antitherapeutic consequences on respondents and protected persons. Part V examines ways in which current guardianship and civil commitment statutes could be more rationally structured to achieve the goals of adult protective proceedings by reforming or eliminating historical structures that are not designed to maximize these goals. Finally, Part VI proposes a statutory scheme that incorporates the values and goals outlined in this article, using the Oregon civil commitment and guardianship statutes as a context and vehicle for discussion.

## II. A Brief History of the Development and Nature of Guardianship and *Parens Patriae* Civil Commitment Proceedings

### A. Guardianship

Guardianship statutes grew out of English law that provided for writs in Chancery Court to inquire into the idiocy (permanent mental disability) or lunacy (intermittent mental disability) of an individual.<sup>11</sup> These writs were used to authorize the Crown, or its delegate, to assume control of the disabled individual's person and property.<sup>12</sup> In the United States, jurisdiction over guardianship cases has generally been assigned to probate courts.<sup>13</sup> The jurisdiction of these courts was

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11. Joan L. O'Sullivan & Diane E. Hoffman, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 14 (1996).

12. *Id.*; see also Johns, *supra* note 6, at 15–18; A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 48–51 (1999).

13. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 193 (1994).

modeled after the English Commonwealth probate court, which reflected an attempt to rationalize the overlapping and conflicting jurisdictions of law, equity, and ecclesiastical courts, all of which had some authority over the estates of decedents and of incompetents.<sup>14</sup> The original major focus of the probate court thus was the management of property.<sup>15</sup>

In the United States, the nature and extent of probate court jurisdiction is determined on a statutory basis by each state.<sup>16</sup> The wardship of incompetent adults is generally included in probate jurisdiction, together with a wide-ranging list of other matters, which may (or may not) include: child custody, adoption, living wills, termination of parental rights, civil commitment of children or adults, determination of paternity, emancipation of minors, and name changes, in addition to the core probate issues of wills, testamentary trusts, and intestacy.<sup>17</sup> Probate jurisdiction was generally conceptualized as distinct from either equity or law, including aspects of both, although no general and coherent justification for this distinction emerged.<sup>18</sup> Probate proceedings were seen as generally nonadversarial, with contested proceedings as the exception.<sup>19</sup> Some states defined all probate jurisdiction as *in rem*, based on jurisdiction over the *thing* or property at issue, although this definition generally failed to adequately describe the actual issues arising in probate courts.<sup>20</sup>

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14. John F. Winkler, *The Probate Courts of Ohio*, 28 U. TOL. L. REV. 563, 563–67 (1997).

15. “In our country, the probate courts have traditionally been the arm of government that exercises guardianship jurisdiction.” Fell, *supra* note 13, at 193. “Probate courts are charged with the responsibility of oversight of the property interests of decedents’ estates and focus their concern on the orderly administration of decedents’ affairs, primarily for the benefit of the heirs and the state.” *Id.* “[T]his similarity in function, and inclusion with general probate matters, may have contributed to many of the problems that now plague the guardianship system. While the focus has shifted from property to people, the courts have been slow to shake the historical underpinnings of guardianship law.” *Id.*

16. CONN. GEN. STAT. ANN. § 45a-98 (West 1993 & Supp. 2003); MICH. COMP. LAWS ANN. § 600.847 (West 1996).

17. F. Paul Kurmay, *Connecticut’s Probate Courts: A Look into the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 379, 380–81 (1999); Note, *The Probate Court’s Power to Probe You*, 10 CONN. PROB. L.J. 107, 110–11 (1995); Paula C. Tredeau, Comment, *The Scope of Texas Probate Jurisdiction over Matters Incident and Appertaining to an Estate*, 16 ST. MARY’S L.J. 233, 233–36 (1984); Winkler, *supra* note 14, at 571–76.

18. See Winkler, *supra* note 14, at 571–72.

19. *Id.* at 573, 575.

20. *Id.* at 575–76.

Partly as a result of this historical development of adult guardianship within the probate courts, the procedural structure of guardianship proceedings did not emphasize the protection of the civil rights of the respondent or protected person from infringement in the legal proceeding.<sup>21</sup> Until the 1980s, most state guardianship statutes failed to require adequate notice and opportunity for hearing to respondents, failed to apply uniformly the rules of evidence and civil procedure, failed to appoint counsel for respondents, failed to provide for the right to confront and cross-examine adverse witnesses, failed to limit guardianship orders to minimize the loss of protected persons' autonomy, failed to impose an appropriate (or any specific) standard of proof, or applied definitions of incapacity or incompetency which allowed particularly elderly persons to be stripped of their autonomy without adequate showing that they were incapable of autonomous decision making.<sup>22</sup> Guardianship proceedings were seen as nonadversarial proceedings brought solely to benefit the respondent; therefore,

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21. Paternalistically, the family, the care providers and the courts base their decisions on what they perceive as being in the best interests of the individual, often with little regard to the desires of the elderly person—the purpose being to help and protect him from his own foolish or irresponsible acts. It may well be that this benevolent purpose has engendered the common perception that the proceedings impose no real loss of liberty. Furthermore, this perception may explain the historical laxity of the system to offer and ensure substantive and procedural safeguards for the genuine deprivations of civil rights and property that occur as a result of the judicial process.

Fell, *supra* note 13, at 194–95 (citation omitted).

22. Johns, *supra* note 6, at 43–45. No personal service was required on respondents. OR. REV. STAT. § 126.007(1) (Supp. 1981). Notice could be waived by the allegedly incapacitated respondent. *Id.* § 126.013. The court “may” appoint counsel for respondent, but only if objections to the petition for guardianship are filed first. *Id.* § 126.103(2). The respondent apparently was only permitted to present evidence and cross-examine witnesses if she or he was represented by counsel at the hearing. *Id.* § 126.103(5). All guardians had the “same powers, rights and duties respecting [the] ward” as the parent of a minor child. *Id.* § 126.137(1). The standard of proof for appointment of guardian was that “the court [be] satisfied” that the respondent was incapacitated and that appointment was “necessary or desirable” to provide care and supervision. *Id.* § 126.107(2). The definition of incapacity included anyone who needed assistance “to take care of himself or his personal affairs.” *Id.* § 126.003(4). A temporary guardian could be appointed for any length of time without notice or hearing of any kind. *Id.* § 126.133. Not until the 1995 revisions to the guardianship statute was it made clear that the Oregon Evidence Code and the Oregon Code of Civil Procedure applied to guardianship proceedings in Oregon. Act of July 18, 1995, ch. 664, § 6 (currently codified at OR. REV. STAT. § 125.050 (2001)).

due process protections were seen as unnecessary.<sup>23</sup> Guardianship was mainly directed at the elderly, whose incapacity was seen as permanent, progressive, and nontreatable.<sup>24</sup> No serious effort was directed toward determining whether the protected person continued to need or benefit from the guardianship.

Beginning in the late 1970s and early 1980s, a series of media exposés, uniform code revisions, national studies and conferences, and congressional hearings led to a revolution in guardianship procedures across the nation.<sup>25</sup> Reforms adopted by many states included the right to appointed counsel, the right to effective notice, standardized notice forms and petition requirements, the right to be present at the guardianship hearing, the right to present and compel evidence and cross-examine witnesses, the requirement of proof by clear and convincing evidence both of incapacity and of the need for guardianship, the development of less restrictive alternatives to guardianship, a focus on functional capacity rather than medical diagnosis, the requirement that guardianships be limited so that they restricted the autonomy of the protected person as little as possible, and ongoing monitoring of the guardianship by the court after appointment.<sup>26</sup> While enormous changes in guardianship statutes occurred during the 1980s and 1990s, studies of actual guardianship proceedings show that many of these changes were not put into effect.<sup>27</sup> One reason for the failure to effectively implement due process reforms in adult guardianship is the continuing attitude that adult guardianship is a probate matter, akin to the appointment of a guardian for a child,<sup>28</sup>

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23. "The concept of the state as parent was attended by two complementary assumptions: that a non-adversarial relationship existed between the state and its citizens, and that the state could define the best interests of citizens and thereby enhance their freedom." GEORGE J. ALEXANDER & ALAN W. SCHEFLIN, *LAW AND MENTAL DISORDER* 5 (1998); see also Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 *STAN. L. & POL'Y REV.* 347, 350 (1998).

24. See Frolik, *supra* note 23, at 349.

25. Johns, *supra* note 6, at 41-66.

26. O'Sullivan & Hoffman, *supra* note 11, at 21-22; see John E. Donaldson, *Reform of Adult Guardianship Law*, 32 *U. RICH. L. REV.* 1273, 1275-76 (1998); Johns, *supra* note 6, at 29-66.

27. GUARDIANSHIP WORK GROUP, *ADULT GUARDIANSHIPS IN OREGON: A SURVEY OF COURT PRACTICES* 6 (1999) [hereinafter *ADULT GUARDIANSHIPS IN OREGON*]; Johns, *supra* note 6, at 44-66; O'Sullivan & Hoffman, *supra* note 11, at 11-13.

28. Indeed, in many statutes, adult guardianship and guardianship of minors are included in the same section. See, e.g., FLA. STAT. ANN. § 744 (West 1997 & Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11, 5/11a (West 1993 & Supp. 2003); MD. CODE ANN., EST. & TRUSTS § 13 (2001 & Supp. 2002); MINN. STAT. ANN. § 525 (West 2002 & Supp. 2003); OR. REV. STAT. § 125 (2001).

nonadversarial, conducted for the benefit of the protected person, dealing with incapacity which is assumed to be both permanent and progressive, and focused primarily on the prudent, impartial management of the person and the estate of the incapacitated individual.<sup>29</sup>

In reality, guardianship of an adult involves the deprivation of substantial civil rights. In the words of the immortal Claude Pepper:

The typical ward has fewer rights than the typical convicted felon . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.<sup>30</sup>

Such issues are not involved in juvenile guardianship since children do not have the same right to independent self-determination as adults.<sup>31</sup> Guardianship proceedings are often highly adversarial, pitting children against parents, spouses against stepchildren, and siblings against each other. Guardianship proceedings are often commenced for the convenience of state case workers or long-term care facilities, or to relieve adult children of the ongoing need to worry about the risks run by an aging parent attempting to remain independent.<sup>32</sup> The capacity of an individual can vary from day to day and from month to month.<sup>33</sup> Some common causes of incapacity of

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29. There are fundamental differences between administration of a decedent's estate and responsibility for the ongoing needs of a living person. The wrapping up of a decedent's affairs, the collection of assets and the distribution of property are basically administrative functions. Probate estate administration deals primarily with the orderly movement of property. Continuous close court oversight may be neither necessary nor desirable. Guardianship, on the other hand, is about people, not property. It's about removing or limiting a person's right of self-determination.

Fell, *supra* note 13, at 196. "Guardianship is an ongoing process. Once established, the guardianship may continue for decades." *Id.* Where a person's liberty and protection is [sic] at stake, a hands-off [sic] approach by the court is not appropriate." *Id.* at 197.

30. SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 100TH CONG., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE (Comm. Print 1987) (prepared statement of Chairman Claude Pepper) [hereinafter A NATIONAL DISGRACE].

31. See Tiffany R. Ritchie, Case Note, *A Potential Casualty in the War on Drugs, The Fourth Amendment Survives a Threatening Attack: Ferguson v. Charleston*, 562 U.S. 67 (2001), 27 S. ILL. U. L.J. 169, 174-75 (2002).

32. Rein, *supra* note 7, at 1826-28.

33. Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 126 (1999).

the elderly are highly treatable and reversible (depression, e.g.).<sup>34</sup> The issues at stake in an adult guardianship often pose difficult conflicts among highly personal values and priorities, without a clear or objective “right” answer.

Guardianship law has seen a long development, with a gradual trend toward treating guardianship proceedings as normally adversarial civil proceedings, in which respondents’ rights must be protected from arbitrary and unconstitutional deprivation.<sup>35</sup> The failure of many probate courts to fully effectuate this evolving conception of guardianship proceedings is most likely due in large part to concerns regarding the additional costs that additional due process rights add to the process. If guardianship is made too expensive, incapacitated people who need the protection and assistance of a guardianship may not have those needs met. However, if guardianship fails to protect the rights of respondents, then respondents can be unjustly deprived of their right to autonomy.

#### **B. Civil Commitment**

The roots of civil commitment lie in the same English Chancery Courts as those of guardianship.<sup>36</sup> However, where the procedures which grew into guardianship focused mainly on the protection of the estates of idiots (permanently mentally disabled), civil commitment law derives both from the civil statutes protecting lunatics (intermittently mentally ill) and from the criminal law, designed to protect third parties and society as a whole from dangerous individuals.<sup>37</sup> These differing historical roots greatly influenced the process that developed for the commitment of the mentally ill.

Very early civil commitment statutes, like early guardianship statutes, generally viewed the proceeding as being nonadversarial and in the interests of the respondent, therefore requiring few procedural requirements to protect the respondent’s rights.<sup>38</sup> These statutes, however, also included the state’s ability to civilly commit mentally ill

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34. Rein, *supra* note 7, at 1837.

35. See generally John J. Campbell & Susan G. Gaines, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 REAL PROP. PROB. & TR. J. 215 (1998).

36. O’Sullivan & Hoffman, *supra* note 11, at 14.

37. Johns, *supra* note 6, at 15–18.

38. Johns, *supra* note 12, at 52–55.

individuals under its police power.<sup>39</sup> Police power civil commitments, where mentally ill individuals are incarcerated in a state institution in order to protect others from harm, resemble criminal proceedings closely enough that eventually most of the due process protections required in criminal cases were applied to civil commitment cases.<sup>40</sup> *Parens patriae* civil commitments and police power civil commitments were lumped together in one statute resulting in equal application of these protections to both kinds of proceedings, even though the justifications behind the two kinds of civil commitment were quite different.<sup>41</sup>

Under the impetus of criminal due process jurisprudence, the due process revolution described above in the guardianship context occurred ten to twenty years earlier in the civil commitment context, beginning in the 1960s.<sup>42</sup> Many of the due process reforms in civil commitment were driven by litigation, whereas in the guardianship context, changes mostly grew out of legislative action in response to studies of guardianship systems. This new civil commitment case law referred explicitly to criminal due process jurisprudence and defined the rights of respondents in civil commitment by comparing and analyzing their situations in relation to those of criminal defendants.<sup>43</sup>

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39. *Id.*

40. *The Role of Counsel*, *supra* note 6, at 1549–52; Bruce Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 40–41 (1999).

41. See *The Role of Counsel*, *supra* note 6, at 1548–63.

42. Johns, *supra* note 12, at 55; see also David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3, 3–22 (David B. Wexler ed., 1990); David B. Wexler, *Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT, *supra*, at 165–87 [hereinafter *Grave Disability*].

43. The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation. In criminal cases, this authority is derived from the police power, granted because of the necessity of protecting society from anti-social actions. This power is tempered with stringent procedural safeguards . . . . In civil commitment proceedings the same fundamental liberties are at stake. State commitment procedures have not, however, traditionally assured the due process safeguards against unjustified deprivation of liberty that are accorded those accused of crime. This has been justified on the premise that the state is acting in the role of *parens patriae*, and thus depriving an individual of liberty not to punish him but to treat him.

*Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473, *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis.

The connection with criminal due process jurisprudence resulted in part from the perceived similarity of outcome (the respondent or defendant is confined in a state institution against his or her will for a defined period of time)<sup>44</sup> and in part from the fact that the justification for police power (but *not parens patriae*) civil commitments was similar to the justification for criminal confinement – to protect the public from harmful individuals.

As a result of this close analytical tie to the rights of criminal defendants, most civil commitment statutes include due process protections similar in structure to those in criminal cases, although these protections are generally somewhat less stringent in the civil commitment context.<sup>45</sup> In most states, respondents in civil commitment have the right to meaningful notice, to clear standards for commitment, to proof of these standards by clear and convincing evidence, to appointed counsel, to a speedy and fair hearing, to present evidence, to confront and cross-examine witnesses, and in some states, to trial

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1974), *vacated and remanded on procedural grounds*, 421 U.S. 957 (1975), *judgment reentered*, 413 F. Supp. 1318 (E.D. Wis. 1976).

The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated. The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. *Jackson v. Indiana*, 406 U.S. 715, 736–37 (1972) (footnotes omitted). “A finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement . . . . [T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can safely live in freedom.” *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

44. “The Principles and Performance Standards herein . . . apply when a lawyer is appointed or retained to represent an individual client in a criminal, . . . or civil commitment proceeding. The common denominator in these . . . types of cases is that the clients are subjected to state action that can deprive them of substantial liberty interests.” OR. STATE BAR, INDIGENT DEFENSE TASK FORCE REPORT: PRINCIPLES AND STANDARDS FOR COUNSEL IN CRIMINAL, DELINQUENCY, DEPENDENCY AND COMMITMENT CASES 5 (1996), *available at* [http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852s66d6000dae23/\\$FILE/Oregon.pdf](http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852s66d6000dae23/$FILE/Oregon.pdf).

45. *See, e.g., In re Hop*, 171 Cal. Rptr. 721 (Cal. 1981); *Heap v. Roulet (Estate of Roulet)*, 590 P.2d 1 (Cal. 1979) (holding criminal due process standards apply in civil commitment).

by jury.<sup>46</sup> However, as in the guardianship context, many of these statutory rights have been less than fully implemented in practice.<sup>47</sup>

Due to the analytical link to criminal law, most respondents in civil commitment have the right to counsel appointed and paid by the state, including counsel on appeal, if the individual is unable to retain counsel.<sup>48</sup> One important result has been the relative wealth of reported appellate cases in civil commitment.<sup>49</sup> By contrast, many respondents in guardianship are unrepresented.<sup>50</sup> As a result, appeals of guardianship decisions are seldom brought, leading to a dearth of case law interpreting guardianship statutes and procedures.<sup>51</sup> Many respondents in civil commitment, with the assistance of legal counsel, have successfully defended their rights against unlawful encroach-

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46. *United States v. Sahhar*, 917 F.2d 1197, 1205–07 (9th Cir. 1990); *Lessard*, 349 F. Supp. at 1091–1103.

47. Winick, *supra* note 40, at 40–42.

48. *See, e.g.*, FLA. STAT. ANN. § 394.467(4), (49) (West 2002 & Supp. 2003); OR. REV. STAT. § 426.100(3)(b) (2001) (providing for right to an appointed counsel, but without mention of such a right on appeal).

49. *See, e.g.*, *Godwin v. State*, 593 So. 2d 211 (Fla. 1992); *People v. Lang*, 498 N.E.2d 1105 (Ill. 1986); *State v. Gibson (In re Gibson)*, 66 P.3d 560 (Or. Ct. App. 2003).

50. In a national study, 31% of respondents in guardianship nationwide were represented by counsel. LAUREN B. LISI ET AL., CTR. FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 55 (1994) [hereinafter NATIONAL STUDY OF GUARDIANSHIP SYSTEMS]. However, among those states where the appointment of counsel was not required by statute, the average rate of representation of respondent was less than 25%. *Id.* at 56. In a study of guardianships in Oregon, where the appointment of counsel is not required, only 5.31% of guardianship respondents in the study were represented by counsel. ADULT GUARDIANSHIPS IN OREGON, *supra* note 27, at 4.

51. For example, in Oregon in the decade from 1990 to 2000, there were 171 reported cases dealing with civil commitment, of which sixty-nine were reversed (40% reversal rate) and 102 were affirmed (seventy-nine of these were affirmed without opinion). Jennifer Wright, Research on guardianship cases in Oregon (unpublished research, on file with author). By contrast, during this same period in Oregon, there were only twelve reported cases dealing with guardianship. *Id.* Of these, all but three either referred solely to financial issues relating to the estate of the protected person, or had no written opinion, or both. *Id.* All three of the guardianship cases resulting in reported opinions were brought by nonprofit legal services offices, and all three decisions were favorable to the respondent (100% reversal rate). *Id.* To compare the number of cases in each area, in 2001 there were 6778 civil commitments filed in Oregon, of which only 1007 civil commitments were granted (approximately 15%). Telephone Interview with Monica Melhorn, Oregon State Court Administrator's Office (July 10, 2002); E-mail from David Hall, Oregon Office of Mental Health and Addiction Services, to Jennifer Wright (June 21, 2002, 8:41) (on file with The Elder Law Journal). In the same year, approximately 1841 guardianships were filed. Telephone Interview with Monica Melhorn, *supra*. Some unknown percentage of these filings were juvenile guardianships. The state does not maintain separate records for adult and juvenile guardianship filings. *Id.*

ment by the state, either in the original proceeding or on appeal.<sup>52</sup> The analytical link to criminal law and procedure has also led to a more formal adversarial process with more awareness of the demands of due process.<sup>53</sup> Still, the formal due process provided to respondents in civil commitment proceedings can also be pro forma.<sup>54</sup> Judges, mental health providers, family members, and attorneys may act to provide the care and treatment that they perceive the respondent to need, rather than to protect the self-determination rights of the respondent.<sup>55</sup>

### III. Goals, Justifications of, and Differences in Adult Protective Proceedings

The goals of adult guardianship and *parens patriae* civil commitment proceedings are the same: to preserve the well-being and safety of adults who, due to mental incapacity, are unable to receive and understand relevant information, to evaluate that information with respect to their personal values and goals, and to determine what actions are in their own best interests. The justification for acting to restrict what would otherwise be the respondent or protected person's right to autonomy and self-determination is also the same in the two contexts.<sup>56</sup> If an individual has lost the ability to make autonomous decisions, then the state's intervention does not itself limit the individual's autonomy.<sup>57</sup> Since the exercise of autonomous choice by the individual is impossible, the state may intervene to protect the well-being of the incapacitated individual from harm resulting from the

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52. "[W]hen lawyers are present at commitment hearings, commitment rates have been significantly reduced." *The Role of Counsel*, *supra* note 6, at 1553–54.

53. *See id.* at 1540–1543.

54. "In practice, commitment hearings tend to be brief and non-adversarial episodes in which judges appear to 'rubber stamp' the recommendations of clinical expert witnesses. Winick, *supra* note 40, at 41. This "give[s] many patients the impression that the hearing is an empty ritual rather than a serious attempt to achieve accuracy and fairness." *Id.* at 42.

55. "This practice has turned the adversarial model into a farce and a mockery in which procedural rights are accorded in only a formal way so as to effectuate what judges, lawyers, and clinicians perceive to be the best interests of the patient." *Id.* at 41.

56. "Involuntary commitments . . . may be accomplished . . . under the state's inherent *parens patriae* power, which is the power of society to protect those who cannot protect themselves." KAPP, *supra* note 9, at 104. "Guardianship statutes are an example of the state's inherent *parens patriae* power to protect those who cannot take care of themselves in a manner that society believes is appropriate." *Id.* at 109.

57. SCHOPP, *supra* note 4, at 66–67.

individual's incapacity. Indeed, one goal of state intervention may be to restore the individual's capacity and thus, ultimately to serve both goals of respecting autonomy and of protecting well-being.<sup>58</sup>

In order to justify state intervention through adult protective proceedings, a showing that the respondent is mentally disabled and unable to make rational, autonomous decisions is not enough. A showing that the respondent is behaving in ways that place him or her at serious risk is also necessary, and, in addition, the causative link between the two facts must also be demonstrated. The proponent of the protective proceedings must show that the individual's mental disability is *causing* the risky behaviors.<sup>59</sup>

This causative link is essential to prevent the evaluation of an individual's ability to make autonomous decisions from being reduced to an evaluation of the social acceptability of the decisions made.<sup>60</sup> The evaluation of rationality must focus on the *nature* of the decision making process, not on the *outcome* of that process. It is not *per se* irrational to prefer to run a risk, even a major risk of serious injury, in order to achieve a goal which one values even more highly.<sup>61</sup> The valuation of goals and values is highly personal and idiosyncratic. If it were not so, it would appear that the choice to risk life and limb simply for the thrill of mountain climbing, scuba diving, or bungee

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58. However, it is not at all clear that state intervention is generally effective in serving this goal of restoring capacity. See discussion of therapeutic jurisprudence analysis of the effects of adult protective proceedings, *infra* notes 92-154 and accompanying text.

59. *State v. Webber (In re Webber)*, 45 P.3d 1046 (Or. Ct. App. 2002) (finding that the state failed to show that respondent's behavior in instigating a fight was due to mental illness); *State v. Gjerde (In re Gjerde)*, 935 P.2d 1224 (Or. Ct. App. 1997) (finding that the state failed to show that respondent's refusal to accept medical advice to enter a nursing home was due to mental illness).

60. A "difference in personal beliefs from that held as the 'perceived norm' of society by others is not a *per se* basis on which an involuntary commitment may be made." *State v. Strasburger (In re Strasburger)*, 909 P.2d 197, 201 (Or. Ct. App. 1996). Guardianship law must not take liberty from an individual who is "simply an eccentric person making unusual, unpopular, or unwise choices." Robert Roca & Thomas Finucane, *Physicians and Guardianship: A Brief Commentary*, 7 MD. J. CONTEMP. LEGAL ISSUES 239, 242 (1996).

61. "Unless a mental disorder has impaired autonomous choice, civil commitment cannot be a vehicle for 'saving people from themselves.'" *Gjerde*, 935 P.2d at 1229; "The value of protecting an individual must be balanced against that individual's right to and need for autonomy and independence. Because of the perceived vulnerability of the elderly, it is too easy to see and focus only on the perceived need for protection and to overlook the equally compelling right to autonomy." Lawrence Frolik & Alison Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 706 (1991).

jumping should be considered a per se indication of legal incapacity. The U.S. Constitution recognizes the right of a competent adult to refuse medical treatment, for example, even where such refusal will result in certain death.<sup>62</sup>

While the goals and justifications for adult protective proceedings in *parens patriae* civil commitment and adult guardianship are the same, the outcome of the proceedings are somewhat different. In a guardianship, the proposed outcome of the legal proceeding is the appointment of a person to make decisions for and to care for the protected person. In civil commitment, the outcome requested is to admit the protected person to a mental hospital or other form of mental health treatment, usually, but not always, as an inpatient.<sup>63</sup> However, these two formally different outcomes may sometimes be indistinguishable in practice. Guardianship is commonly used to involuntarily place an elderly person in a treatment facility: sometimes a mental hospital, more commonly a nursing home.<sup>64</sup> In some cases, the ultimate outcome of civil commitment might also be placement of the protected person not in a mental hospital, but in a nursing home.<sup>65</sup>

The effect on the protected person in the different protective proceedings may also be different. A civil commitment results in the involuntary placement of the protected person in a treatment setting, most commonly a mental hospital, for a fixed maximum period of time.<sup>66</sup> Commitment may be renewed after the period of time expires, but generally some form of court review of the continued commitment must occur.<sup>67</sup> The protected person who is civilly committed may or may not retain the right to refuse medical treatment, including

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62. "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990).

63. SCHOPP, *supra* note 4, at 83, 94, 106.

64. See Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 646-47 (1992).

65. *Gjerde*, 935 P.2d at 1226.

66. *E.g.*, FLA. STAT. § 394.467(6)(b) (West 2002); 405 ILL. COMP. STAT. ANN. 5/3-813 (West 1997 & Supp. 2003); MINN. STAT. ANN. § 253B.09(5) (West 2003); OR. REV. STAT. § 426.130 (2001).

67. *E.g.*, OR. REV. STAT. §§ 426.301, .303, .307 (2001). *But see State v. Johansen (In re Johansen)*, 866 P.2d 470 (Or. Ct. App. 1993) (holding that it is permissible to give hearing on recommitment only on request of protected person).

psychoactive medications.<sup>68</sup> Civil commitment also results in the labeling of the protected person as a mentally ill individual.<sup>69</sup> Persons so labeled may suffer ongoing social stigma,<sup>70</sup> and may also be subject to legal requirements and restrictions as a result.<sup>71</sup>

The most common scenario for a *parens patriae* civil commitment is an individual who ceases to take his or her psychoactive medications often due to the desire to avoid the unpleasant side effects of the drugs.<sup>72</sup> The individual begins to behave in a socially unacceptable manner and draws attention to himself or herself.<sup>73</sup> The individual has no one who is willing or able to intervene informally to mediate between the individual and society at large or to seek guardianship.<sup>74</sup> He or she may be picked up by police for unacceptable, although perhaps not illegal, behavior and end up in the civil commitment process.<sup>75</sup> The individual may seek help by voluntarily going to a hospital or doctor, who may then initiate civil commitment proceedings.<sup>76</sup> Family or friends of the individual may initiate civil commitment to force the individual to accept the help that family and friends believe is needed.<sup>77</sup>

The most common scenario for the elderly is slightly different. Frequently, the elder may already be receiving care and may have become “difficult,” meaning anything from less amenable to following the rules of the care facility to actively assaultive. Civil commitment may be used as a way to evict a difficult-to-care-for resident from a care facility. Elders can also end up in civil commitment proceedings after hospitalizations for medical problems resulting from inadequate

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68. SCHOPP, *supra* note 4, at 118–20.

69. David S. Douglas et al., *RX for the Elderly: Legal Rights (and Wrongs) Within the Health Care System*, 20 HARV. C.R.-C.L. L. REV. 425, 434 (1985).

70. *Vitek v. Jones*, 445 U.S. 480, 492 (1980); *State v. Van Tassel*, 484 P.2d 1117, 1120 (Or. Ct. App. 1976).

71. E.g., OR. REV. STAT. § 166.250 (2001) (making it unlawful for anyone who has been committed to own a firearm).

72. See generally Douglas Mossman, *Unbuckling the “Chemical Straitjacket”: The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033 (2002).

73. See Telephone Interview with Robert C. Joondeph, Director, Oregon Advocacy Center, (July 18, 2001).

74. See Johns, *supra* note 6, at 69.

75. See Telephone Interview with Robert C. Joondeph, *supra* note 73.

76. See generally Mark S. Kaufman, Note, ‘Crazy’ Until Proven Innocent? *Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333 (1988).

77. Kathleen Winchell, Note, *The Need to Close Kentucky’s Revolving Door: Proposal for a Movement Towards a Socially Responsible Approach to Treatment and Commitment of the Mentally Ill*, 29 N. KY. L. REV. 189, 195 (2002).

care, falls, or other problems in the home, especially if the elder is unwilling to accept medical recommendations about future care, particularly nursing home care.<sup>78</sup>

In order to determine that the respondent should be civilly committed, the court must find that the individual is mentally ill and that as a result of this mental illness, he or she poses a substantial threat to his or her own safety or is unable to provide for his or her basic needs.<sup>79</sup> The court may also be required to find that the respondent cannot or will not obtain the mental health treatment needed to avert this threat voluntarily.<sup>80</sup> If the court makes the required findings, the outcome is defined by the nature of the proceeding: the respondent is committed for treatment, generally to a state mental hospital.<sup>81</sup> The court does not determine that the respondent, once admitted to the mental hospital, will be required to accept any particular form of treatment; generally, the protected person retains the right to refuse consent to medical treatment unless further legal proceedings deprive him or her of that right.<sup>82</sup> Civil commitment is for a determinate period of time, generally six months.<sup>83</sup> After that period of time elapses, the protected person either must be released or there must be some opportunity for further court review of the commitment.<sup>84</sup>

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78. See Telephone Interview with Robert C. Joondeph, *supra* note 73; see also Fred Bayles & Scott McCartney, *Declared 'Legally Dead' by a Troubled System*, in A SPECIAL REPORT: GUARDIANS OF THE ELDERLY: AN AILING SYSTEM 1 (Associated Press ed., 1987) [hereinafter AN AILING SYSTEM]; Fred Bayles & Scott McCartney, *Guardianship Entrepreneurs Entering the Field*, in AN AILING SYSTEM, *supra*, at 19.

79. E.g., FLA. STAT. ANN. § 394.455(18) (West 2002); 405 ILL. COMP. STAT. ANN. 5/1-119 (West 1997); MD. CODE ANN., HEALTH-GEN. I § 10-617(a) (2000); MINN. STAT. ANN. § 253B.02(13) (West 2003); OR. REV. STAT. § 426.005(1)(d) (2001).

80. E.g., FLA. STAT. ANN. § 394.467(1)(a)(1)(a); MD. CODE ANN., HEALTH-GEN. I § 10-632(e)(2)(iv); MINN. STAT. ANN. § 253B.09(1); OR. REV. STAT. § 426.130(1)(b)(A)(i).

81. See, e.g., FLA. STAT. ANN. § 394.467(1), (2); MD. CODE ANN., HEALTH-GEN. I § 10-632(a); MINN. STAT. ANN. § 253B.09(1). The protected person may also be subject to some form of conditional release, conditioned on participating in a treatment program, or may be released on an outpatient basis, on similar conditions. E.g., MINN. STAT. ANN. § 253B.09(1); OR. REV. STAT. § 426.130(1)(b)(B).

82. See, e.g., 405 ILL. COMP. STAT. ANN. 5/2-107.1(a) (West 1997); MD. CODE ANN., HEALTH-GEN. I § 10-708 (requiring noncourt proceeding); MINN. STAT. ANN. § 253B.092(8).

83. E.g., FLA. STAT. ANN. § 394.467(6)(b); 405 ILL. COMP. STAT. ANN. 5/3-813 (West 1997 & Supp. 2003); MINN. STAT. ANN. § 253B.09(5); OR. REV. STAT. §§ 426.130(2), .301.

84. FLA. STAT. ANN. § 394.467(7); 405 ILL. COMP. STAT. ANN. 5/3-813 (West 1997 & Supp. 2003); MINN. STAT. ANN. § 253B.13(1); OR. REV. STAT. § 426.301(1).

The outcome and effects of a guardianship proceeding on the protected person can differ dramatically from those of *parens patriae* civil commitment described above. A guardianship results in the reduction of the protected person to the status akin to that of a minor child.<sup>85</sup> The protected person loses the right to determine where he or she will live, whom he or she will see, where he or she will go, and how he or she will live his or her life.<sup>86</sup> The guardian's powers generally include the right to consent to medical treatment on behalf of the protected person, including the right to withhold or withdraw life sustaining treatment.<sup>87</sup> The right of the guardian to make decisions on behalf of the protected person may even include the right to admit the protected person to a mental hospital.<sup>88</sup> Adult guardianships are generally expected to continue until the protected person dies, and there may be little or no court involvement once the guardianship is established.<sup>89</sup>

One of the most common scenarios for a guardianship proceeding is that of the elderly individual who insists on remaining in his or her own home after a doctor recommends nursing home placement. The individual's adult children, genuinely concerned for their parent's well-being, decide that the refusal to accede to the doctor's recommendation is proof that the parent is no longer able to make rational decisions for himself or herself. The adult children then seek a guardianship in order to force the parent's admission to the nursing home. The issue before the court in the guardianship proceeding is whether the respondent is legally incapacitated. Once incapacity is found, the determination of what actions are in the protected person's

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85. See sources cited *supra* note 28 and accompanying text.

86. *E.g.*, FLA. STAT. ANN. § 744.361 (West Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11a-17 (West Supp. 2003); MD. CODE ANN., EST. & TRUSTS § 13-708 (West Supp. 2003); MINN. STAT. ANN. § 525.56(3) (West Supp. 2003); OR. REV. STAT. § 125.315(1).

87. *E.g.*, 755 ILL. COMP. STAT. ANN. 5/11a-17 (West Supp. 2003) (requiring special court order); MD. CODE ANN., EST. & TRUSTS § 13-708(b)(8) (Supp. 2002); MINN. STAT. ANN. § 525.56(3)(4)(a) (West Supp. 2003) (giving the guardian the power to make medical treatment decisions, but life-sustaining treatment not specified); OR. REV. STAT. § 125.315(1)(c).

88. *E.g.*, OR. REV. STAT. § 125.315. But see *People v. Gardner (In re Gardner)*, 459 N.E.2d 17 (Ill. App. Ct. 1984); *Ginsberg v. Detzel (In re Detzel)*, 521 N.Y.S.2d 6 (N.Y. App. Div 1987); *In re Anderson*, 564 P.2d 1190 (Wash. Ct. App. 1977); *Watts v. Combined Cmty. Servs. Bd.*, 362 N.W.2d 104 (Wis. 1985), for holdings that a guardian may not place a protected person in a mental hospital without going through the civil commitment process.

89. *E.g.*, OR. REV. STAT. § 125.315.

best interests is generally left to the sole discretion of the guardian. The guardianship proceeding does not generally require that the court make specific findings that the actions proposed by the guardian are in the best interests of the protected person.<sup>90</sup> The petitioner may not even be required to indicate to the court what actions are proposed.<sup>91</sup>

As the above discussion demonstrates, the goals of and justifications for guardianship and *parens patriae* civil commitment are the same. The outcomes also have some similarities, most importantly the fact that both procedures often result in involuntary placement of the protected person in a residential facility. While both proceedings are justified by the state's power to protect the well-being of its incapacitated citizens, each looks to different means to safeguard that well-being. Guardianship relies almost entirely on the wisdom and good will of the individual appointed as guardian to determine what is in the protected person's best interests, while civil commitment relies on the court process and mental health care providers to decide what is best for protected persons. While each system has its advantages, as argued below, the distinction between the two systems is arbitrary, and each system also has its flaws, some of which derive from the same accidents of history which created the distinction between *parens patriae* civil commitment and adult guardianship in the first place. Both systems should be seen as aspects of what should be re-envisioned as an integrated and rationalized system of adult protective proceedings.

#### IV. Therapeutic and Antitherapeutic Effects of Adult Protective Proceedings

Therapeutic jurisprudence provides a useful analytical framework for evaluating adult protective proceedings. Therapeutic jurisprudence is a mode of legal analysis which "seeks to apply social science to examine law's impact on the mental and physical health of the people it affects. It recognizes that, whether we realize it or not, law functions as a therapeutic agent, bringing about therapeutic or anti-therapeutic consequences."<sup>92</sup> Therapeutic jurisprudence argues that, while law is based on many important values, therapeutic concerns

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90. See generally ADULT GUARDIANSHIPS IN OREGON, *supra* note 27.

91. See generally *id.*

92. BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3 (1997).

should be included among these values.<sup>93</sup> All else being equal, therapeutic effects of legal procedures should be maximized and antitherapeutic effects minimized.<sup>94</sup>

Therapeutic jurisprudence, or TJ, was first applied to mental health law, and much has been written on therapeutic jurisprudence analysis of civil commitment.<sup>95</sup> TJ analysis was next directed to criminal law, family law, and a variety of other legal fields,<sup>96</sup> however, the application of TJ to concepts in elder law is a relatively recent development.<sup>97</sup> TJ analysis encourages the use of empirical research to determine the effects of legal structure and procedure on the individuals affected by the law in practice.<sup>98</sup> This analysis seeks to determine whether laws actually achieve the social and legal goals that they are intended to accomplish, and whether there are unnecessary and avoidable negative effects of the law on those involved in the legal process.

The application of TJ analysis to adult protective proceedings is a natural step. Since the justification for such proceedings is the protection of the well-being of the protected person under the *parens patriae* power of the state, it is logical to judge different statutory schemes by evaluating how protected persons actually fare when placed under protective proceedings. The central question is whether the well-being of protected persons is improved compared to that of similarly impaired individuals who have not been the subject of protective proceedings. Well-being must be defined according to generally acceptable and objective criteria reflecting psychological and physical indicators, such as the person's functional capacity, physical

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93. See David B. Wexler & Bruce J. Winick, *Introduction to LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (David B. Wexler & Bruce J. Winick eds., 1996).

94. *Id.*

95. See, e.g., DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

96. *Id.*

97. E.g., Marshall B. Kapp, "A Place Like That": *Advance Directives and Nursing Home Admissions*, 4 PSYCHOL. PUB. POL'Y & L. 805 (1998).

98. Legal judgments, however, are often based on factual predicates that remain unexamined empirically and that might turn out not to be true; some ignore altogether the potential impact they may have on therapeutic values. Our aim is to suggest that legal decision makers explicitly take account of this impact, that they become more sophisticated about and make better use of the insights . . . of the behavioral sciences, and that social scientists audit law's success or failure in this regard.

WEXLER & WINICK, *supra* note 95, at xi.

and mental health, injury rate, self-evaluation of the quality of life, and lifespan. The common assumption that a mentally disabled adult's well-being can best be protected by confinement in a mental hospital, nursing home, or other care facility must be examined in the light of actual outcomes for individuals so confined and for their counterparts who remain without such care.

A TJ framework is also useful in examining the other necessary criterion for *parens patriae* intervention: the determination of the incapacity to make reasoned decisions due to mental disability.<sup>99</sup> Accurate determination of mental incapacity is essential to justify the infringement of autonomy rights.<sup>100</sup> From a TJ standpoint, the empirical questions to be answered are: how reliable and consistent are our determinations of incapacity; what is the most accurate person or entity to make these determinations; how great is the risk of erroneous determination; how should the risk of erroneous determination be allocated to minimize antitherapeutic consequences; and are the antitherapeutic effects of wrongfully depriving a capable adult of autonomy better or worse than the antitherapeutic effects of failing to protect an incapable adult. It is crucial to remember that not all mental disabilities are incapacitating and individuals who are incapacitated in some respects may retain the capacity to function adequately in other areas. The logic of *parens patriae* only justifies depriving adults of autonomy in those areas in which they are incapable of functioning autonomously.

Critics may object that, by lumping *parens patriae* civil commitment and guardianship proceedings together in an analysis of their therapeutic or antitherapeutic effects, unwarranted assumptions are made about similarities in outcomes from the two proceedings. While the outcomes of the different proceedings are different in form, there are still enough similarities in the effect on the protected person to warrant examining both under the same TJ lens. Guardianship frequently results in institutional confinement,<sup>101</sup> as does *parens patriae* civil commitment.<sup>102</sup> Studies have shown that guardianship proceedings are highly correlated with an involuntary change in the protected

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99. *Id.* at 42–45.

100. *Id.*

101. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 71–73.

102. Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 93, at 17, 38–40.

person's living situation.<sup>103</sup> Data has been examined regarding the different effects of guardianship proceedings on protected persons, whether or not the immediate purpose of the guardianship was to place the protected person in a residential facility.<sup>104</sup> *Parens patriae* civil commitment does not always result in admission to a mental hospital. Many states provide for outpatient commitment where the protected person is required to pursue some course of mental health treatment outside of a residential mental health facility.<sup>105</sup> In some cases, outpatient civil commitment may result in nursing home placement.<sup>106</sup> While the outcomes of guardianship and of civil commitment are clearly not identical, given that the two proceedings are designed with different kinds of outcomes in mind, they are similar enough, in spite of this structural difference, to warrant examining their therapeutic and antitherapeutic effects together.

Other critics may question why the discussions of adult protective proceedings tend to focus the effects of these proceedings specifically on the elderly. In actual practice, predominantly elderly persons are subject to guardianship.<sup>107</sup> In an Oregon study, nearly eighty percent of respondents in guardianship cases were over sixty years old and almost sixty percent were over seventy-five years old.<sup>108</sup> Whether *parens patriae* civil commitment, which looks to the ability of the respondent to provide for his or her own safety and basic needs, frequently involves elderly respondents is more of an open question. While some studies indicate that the elderly are not more likely to be targets of civil commitment,<sup>109</sup> other studies find that civil commitment, particularly *parens patriae* civil commitment, "disproportionately and often inappropriately affects older persons."<sup>110</sup> Regardless

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103. In a national study, forty-six percent of respondents were placed in a nursing home after a guardianship petition was filed. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 71-73; see also ADULT GUARDIANSHIPS IN OREGON, *supra* note 27, at 5; Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 L. MED. & HEALTH CARE 210, 215 n.85 (1984).

104. Rein, *supra* note 7, at 1834 n.70.

105. Gerry McCafferty & Jeanne Dooley, *Involuntary Outpatient Commitment: An Update*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 277, 277 (1990).

106. E.g., OR. REV. STAT. § 426.127 (2001).

107. See ADULT GUARDIANSHIPS IN OREGON, *supra* note 27, at 3.

108. *Id.*; see also Rein, *supra* note 7, at 1840.

109. *Grave Disability*, *supra* note 42, at 173.

110. KAPP, *supra* note 9, at 103. "Researchers have found that a 'need for treatment' criterion correlates with an older and more largely female patient population, whereas a predominant 'dangerousness to others' criterion tends to correlate more with commitment of a younger, male-dominated population." *Id.* at 104

of who may be most often affected by civil commitment, adult protective procedure statutes are of crucial interest to the swiftly growing cohort of the elderly:

[T]he senior citizens of today and tomorrow are at a disproportionately greater risk than the general population of becoming the unwilling or reluctant 'beneficiaries' of guardianship, conservatorship, protective services, or other forms of surrogate management. In effect, a double standard exists. Society is unwilling to tolerate in a seventy- or eighty-year-old person 'the same silly decision' that would go unchallenged if made by an individual in the prime of her life.<sup>111</sup>

While both guardianship and civil commitment affect younger adults as well as the elderly, age and age related biases often play a crucial factor in the decision to pursue adult protective proceedings, in their outcome, and in the effect on protected persons.

The difficult decisions to be made in adult protective placement are usually formulated as balancing the goal of preserving autonomy and self-determination against the competing goal of protecting safety and well-being.<sup>112</sup> Courts and legislatures struggle with the issue of when the state may restrict a respondent's personal liberty in order to protect the respondent from the danger and harm flowing from the choices the respondent is making. In theory, the law resolves this dilemma by focusing on capacity.<sup>113</sup> If the respondent retains legal capacity, then his or her freedom of choice must be preserved no matter how self-destructive those choices may be. If the respondent lacks legal capacity, then the state may authorize other actors to step in and supercede the respondent's right to choose.<sup>114</sup>

Capacity thus becomes the determinant of whether state intervention can be justified. However, the resulting focus on capacity, to the exclusion of other issues, fails to comport with the full requirements of the *parens patriae* justification for infringing on personal liberty. In addition to a loss of autonomous decision-making capacity on the part of the protected person, *parens patriae* requires that the state's

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(citations omitted); see also Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 PSYCHOL. PUB. POL'Y & L. 80, 87 (1995).

111. Rein, *supra* note 7, at 1844 (citations omitted).

112. *Id.* at 1864-65.

113. AM. BAR FOUND., *THE MENTALLY DISABLED AND THE LAW* 36 (Samuel J. Brakel & Ronald S. Rock eds., revised ed. 1971); see also WEXLER & WINICK, *supra* note 95, at 64.

114. Rein, *supra* note 7, at 1824.

intervention be to the benefit of the protected person.<sup>115</sup> The rationale for state exercise of power requires *both* lack of individual capacity *and* beneficent action by the state.<sup>116</sup> “[I]n dealing with impaired but still self-aware persons . . . , primary reliance on the test of competency—or on any other single test that focuses on the condition of the individual rather than on the merits of the proposed intervention— . . . is practically and morally deficient.”<sup>117</sup>

When focusing on the effects of adult protective proceedings on protected persons, the supposed benefits are not as apparent as legislatures, courts, family members, and medical providers have assumed.<sup>118</sup> Many studies have indicated that intervention in the freedom of elderly adults to make their own decisions can lead to “decline, disorientation, stress, and deterioration of the immune system.”<sup>119</sup> A study comparing matched experimental and control groups of elderly persons found that “the result of social service assessment and intensive protective services was an increased rate of institutionalization and mortality for the experimental group.”<sup>120</sup> In the

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115. *Id.* at 1826.

116. *Id.* at 1826–27.

117. *Id.* at 1820.

118. Social workers, court investigators, probate judges, and others engaged in the guardianship process frequently see the fundamental issue as one of freedom versus safety . . . the premise that intervention poses fewer risks than nonintervention and that institutional care settings are safer than an individual’s home have been persuasively challenged by mounting evidence to the contrary. Even assuming the soundness of the premise of safety, however, some elders . . . would prefer to give up safety if safety were to require them to relinquish control over their own lives, especially if that means living out their remaining days in a nursing home . . . . Such a decision to encounter risk is often interpreted as evidence of incompetency or incapacity.

*Id.* at 1864–65 (citations omitted).

119. *Id.* at 1835 (citation omitted).

120. Nolan, *supra* note 103, at 218 n.85 (discussing M. BLENKNER ET AL., BENJAMIN ROSE INST., PROTECTIVE SERVICES FOR OLDER PEOPLE: FINAL REPORT: FINDINGS FROM THE BENJAMIN ROSE INSTITUTE 183–85 (1974)). Evidence indicates that intervention increases the rate of institutionalization and death. See Winsor C. Schmidt, *Guardianship of the Elderly in Florida*, 55 FLA. BAR J. 189, 190 (1981). “In their landmark study of over 400 guardianships, Alexander and Lewin found that wards ended up worse in every case.” *Id.* (discussing G. ALEXANDER & T. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT 136 (1972)).

Whatever the risks to the individual in the community these risks are not removed by involuntary placement in a nursing home or state psychiatric facility, but are frequently compounded . . . . A huge number of patients will die during the first three months of placement where they might have lasted for a much longer period in the familiar surroundings at home.

civil commitment context, it is not clear that involuntary institution-alization improves the mental health of protected persons, even in forms of mental illness which, unlike many of the dementias suffered by the elderly, are considered highly treatable.<sup>121</sup> Indeed, civil commitment can itself be destructive of the mental health of the protected person:

A sense of being competent and self-determining provides strong intrinsic gratification and may be a prerequisite for psychological health. Exercising self-determination is thought to be a basic human need. A variety of studies show that . . . denying . . . [individuals] the opportunity to choose “undermines their motivation, learning, and general sense of organismic well-being.” Indeed, the stress of losing the opportunity to be self-determining may cause “severe somatic malfunctions” and even death.<sup>122</sup>

To the extent that protective proceedings do provide needed care and treatment to respondents, it is not clear that such protective proceedings are required to provide such care. In a study of over 400 guardianships, the researchers “reported that they could find no benefit that could not have been achieved without a finding of incompetency and that in almost every case examined, the aged incompetent was in a worse position after he or she was adjudicated incompetent than before.”<sup>123</sup> Mental health treatment provided under civil commitment

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Rein, *supra* note 7, at 1834 n.70 (quoting Georgina D. Vassiliou, *Another View of Conservatorships*, N.Y. L.J., Jan. 17, 1990, at 8). “In the writer’s [a certified geriatric nurse practitioner] experience, knowledge of . . . an adjudication [of incompetence] can be lethal. The writer has known at least three wards whose physical conditions were not terminal but who refused to eat and died within two weeks of notice that guardianship had been imposed.” Nolan, *supra*, at n.19.

121. “Virtually no well designed studies have evaluated whether or not psychotherapy is effective in treating mentally ill patients confined against their will to public psychiatric hospitals for treatment.” Mary Durham & John La Fond, *A Search of the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment for the Mentally Ill*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT, *supra* note 42, at 148.

122. Bruce J. Winick, *On Autonomy: Legal and Psychological Perspective*, 37 VILL. L. REV. 1705, 1765 (1992) (quoting EDWARD L. DECI, THE PSYCHOLOGY OF SELF-DETERMINATION 209 (1980) (other citations omitted); see also George J. Alexander, *Remaining Responsible: On Control of One’s Health Needs in Aging*, 20 SANTA CLARA L. REV. 12 (1990).

While society has traditionally focused its attention, in a self-congratulatory manner, on the value of providing care for the subject’s benefit, little analysis has been devoted to the *ultimate* ‘benefit’ and the ramifications of diminished self-determination . . . The loss of autonomy may entirely vitiate putative benefits by aggravating the subject’s morbidity.

ALEXANDER & SCHEFLIN, *supra* note 23, at 6.

123. Rein, *supra* note 7, at 1834, n.70 (quoting WINSOR C. SCHMIDT ET AL., PUBLIC GUARDIANSHIP AND THE ELDERLY 12 (1981), discussing GEORGE J. ALEXANDER

may be less effective than the same treatment provided on a voluntary basis due simply to the fact of coercion in treatment.<sup>124</sup> “In those circumstances in which the law authorizes coercive mental health intervention, . . . clinicians will rarely discuss hospitalization and treatment options with their patients, but will make treatment decisions unilaterally and order that hospitalization and treatment be imposed involuntarily, even over objection.”<sup>125</sup>

If we cannot demonstrate that mentally incapacitated adults in general have a higher degree of well-being under the intervention of protective proceedings than they do when left alone, then the justification for *parens patriae* intervention is lacking. In order to have a legally and ethically justifiable system of adult protective proceedings, we must design a system in which the well-being of incapacitated adults is enhanced. Our current systems simply do not qualify.

If adult protective proceedings can have a seriously antitherapeutic effect on incapacitated protected persons, it may be assumed that those effects are even more serious when they are imposed on individuals who retain the capacity to make their own decisions but who are erroneously deprived of that capacity by the courts. Unfortunately, it is not clear that the courts, or the experts they rely upon, are able to determine capacity with a high degree of accuracy.

The diagnosis of mental illness is not a completely straightforward matter:

Since there are no biological tests for the vast majority of mental disorders, the psychiatric association has tremendous leeway in what it chooses to classify or not classify as an illness. Unfortunately, there are few actions or traits that the association does not consider to be possible symptoms of some disorder.<sup>126</sup>

Psychiatrists frequently are unable to accurately diagnose or effectively treat mental illness.<sup>127</sup> The determination of legal capacity requires a combination of medical diagnosis, analysis of functional abili-

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& TRAVIS H.D. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 136 (1972)).

124. Bruce Winick, *Coercion and Mental Health Treatment*, 74 *DENV. U. L. REV.* 1145, 1157, 1159–60 (1997); *see also* Durham & La Fond, *supra* note 121, at 133–63.

125. Winick, *supra* note 124, at 1149.

126. ALEXANDER & SCHEFLIN, *supra* note 23, at 29 (quoting Stuart A. Kirk & Herb Kutchins, *Is Bad Writing a Mental Disorder?*, *N.Y. TIMES*, June 20, 1994, at A17).

127. Note, *Civil Commitment and the “Great Confinement” Revisited: Straightjacketing Individual Rights, Stifling Culture*, 36 *WM. & MARY L. REV.* 1769, 1776–82 (1995). “Classifications of psychopathology tend to reinforce the cultural norms of those making the diagnoses.” *Id.* at 1796.

ties, and application of legal concepts and categories.<sup>128</sup> Medical doctors are not trained in the combined legal/functional/medical assessment required to determine whether a given individual lacks legal capacity,<sup>129</sup> nor are they very accurate in their determinations of capacity.<sup>130</sup> In a study of the ability of doctors to assess patient competence, only thirty percent of the doctors were able to correctly apply the definition of competence to a fact scenario based on an actual legal case.<sup>131</sup> Psychiatrists were more able than other doctors to answer correctly theoretical questions about the standards for legal incompetence but were more often wrong in applying those standards to fact scenarios.<sup>132</sup> Only a minority of doctors understood that a person with a diagnosis of depression or dementia could nevertheless be legally competent.<sup>133</sup>

Our results call into question the widespread belief that physicians in general, and psychiatrists in particular, are experts at competence assessment . . . these findings suggest that the common clinical practice of relying on psychiatric opinion may produce inaccurate assessments of competence that undermine patient autonomy. They also suggest that judges must be exceedingly careful in evaluating medical and psychiatric testimony in competency proceedings. In particular, judges should

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128. "Although many physicians undoubtedly regard a competency assessment as an exercise in clinical description, it inevitably involves subjective cultural, social, political, and legal judgments which are essentially normative in nature. . . . A determination of incompetency functions as a veto on the exercise of rights." WEXLER & WINICK, *supra* note 95, at 49-51; *see also* SCHOPP, *supra* note 4, at 44, 119-25.

129. The use of testimony from treating physicians at the guardianship hearings has been widely criticized because the testimony often contains legal conclusions masquerading as medical facts. Incompetency is a legal conclusion, not a medical or psychological determination . . . . A court's reliance on the testimony of a proposed ward's physician may be grossly inappropriate. The physician may know little about the defendant's actual limitations, and even less about the legal meaning of incompetency.

Phillip Tor, Note, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 750-51 (1993) (citations omitted).

130. "[D]espite their knowledge of the correct legal standard, many physicians believe the assessment of competence is primarily a medical question, rather than the application of a legal rule." Lawrence J. Markson et al., *Physician Assessment of Patient Competence*, 42 J. AM. GERIATRICS SOC'Y 1074, 1078 (1994).

131. *Id.* at 1076-77.

132. "[I]t is not enough to educate physicians about the proper legal standard for competence assessment because most physicians know the standard. The key problem seems to be an inability to apply the standard properly when this would lead to an outcome that the physician finds unacceptable or medically irrational." *Id.* at 1079.

133. *Id.* at 1078.

not rely upon – and perhaps should not even ask for – expert witnesses’ conclusions regarding patient competence.<sup>134</sup>

Reliance by courts on the opinion of physicians, in determining capacity in guardianship and civil commitment cases, appears to be seriously misplaced.

Courts have found that “commitment decisions under the [state statute] were highly error-prone, especially where review of those decisions depended on the initiative and competence of the persons committed.”<sup>135</sup> Studies have found that:

[W]hen lawyers are present at commitment hearings, commitment rates have been significantly reduced. This suggests that psychiatrists unchecked by opposing counsel seek to commit many who, given the articulated legal standard, should not be committed . . . [T]he psychiatrist will receive more negative feedback from erroneous predictions of nonharmful behavior than of harmful behavior and will be thus inclined to overpredict rather than underpredict harmful behavior.<sup>136</sup>

There is a built-in bias on the part of psychiatric experts that can lead to respondents with legal capacity being committed.<sup>137</sup> If the psychiatrist testifies that the respondent does not need commitment and the respondent subsequently suffers (or inflicts) harm in the community, the psychiatrist may feel responsible or be held liable for that harm.<sup>138</sup> If the psychiatrist testifies erroneously that the respondent needs commitment, the psychiatrist is unlikely to suffer any adverse consequences from an unnecessary or unlawful commitment to a treatment facility.<sup>139</sup>

In fact, while the justification for civil commitment relies on the incapacity of the respondent to decide what medical treatment, if any, is in his or her best interests, the procedure in civil commitment may fail to directly address this foundational issue of capacity. Civil commitment statutes may only require the finding of mental illness or “grave disability” before moving on to the determination of whether the respondent is at serious risk and whether commitment is in the respondent’s best interests.<sup>140</sup> While the court may be required to find that the mental disability is the cause of the risk to the respondent’s

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134. *Id.* at 1079.

135. *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981).

136. *The Role of Counsel*, *supra* note 6, at 1554.

137. *See id.*

138. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340, 349–52 (Cal. 1976).

139. *See, e.g., id.* at 353.

140. *E.g., OR. REV. STAT. § 426.070(5)(a)* (2001).

safety,<sup>141</sup> there may be no specific requirement that the court find that the mental disability has resulted in the respondent's incapacity to make his or her own determination of what is in his or her best interests. This important link in the chain of justification for interference with individual autonomy may be left out.<sup>142</sup>

The risk of error in guardianship proceedings would appear to be at least as high as that in civil commitment. In the Oregon example, 92 out of 171 reported decisions in civil commitment appeals between 1990 and 2000 resulted in written opinions.<sup>143</sup> Of these, sixty-nine (75% of the written opinions, or 40% of the total reported cases) resulted in reversals.<sup>144</sup> All respondents in civil commitment in Oregon are represented by counsel.<sup>145</sup> In the guardianship context, where only 5.3% of respondents were represented by legal counsel,<sup>146</sup> three out of twelve reported decisions during the same time period resulted in written opinions dealing with guardianship issues, of which all three were reversals (100% of the written opinions, or 25% of the total reported cases).<sup>147</sup> While court visitors reported that respondents were able to receive and evaluate information and communicate decisions (the statutory standard for legal capacity) to at least some degree in 38.5% of guardianships filed, visitors recommended, and courts appointed, guardianships in 91% of the cases.<sup>148</sup> In a national study, around 70% of respondents in guardianship were unrepresented.<sup>149</sup> Fifty-eight percent of guardianship hearings lasted no more than fif-

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141. SCHOPP, *supra* note 4, at 53; John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 320, 322 (1994).

142. See analysis in *State v. Webber (In re Webber)*, 45 P.3d 1046, 1050 (2002).

As the governing statute makes clear, a person must be more than mentally ill in order to be committed involuntary—the person must also be dangerous to self or others *as a result of* the person's mental illness . . . a mental illness must be the *cause* of a person's dangerousness to himself or others before an involuntary commitment can lawfully be ordered.

*Id.*

143. Statistics based on author's own survey (on file with author).

144. *Id.*

145. OR. REV. STAT. § 426.100(e) (2001).

146. ADULT GUARDIANSHIPS IN OREGON, *supra* note 27, at 4.

147. Statistics based on author's own survey (on file with author).

148. ADULT GUARDIANSHIPS IN OREGON, *supra* note 27, at 4.

149. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 87.

teen minutes.<sup>150</sup> Respondents were present at only 28% of guardianship hearings.<sup>151</sup> Guardianships were granted 94% of the time.<sup>152</sup>

Adult protective proceedings can have serious antitherapeutic consequences, even for those who meet legal definitions of incapacity. In general, incapacitated adults do not necessarily appear to fare better under protective proceedings than if they were left to make decisions on their own behalf.<sup>153</sup> Many of the benefits conferred by protective proceedings seemingly could be provided without depriving individuals of autonomy. Finally, our current legal procedures appear prone to error in the determination of incapacity, which is the sole basis on which deprivation of autonomy can be justified.<sup>154</sup> In order to maximize the therapeutic possibilities of adult protective proceedings, we need to be prepared to discard old structures and procedures which have failed to achieve their purpose and to creatively design new structures and procedures to achieve the specific “real world” outcomes that we desire.

## V. Rationalizing the Structure of Adult Protective Proceedings

Several of the points made thus far in this article—that adult guardianships and *parens patriae* civil commitments deprive individuals of civil rights and autonomy, that these proceedings can be harmful to protected persons, and that due process protections are often insufficient, in practice if not in the letter of the law—are not new. In fact, they are all too familiar to those who have studied the scholarly literature on these topics. Unfortunately, many of the arguments above are still novel to and unexamined by those involved with these proceedings in daily life: attorneys, physicians, judges, social workers, family members, respondents, and protected persons. These well-established points should be repeated in any forum which may bring them before those involved in adult protective proceedings. Use of the analytical framework of therapeutic jurisprudence is a helpful way to examine adult guardianship proceedings that have not commonly been examined from a self-consciously therapeutic jurisprudence per-

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150. *Id.* at 44.

151. *Id.* at 49.

152. *Id.* at 63.

153. *See generally id.* at 73.

154. *See* SCHOPP, *supra* note 4, at 67.

spective. However, many writers on guardianship have used many of the analytical tools of TJ without understanding or labeling them as such.<sup>155</sup>

Beyond reporting and analyzing the problems with current systems, the next important step is to determine how to maximize the therapeutic benefits from adult protective proceedings through a reconception of traditional structures. The existence of two separate forms of protective proceedings, based on different historical developments, but sharing the same justification and goals, and sharing many of the same outcomes, is not rational or justifiable. If the state proposes to deprive an adult of his or her right to make autonomous decisions, based on the alleged incapacity to make reasoned decisions and the state's *parens patriae* power, then it should use a single proceeding to do so. The artificial separation between adult guardianship and *parens patriae* civil commitment results in unjustifiable differences in protection of the autonomy rights of individuals.

This unified adult protective proceeding should be statutorily separate from other proceedings which do not share the same justification and goals, including guardianships of minors and police power civil commitments. Lumping adult guardianships with juvenile proceedings that do not affect the same vital autonomy rights, and *parens patriae* civil commitments with quasi-criminal proceedings, designed to protect third persons and society from harm, has resulted in conceptual confusion and all manner of unintended legal consequences.<sup>156</sup> Creating a single entity for protection of incapacitated adults from harm resulting from their incapacity would resolve this confusion and allow for rational design to maximize therapeutic effects.

Arguably, the factual issues, community systems, sources of evidence, and other factors for resolving issues regarding mental illness are quite distinct from those regarding dementias or other mental disabilities predominantly associated with aging. However, current civil commitment statutes do not exclude dementias from the definitions of mental illness which may justify commitment;<sup>157</sup> neither do guardian-

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155. See generally THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT, *supra* note 42.

156. In many statutes, adult guardianship and guardianship of minors are included in the same section. See sources cited *supra* note 28. The due process protections required to protect the rights of adults in guardianship, for example, may add unnecessarily to the expense of creating a juvenile guardianship.

157. See, e.g., MICH. COMP. LAWS ANN. § 330.1401 (West 1999); MISS. CODE ANN. § 41-21-61 (2001); WASH. REV. CODE ANN. § 71.05.040 (West 2002).

ship statutes exclude incapacity resulting from “classic” mental illnesses such as schizophrenia or bipolar disorder.<sup>158</sup> Indeed, medical research indicates that many apparent dementias of the elderly are the result of undiagnosed and untreated depression.<sup>159</sup> The separation between community systems for treating mental disability in the elderly and in younger populations create artificial and antitherapeutic distinctions in adult protective proceedings. Both the mentally ill and the elderly incapacitated may benefit from a cross-fertilization of resources and perspectives.

Critics may argue that *parens patriae* and police power concerns in civil commitment overlap to such a degree that it does not make sense to separate out the small subgroup of civil commitment proceedings that fall solely under a *parens patriae* rationale.<sup>160</sup> If a commitment proceeding can be justified under the police power, then concerns and procedures intended to protect third parties and the public in general from harm are applicable. However, when there is no police power justification for a civil commitment, the proceedings should be closely focused on whether *parens patriae* analysis justifies what would otherwise be a forbidden intrusion on individual autonomy. The result of this distinction would be a splitting off of a significant subset of civil commitment proceedings, which would be conceptualized and treated differently than police power civil commitments. The proceedings in which police power concerns alone would be adequate to justify commitment would be unaffected, even if the facts also raised *parens patriae* concerns. If police power concerns were held to be inadequate to justify commitment in a given case, the case could be remanded to an adult protective proceeding for the protection of the respondent. These proceedings could also be conducted at the same time. Many of the central issues raised in the different proceedings would be distinct. In the police power civil commitment, the cen-

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158. See sources cited *supra* note 157, which make no mention of an exclusion for schizophrenia or other bipolar diseases.

159. Norra MacReady, *Elderly Depression Linked to Cerebrovascular Changes*, 354 LANCET 1183 (1999); Myrna A. Wallis, *Looking At Depression Through Bifocal Lenses*, NURSING 2000, Sept. 2000, at 58; Kathleen A. Welsh-Bohmer & Joel C. Morgenlander, *Determining the Cause of Memory Loss in the Elderly*, POSTGRADUATE MED., Oct. 1999, at 99.

160. To the contrary, in Oregon in the year 2001, for example, of 1007 civil commitments ordered, 427, or forty-two percent, involved danger to self and/or inability to meet basic needs as the sole criteria for commitment. Telephone Interview with David Hall, Oregon Office of Mental Health and Addiction Services (July 30, 2001).

tral issue would be whether the individual was a risk to others. In the protective proceeding, the key issues would be whether, due to mental disability, the individual was incapable of making his or her own decisions, whether that incapacity put him or her at risk, and whether the individual's best interests would be better served by some form of state imposed protection. Currently, two different proceedings regarding the same individual, a *parens patriae* civil commitment and a guardianship, may proceed simultaneously. These concurrent proceedings may cover identical ground in determining whether intervention is warranted. The creation of a separate adult protective proceeding would, in these cases, make more efficient use of judicial resources.

The merging of *parens patriae* civil commitment and adult guardianship can utilize the strengths of each proceeding and minimize the antitherapeutic consequences of both. The advantage of civil commitment is that there is a state actor to take the responsibility for acting to protect the well-being of an incapacitated respondent. Guardianship, in contrast, generally relies on the willingness of a private individual to step forward and assume the role of guardian. If no individual is willing to serve, then no protection can be provided.<sup>161</sup>

Another important aspect of civil commitment is the provision of counsel, including appointed counsel, to the respondent. While some statutes provide for appointment of counsel in guardianships,<sup>162</sup> most respondents, including nearly all respondents in states where appointed counsel is not mandated, are still unrepresented.<sup>163</sup> The limitations of civil rights in guardianship are at least as serious as in civil commitment. It is an oddity of history that appointed counsel should be the exception in one proceeding and the rule in the other.<sup>164</sup> The

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161. I do not include here a discussion of the role of public guardians. In the most recent study available, only two percent of all guardianships were held by public guardians. Fred Bayles & Scott McCartney, *Public Guardians Struggle to Keep Pace*, in AN AILING SYSTEM, *supra* note 78, at 15. Public guardianships pose their own distinct set of issues and concerns, which are beyond the scope of this article.

162. *E.g.*, FLA. STAT. ANN. § 744.331(2)(a) (West 1997 & Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11a-10(b), (c) (West 1993 & Supp. 2003); KAN. STAT. ANN. § 59-3010(3) (1994); MINN. STAT. ANN. § 525.5501 (West 2002).

163. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 55-56.

164. The need for procedural protections in the context of the appointment of temporary guardianships is at least as critical, if not more so, than in the civil commitment proceedings which are initiated by a state. The guardianship which arises from the statute providing for the appointment of temporary guardianships entrusts the life of a person to a private party whose motives may be more questionable

importance of legal counsel in protecting the due process rights of respondents and in ensuring a higher degree of accuracy in determinations has been well documented.<sup>165</sup> In addition, the willingness of the protected person to cooperate with decisions made by third parties via protective proceedings is likely to increase when the protected person feels that his or her rights were respected in the proceeding.<sup>166</sup> Thus, the therapeutic potential of the protective proceedings is increased.<sup>167</sup>

A third valuable component of civil commitment is the focus on treatment as the outcome. As argued below, the question of treatment must be addressed in the proper place after logically prior issues (i.e., capacity) have been resolved. Nevertheless, adult protective proceedings must look to the future and must be justified by a proposed plan for care and treatment which is specifically designed to maximize the best interests of the protected person. Under most guardianship statutes, what becomes of the protected person once the guardian is granted authority over him or her generally is not specified or evaluated.<sup>168</sup>

A fourth advantage of the civil commitment process, at least in some states, is the assurance of swift hearings, conducted on the record, as to the basis for the interference with the respondent's freedom.<sup>169</sup> Oregon, the context I use as exemplar, is unusual, indeed unique, in that guardianships may be granted without any hearing being held at all.<sup>170</sup> If no objections to the petition are filed, a guardian-

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than the motives of a disinterested state.

Grant v. Johnson, 757 F. Supp. 1127, 1133 (D. Or. 1991), *affirmed on procedural grounds*, 15 F.3d 146 (9th Cir. 1994); *see also* A NATIONAL DISGRACE, *supra* note 30.

165. *See* discussion of comparative rates of granting of petitions of guardianship and of civil commitment in Oregon, and comparative reversal rates on appeal, *supra* note 51. *See also* *The Role of Counsel*, *supra* note 6, at 1552-59.

166. Winick, *supra* note 40, at 60.

167. *See id.*; Winick, *supra* note 124.

168. Several state statutes require that guardians report to the court periodically but do not include a review or evaluation by the court of the guardian's actions. FLA. STAT. ANN. § 744.3675 (West 1997 & Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11a-17(b) (West 1993 & Supp. 2003) (providing that guardian's report is optional at the court's discretion); MINN. STAT. ANN. § 525.58(4) (West 2002) (providing that annual report may be waived by the court); OR. REV. STAT. § 125.325 (2001). *But see* MD. CODE ANN., EST. & TRUSTS § 13-708(7) (2001 & Supp. 2002) (stating that the court must make an annual finding, based on the guardian's report, that the grounds for appointment continue to exist).

169. MINN. STAT. ANN. § 525.58(4) (West 2002); OR. REV. STAT. § 125.080.

170. OR. REV. STAT. § 125.080.

ship may be granted on essentially a default basis.<sup>171</sup> Temporary guardianships can be granted on an ex parte basis without any notice at all.<sup>172</sup> While notice and swift hearing rights are specified in the statute,<sup>173</sup> without any attorney to effectively assert these rights in the vast majority of cases, hearings may frequently be long delayed, despite the requirements of the statute.<sup>174</sup> In contrast, attorneys for respondents in civil commitment assert their clients' rights to speedy hearings consistently, and these hearings are scheduled automatically.

A final valuable aspect of the civil commitment process is that the process allows placement decisions for medical treatment to be made without permanently depriving the protected person of all of his or her individual rights. The focus of the proceeding is what must be done immediately to meet the needs and avoid the risks to the protected person that have resulted from his or her mental disability and resulting incapacity. The concept is that once the immediate dangers have been averted, the process should ultimately result in a cessation of coercive interference with the individual's freedom. A permanent surrogate decision maker should not be set for any adult so long as that adult is able to indicate an objection to having his or her autonomy limited or to express his or her own desires as to what should happen to him or her. While it is true that eventually some elderly people lose any ability to even offer an opinion in this discussion, current protective proceedings have a serious tendency to suppress the elderly person's voice and remove him or her prematurely from the decision-making process.<sup>175</sup> The time-limited nature of the intrusion

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171. *Id.* § 125.080(2).

172. *Id.* § 125.605(2).

173. *Id.* § 125.605(2), (5).

174. "Regardless of what the statute requires, temporary guardianships are freely granted and hearings are not held for long periods. Temporary guardianships may even be renewed while objections are pending and have not yet been heard." Telephone Interview with Lynda A. Clark, Regional Director, Albany Regional Office, Legal Aid Services of Oregon (May 22, 2003). Ms. Clark was counsel for respondent in *Schaefer v. Schaefer*, 52 P.3d 1125 (2002). In that case, temporary guardianship was granted April 30, 2001, the respondent filed objections by May 2, 2001, but a hearing was not held until June 18, 2001, despite the statutory requirement of hearing within two judicial days of objections being filed. *Schaefer*, 52 P.3d at 1127. The Oregon Appeals Court declined to address this violation of the statute. *Id.* at 1125-29 (failing to address the time lapse between appointment of guardian and hearing).

175. "[D]eficits severe enough to mandate a recommendation that defendant be found incompetent cannot be easily disguised. If a case falls on the borderline, the presumption of competency should prevail." Nolan, *supra* note 103, at 217 n.35.

on autonomy rights and the ongoing monitoring provided by the court is essential to fulfilling the purposes of *parens patriae*.

Current guardianship proceedings also offer important advantages to building a well designed integrated protective proceeding. In the first place, the explicit emphasis on decision-making capacity serves as an important guard against unjustified infringements on autonomy. In guardianship, the first issue to be resolved is whether the respondent is capable of receiving and understanding relevant information and making decisions using that information to pursue his or her own concept of his or her best interests.<sup>176</sup> If the respondent has this capacity, the protective proceedings must be terminated. Civil commitment begins the inquiry somewhat differently, by asking whether the respondent suffers from a mental illness.<sup>177</sup> The risk is that, once mental illness has been diagnosed, the court may assume that the mental illness has destroyed the respondent's capacity to make decisions without further inquiry.<sup>178</sup> The requirement that the mental illness be the *cause* of the respondent's actions that put the respondent at risk is meant to guard against this assumption.<sup>179</sup> A focus on how the diagnosed mental illness actually affects the respondent's capacity to make the decisions in question is a more effective protection against the tendency to mistake mental disability for incapacity. For example, many mentally ill people decide to discontinue taking psychoactive medications because they believe that the negative side effects of the medications outweigh the benefits they receive from them. Often authorities assume that it is only the person's mental illness that leads him or her to make this decision. However, that issue must be explored by inquiring what the person understands to be the consequences of taking the medications and those of not taking the

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176. "[I]n order to understand and make a valid personal decision, a person must have a set of values and goals, must be able to compare likely outcomes, and must make consistent choices . . . . The decision is not required to be rational." Barnes, *supra* note 64, at 719 (citations omitted).

177. See, e.g., OR. REV. STAT. § 426.070 (2001).

178. There is a trend opposing the use of psychiatric diagnostic terms in the language of guardianship statutes . . . diagnosis of a mental disorder, in and of itself, does not indicate that a guardian must be appointed, and guardianship is necessary only when the mental disorder can be shown to interfere with the ability of a person to manage her essential affairs. Even persons with such serious conditions as schizophrenia, dementia, and manic-depressive illness may not . . . require a guardian.

Roca & Finucane, *supra* note 60, at 241–42.

179. State v. Gjerde (*In re Gjerde*), 935 P.2d 1224, 1227 (Or. Ct. App. 1997).

medications. If the person understands the costs of discontinuing medication and determines that those costs are outweighed by the benefits, the person should be free to make that decision, regardless of his or her mental diagnosis.<sup>180</sup>

Another advantage of guardianship is that it allows for the participation of family members in making decisions on behalf of protected persons. When an individual due to incapacity cannot make decisions for himself or herself, someone must make decisions on that individual's behalf. A reasonable assumption is that those who love and value the protected person and who knew the person most intimately when he or she had capacity would be best able to make decisions which will truly be in the protected person's best interests. Ultimately, a protected person's well-being will be highly correlated with the continuing presence of concerned loved ones who will keep close track of the person's ongoing care and condition.<sup>181</sup> Including these loved ones in the legal process may result in the loved ones remaining involved with the protected person's day-to-day life.<sup>182</sup> Family members commonly care about the protected person more deeply and on a more sustained basis than participants in the medical or legal system. Family members also generally have a better knowledge of

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180. An additional therapeutic advantage to this focus on decision-making capacity in this context might be that, rather than simply compelling the person to take the medications (which simplifies life for those around him or her), medical providers and other care givers might have to work with the person to find alternative ways of treating his or her mental illness without undergoing the unwanted side effects of the particular medication.

181. See Eva Szeli, *Ex Parte Civil Commitment, Family Care-Givers, and Schizophrenia: A Therapeutic Jurisprudence Analysis*, 24 SEATTLE U. L. REV. 529, 532-33 (2000), for a counterargument.

The concept of "expressed emotion" (EE) was based on observations of increased likelihood of early relapse in schizophrenic patients who returned to close familial ties after discharge from psychiatric hospitalization. Expressed emotion was characterized as a pattern of hostility and intrusiveness directed towards the mentally ill individual by the family. The disruptive force of high levels of EE in some families seemed to be a result of three variables identified by these researchers: familial overinvolvement with the patient, criticism of the patient, and hostility toward the patient. The affective attitudes displayed by family members toward schizophrenic patients have been found to be strongly associated with the probability of relapse in those patients.

*Id.*

182. However, conflicts in the legal process can also serve to drive an unnecessary wedge between the protected person and loved ones. See discussion of the need for alternative dispute resolution options, *infra* note 194 and accompanying text.

the unique individual and his or her goals and values. Finally, a system for protecting incapacitated individuals from harm that excludes family members who are ready and willing to offer assistance and care runs counter to the usual structure of society and is likely to be perceived as both inhuman and politically unacceptable.

Another advantage of separating out *parens patriae* protective proceedings from police power civil commitments is a reduction in the stigma associated with civil commitment. Due to both the connection to criminal proceedings, and to prejudices and stereotypes associated with mental illness, a civil commitment is seen as carrying a heavy stigma.<sup>183</sup> Guardianship, by contrast, does not generally create the same negative assumptions about the protected person. While there are many stereotypes associated with aging, they are not uniformly negative. Old age is a category which all of us hope to fall into one day; therefore, the stereotypes of aging are less likely to create an image of the elderly person as alien, beyond considerations which we would apply to ourselves and how we would want to be treated. A separate protective proceeding would include nonelderly mentally disabled persons but would perhaps serve to associate them with more positive and less alienating mental images.

A fourth advantage of guardianship proceedings is the growing focus on functional assessment as the key to determining capacity.<sup>184</sup> This emphasis grows out of the focus on decision-making capacity described above. The crucial issue is not whether the respondent has some general mental abilities (knowledge of the date, of who is president, or the ability to subtract sevens, e.g.), but whether the respondent is able to function specifically in his or her own environment to meet his or her own needs.<sup>185</sup> Such a focus on functional assessment

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183. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). For example, the chapter in which the Oregon civil commitment statute is found is entitled "Mentally Ill and Sexually Dangerous Persons." OR. REV. STAT. § 426 (2001).

184. Nolan, *supra* note 103, at 210.

185. The functional assessment differs from other sorts of evaluations and diagnostic methods primarily in its focus on *resulting behavior*. . . . Thus, for example, when the defendant is disoriented as to date and time but uses newspapers and television announcements as cues to compensate for his deficit, functional evaluation would credit the adaptation as an effective use of resources. In contrast, a formal mental status evaluation would note the disorientation negatively. The functional evaluator is less interested, therefore, in the cause of disability, the prognosis, or the potential for treatment.

*Id.* at 211.

requires the court to pay close attention to the specific behaviors that allegedly put the respondent at risk. This fact-based inquiry will be less likely to rely on generalizations from medical diagnosis and on stereotypes about mentally ill or elderly people. The inquiry focuses on the respondent's ability to function safely in his or her specific environment.<sup>186</sup> In addition, the consideration of remedies, if incapacity is established, focuses on the specific protections necessary to prevent the threatened harm.<sup>187</sup> Many guardianship and civil commitment statutes require that the least restrictive alternative be employed to protect incapacitated persons from harm.<sup>188</sup> A focus on functional limitations highlights what intervention is needed.<sup>189</sup> Protective proceedings statutes should require a determination of functional capacity because:

First, a functional emphasis on incapacity recognizes that incapacity may be partial or complete. Second, legal standards rather than clinical standards need to be met. Third, functional impairment can change over time and does not necessarily reflect a permanent condition. Fourth, functional incapacities are likely to impair the ability to manage personal or financial affairs and cause substantial harm to the individual. And fifth, labels that are used for diagnostic purposes . . . are considered an insufficient basis for a finding of incapacity . . . specific behavioral indices of incapacity can be more objectively documented than a putative mental state of incompetency.<sup>190</sup>

A final strength of combining guardianship law with civil commitment law is the cross-fertilization that will occur between the fields of gerontology and mental illness. Mental illness experts are aware of the many treatments available to alleviate the painful symptoms of mental illness. Treatment is oriented to the restoration of normal mental functioning. A wide variety of drugs are available to try to correct neurochemical imbalances that contribute to many forms of mental illness. Those involved in the field of mental illness seek creative ways to cure illness and solve the problems it creates. Experts in gerontology, on the other hand, tend to know a great deal about living

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186. See generally *id.* at 211, 213–14.

187. See generally *id.* at 212–13.

188. See, e.g., CAL. WELF. & INST. CODE § 5358 (West 1998); 405 ILL. COMP. STAT. ANN. 5/3-811 (West 1997 & Supp. 2003).

189. For example, if the main problem is that the incapacitated person cannot correctly manage her or his medications, due to mental disability, a protective service proceeding might simply result in an order that the protected person's medication will be dispensed by a third party. Tor, *supra* note 129, at 758.

190. *Id.* at 744 (citing recommendations made at the Wingspread Symposium).

with the normal, and often irreversible, effects of the aging process. Treatment is oriented to maintaining the highest possible level of function for the longest possible time. Gerontologists have developed ways to help elderly persons compensate for functional deficits. Those involved in working with the aging seek creative ways to help people make the most of life despite the physical and mental problems that can result from aging. Both can benefit from the orientation and expertise of the other.

The proposed integrated adult protective proceeding should avoid the antitherapeutic consequences that are associated with both guardianship and *parens patriae* civil commitment. A major goal of the integrated proceeding should be to avoid institutionalization of the protected person whenever possible, contrary to the current practice in both guardianship and civil commitment. As discussed above, in a proceeding which justifies interference with rights to autonomy and self-determination based upon *parens patriae*, the decisions enforced upon the incapacitated person must actually leave that person better off than he or she would have been if no action had been taken. As a general rule, institutionalization of incapacitated persons fails to meet that criterion.<sup>191</sup> The protective proceeding must require stringent justification for any proposed course of action that includes institutionalization of the protected person. This justification must take into account the risks posed by institutionalization, must demonstrate that in a particular case those risks are outweighed by the benefits of institutionalization, and must include a plan for how the risks of institutionalization are to be ameliorated in the particular case.

Protective proceedings should focus on finding the least restrictive alternative available that can serve to protect the incapacitated person from harm. Many guardianship and civil commitment statutes require such a finding, but such requirements are often ignored.<sup>192</sup> In place of a generalized deprivation of decisional rights, protective proceedings should impose the minimum interference with autonomy necessary to protect the protected person from serious harm.<sup>193</sup>

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191. See *supra* notes 86-91 and accompanying text.

192. E.g., FLA. STAT. ANN. § 744.331(6) (West 1997 & Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11a-12 (West 1993 & Supp. 2003); MD. CODE ANN., EST. & TRUSTS § 13-708(a)(1) (2001 & Supp. 2002); OR. REV. STAT. § 125.305(2) (2001).

193. [L]imited guardianship is rarely used . . . . A judge, when faced with the choice of granting a limited or plenary guardian, is likely to select plenary power in the belief that such power will provide the guardian with sufficient authority to handle any circumstance

As noted above, other interests are affected in protective proceedings, aside from those of the respondent. As a result of the importance to incapacitated persons of preserving family ties, protective proceedings should include alternative dispute resolution mechanisms for airing and reconciling, if possible, the concerns of family members with those of the respondent. Mediation has been used successfully in many other legal contexts involving the interests of different family members (e.g., child custody). However, mediation in protective proceedings would require special protections for the respondent and special training for the neutral. Respondents in protective proceedings are almost invariably in an unequal bargaining position.<sup>194</sup> They generally suffer from some mental or physical disability that led to the instigation of protective proceedings in the first place. Special care must be taken to ensure that the voice of the respondent receives equal expression in the mediation process. Protective proceeding mediators must also avoid undue pressure on the respondent to achieve a settlement. The respondent must feel free to assert his or her right to a trial to determine whether he or she will be deprived of autonomy.

In order to make effective use of the benefits of functional assessment and to overcome the reluctance of courts to make use of limited protective orders, the court must have access to the expert assistance it needs to craft protective orders limited to the specific needs and situation of each protected person. Under current guardianship and civil commitment procedures, the court generally has access to a neutral expert, called an investigator, examiner, guardian ad litem, or court visitor, who investigates the allegations in the petition and evaluates the mental condition of the respondent.<sup>195</sup> The qualifications

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that might arise. The appointment of a limited guardian, on the other hand, might result in a rehearing if the power granted to the guardian should prove inadequate to the changing needs of the ward. Moreover, the appointment of a plenary guardian eliminates the effort of tailoring the power of the guardian to fit the particular needs of the ward. In short, plenary guardianship is familiar, uncomplicated, and saves time and effort. With these "advantages," it is easy to understand why limited guardians stand little likelihood of being appointed so long as the court has the discretion to appoint a plenary guardian.

Fell, *supra* note 13, at 202-03 (citation omitted).

194. See generally Mary Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611 (2002).

195. See Sally Balch Hunne, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 (1995).

required of this court expert vary widely.<sup>196</sup> In order to achieve the *parens patriae* goals of protective proceedings, the court expert must be qualified to perform functional evaluation and have expertise in complex case management for the mentally or physically disabled. The expert should provide information to the court about exactly how the respondent's mental disability affects his or her ability to perform necessary daily functions, in what specific ways the respondent is at risk due to functional deficits, and what resources are available in the community to assist the respondent. The expert can thus give the court the information it needs to determine what kind of protective order may be necessary if the court should find that the respondent lacks the capacity to make his or her own decisions. The expert should not be asked to make the legal determination as to whether the respondent is incapacitated. The court should not delegate that core legal function to someone who lacks legal expertise. As uncomfortable as it may be for courts to make these tough decisions themselves, without being able to punt to an expert, courts must face the hard fact that capacity is a *legal* standard. Therefore, judges, as experts in the law, have the background and skills necessary to make the determination of legal capacity or lack thereof.

In order to avoid the high risk of error associated with both guardianship and civil commitment, it is crucial that hearings on petitions in protective proceedings be meaningful and substantive. Holding a hearing adds nothing of value to the proceedings if the hearing is pro forma and little or no evidence is offered. The reason for a hearing is for a court to make an independent and impartial decision as to whether a respondent is unable to make autonomous decisions, and how to make sure that intervention, if necessary, will be to the benefit of the respondent.<sup>197</sup> Courts must take this duty seriously. Unfortunately, under current guardianship and civil commitment procedures,

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196. FLA. STAT. ANN. § 744.107 (West 1997 & Supp. 2003) (allowing court to appoint a monitor with no qualifications required); 755 ILL. COMP. STAT. ANN. 5/11a-9(b) (West 1993 & Supp. 2003) ("appropriate evaluations to be performed by a qualified person"); MD. CODE ANN., EST. & TRUSTS § 13-705(c)(2) (2001) (requiring reports from two licensed physicians who have examined the respondent, or one licensed physician who has examined the respondent and one licensed psychologist who has evaluated the respondent); OR. REV. STAT. § 125.150(2) (2001) ("must have the training or expertise adequate to allow the person to appropriately evaluate the functional capacity and needs of a respondent"). *But see* Schaeffer v. Schaeffer, 52 P.3d 1125, 1127 (2002) ("The visitor . . . had a good deal of experience but no formal medical training or college degree.").

197. *See* Schaeffer, 52 P.3d at 1128.

hearings can sometimes be little more than a brief and insubstantial formality,<sup>198</sup> if they are held at all.<sup>199</sup> Even where it seems clear to participants that protective proceedings are warranted and necessary, a substantive, fair hearing can have an important therapeutic effect on the protected person, making the goals of the protective proceeding easier to achieve.<sup>200</sup>

A common issue to both civil commitment and guardianship is the need for a clear definition of the role of counsel for respondents. Attorneys should be required to act as an advocate for the respondent, giving the respondent advice about legal options and probable outcomes, and then presenting the best case that can be made for the client's own preferences.<sup>201</sup> This role definition would serve to resolve the confusion between the role of attorney as advocate for respondent's position, and as guardian ad litem, advocating for the best interests of respondent as perceived by the attorney. The presence of counsel as advocate helps to ensure that protective action will not be imposed unless a legal case can be made for such action under the scrutiny of the adversarial process. Counsel as advocate also avoids the duplication of function, where both the court and the attorney or guardian ad litem attempt to determine what is in the respondent's best interests.

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198. "In practice, commitment hearings tend to be brief and non-adversarial episodes in which judges appear to 'rubber stamp' the recommendations of clinical expert witnesses . . . [which] give[s] many patients the impression that the hearing is an empty ritual rather than a serious attempt to achieve accuracy and fairness." Winick, *supra* note 40, at 41–42 (citation omitted). In the 1994 national study, 25% of guardianship hearings lasted less than five minutes, and 58% lasted less than fifteen minutes. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 44. Only 17% lasted longer than half an hour. *Id.*

199. As noted above, Oregon does not require that a hearing be held unless objections to the guardianship are filed. OR. REV. STAT. § 125.080 (2001). In the majority of guardianship cases, there is no hearing prior to the appointment of a guardian. NATIONAL STUDY OF GUARDIANSHIP SYSTEMS, *supra* note 50, at 42–44.

200. "[I]ncreasing the individual's sense of participation, dignity, and trust during the commitment proceedings is likely to increase his or her acceptance of the outcome of the hearing, lead to a greater willingness to accept hospitalization and treatment, and enhance treatment efficacy." Winick, *supra* note 40, at 44 (citation omitted).

201. "Counsel is directed to act as an advocate for the client and not substitute counsel's own judgment for that of the client concerning the client's best interests. The guardian *ad litem*, on the other hand, is directed to promote the defendant's best interest, rather than the defendant's expressed preferences." Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 MD. J. CONTEMP. LEGAL ISSUES 191, 208 (1995–96) (citing WASH. REV. CODE ANN. § 11.88.045 (West 1992)).

A serious question arises upon reviewing all of the above recommendations—how will this affect the cost of protective proceedings. In fact, many protective proceedings are uncontested. All parties involved may agree on the need for protection and on the proper means to safeguard the respondent's well-being. The respondent may be so disabled that he or she is unable to express any preference, much less make a formal objection to the proceedings. Is it not preferable to avoid unnecessary cost of substantive hearings, with appointed counsel for respondents, and the full panoply of due process?

The answer is that many of these apparently "uncontested" proceedings are in reality proceedings where only those who are in agreement have been heard. Without any examination of the need for protective proceedings, or of the benefits of the proposed course of action, the petitioner's position will frequently appear unquestionably correct. Once questions are asked, uncertainties about the respondent's capacity, about the risk to the respondent, and about the existence of less restrictive alternatives often develop. When the state acts under the power of *parens patriae*, it assumes a responsibility to question the decisions of private parties, whether family members, medical providers, or social workers, who believe that the autonomy of a respondent should be restricted. Such a power cannot simply be delegated without a careful determination that the positions taken by the parties are valid and supported by clear and convincing evidence. Where the need for protective proceedings is clear, providing evidence to meet this standard will be correspondingly easier. Our system of justice is predicated on the belief that evidence should be tested by confrontation with an adverse position in order that all relevant evidence will be included in the decision-making process and that all evidence will be tested as to weight and reliability.

Currently, in the civil commitment context, most of the costs of proceedings are born by the state, which appoints counsel and provides mental health investigators and examiners.<sup>202</sup> In guardianship, the cost of proceedings is ultimately paid by the protected person, who pays for his or her own attorney (if any), for the attorney for petitioner, and frequently for the cost of the court

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202. See, e.g., FLA. STAT. ANN. § 394.467(4) (West 2002); 405 ILL. COMP. STAT. ANN 5/3-805, 819 (West 1997); OR. REV. STAT. § 426.100(3)(b) (2001).

expert/investigator/guardian ad litem.<sup>203</sup> This system of payment from the estate of the protected person sets up a series of perverse consequences. Petitioners and cross-petitioners, often adult siblings, carry out family fights in court. Since the cost will be born by the respondent, there is little incentive to avoid costly litigation or to seek a compromise (until respondent's money runs out). If petitioner's attorney agrees to look solely to respondent's estate for payment (a common situation in Oregon, for example), a conflict of interest results which makes it very difficult to settle a case, since petitioner's attorney may not be paid if the petition is dismissed. On the other hand, forcing petitioners to bear the full cost of protective proceedings would further diminish the number of family members who are willing to take action when they believe it is necessary to protect an incapacitated person from serious harm. Imposing the cost of protective proceedings on petitioners would also exacerbate the problem of informal usurpation of the rights of mentally disabled persons. Frequently, in order to avoid the cost and burden of formal legal proceedings, mentally disabled individuals may be admitted to mental hospitals or nursing homes on a supposedly voluntary basis.<sup>204</sup> Such decisions pose substantial risks to the individual and deprive the individual of precious autonomy rights.<sup>205</sup> These crucial and life-altering decisions are made by third parties, with no legal authority to make them, and with no assurance that the costs, benefits, and alternatives have been taken into account, on behalf of individuals who are unable to participate in the decision-making process.

In both guardianship and civil commitment, the state asserts the authority to interfere with the autonomy of incapacitated individu-

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203. FLA. STAT. ANN. § 744.107 (West 1997 & Supp. 2003); 755 ILL. COMP. STAT. ANN. 5/11a-10(c) (West 1993 & Supp. 2003); OR. REV. STAT. § 125.070(3).

204. Many individuals have been "voluntarily" admitted to (or more accurately, 'placed in') a nursing home even though (a) they personally lack sufficient mental capacity to engage in a rational decision-making process about the matter but had not been formally declared incompetent by the local court of appropriate jurisdiction; and (b) either no interested, competent family members were available at the time of admission, or interested, competent family members were available but had not been formally authorized to act as surrogate decision makers . . . .

Kapp, *supra* note 97, at 809-10 (citations omitted).

205. *Zinerman v. Burch*, 494 U.S. 113, 133-34 (1990) (stating that it is unconstitutional to admit a patient to a mental hospital on a "voluntary" basis if the patient lacks the ability to give informed consent, due to mental illness).

als.<sup>206</sup> The only way to achieve the goals of *parens patriae* intervention is for the state to assume the cost of protective proceedings.

## **VI. An Immodest Proposal for a More Rational and Integrative Approach to Adult Protective Proceedings**

I would like to take the analysis above and carry it to its logical conclusion by outlining a draft statute that takes an integrative approach to adult protective proceedings.<sup>207</sup> In this way, I hope to provide a concrete opportunity for legislators, practitioners and legal scholars to examine, question, and refine what a therapeutic jurisprudence approach to such proceedings might look like. It is my fervent hope that such a project may help move many of the arguments outlined above and elsewhere from the realm of scholarly analysis to that of real impact on the lives of mentally disabled people. As a rapidly aging baby boomer, I share a personal stake in wishing to see the serious flaws in current protective proceedings, already the subject of years of scholarly argument, corrected before I find myself in the role of respondent. My proposed statute takes as a jumping off point Oregon's current guardianship and civil commitment statutes.<sup>208</sup> This legal context is the one with which I am most familiar, after over fifteen years of elder law practice and involvement in both guardianship and civil commitment legislative efforts.

### **Adult Protective Proceedings: A Statute**

#### **SECTION I—POLICY STATEMENT**

The intent of the adult protective proceedings statute is to preserve, protect, and foster the autonomy of all citizens in protective proceedings and to protect from serious and imminent harm those

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206. See, e.g., OR. REV. STAT. §§ 125.300–.330, 426.005–.100.

207. I extend my apologies in advance to my colleagues who work as legislative counsel and who cringe at the clumsy attempts of nonspecialists to draft legislation. This proposal is meant as a starting point for discussion, not as a polished final product ready for enactment. I do not address the specific issues relating to conservatorship and management of the funds of incapacitated people. Obviously, these issues are intimately related to the autonomy and well-being of the incapacitated and would need to be addressed in any actual protective proceedings statute. I do not mean to denigrate the importance of these issues; they are simply beyond the scope of this article.

208. OR. REV. STAT. §§ 125, 426.

who due to incapacity are unable to make autonomous choices. The procedures outlined herein are intended: to ensure as accurate a determination as possible of whether and to what extent a respondent or protected person is incapacitated; to protect respondents and protected persons who are not incapacitated from infringement of their autonomy; to ensure that any limitations on the autonomy of protected persons serve their best interests; and to ensure that the autonomy of protected persons is subjected to the least possible restriction that will serve their best interests. Guardianship is considered to be an extraordinary remedy because it results in an indefinite limitation on the autonomy of the protected person.

#### SECTION II—DEFINITIONS

1. “Attorney for Respondent” means an attorney either retained by a respondent or appointed by the court to represent the respondent if the respondent has not retained an attorney. Attorney for respondent shall act as a zealous advocate for the expressed wishes of the respondent and not as a guardian ad litem.

2. “Autonomy” means the right of every adult citizen freely to make his or her decisions, within the bounds of the law, as to how he or she will conduct his or her own life.

3. “Best Interests” mean the maximization of outcomes that incorporate the values, priorities, and self-evaluation of the quality of life of the respondent or protected person, if known. If the values, priorities, and self-evaluation of the quality of life of the respondent or protected person cannot be determined, then best interests mean the maximization of the respondent or protected person’s mental and physical health, functional capacity, freedom from injury, and life-span.

4. “Care and Treatment Plan” means a plan submitted by the petitioner to the court with the petition for protective proceedings describing what actions may be taken under the requested protective order to maximize the well-being of the respondent. Any care and treatment plan that proposes the placement of the protected person in a residential facility shall state the intent to place, the name of the facility, the type of the facility, and the care and treatment which may be provided in the facility. The care and treatment plan shall be time limited and shall last for no more than 180 days, except that a request for a guardian may be for an indefinite period. Only the care and

treatment ordered in the protective order is authorized by the court. The court may require modification in the care and treatment plan due to information discovered, or changes in the respondent's mental or physical state or living situation occurring during the pendency of the protective proceedings, prior to the issuing of a protective order.

5. "Court Expert" means an individual appointed by the court to investigate the allegations of the petition and to interview the respondent, petitioner, and all other individuals named in the petition as having information relevant to the protective proceeding. The court expert shall be a licensed or certified professional in medicine, mental health, counseling, or social work who has received specific training and is qualified to perform a functional assessment of the respondent, provide a diagnostic evaluation of the respondent, and make proposals for any less restrictive and/or more effective care and treatment alternatives.

6. "Court Expert's Report" means a report prepared by the court expert stating the results of the court expert's investigation, including a functional assessment, a diagnostic evaluation, and proposals for any less restrictive and/or more effective care and treatment alternatives recommended by the court expert.

7. "Department" means the Department of Human Services.

8. "Diagnostic Evaluation" means an evaluation of the respondent by the court expert, describing the effects of any mental illness or disability to the court, evaluating the proposed care and treatment plan, and describing its probable effects on the respondent, including any negative effects resulting from any proposed limitations on the respondent's autonomy.

9. "Emergency Protective Order" means a protective order issued prior to hearing, under section III of this Act.

10. "Functional Assessment" means an assessment by a court expert of the functional capacity of the respondent, including specific determinations of the respondent's ability to carry out activities of daily living, either independently or with assistance, in the respondent's current living situation. The functional assessment shall be conducted in the respondent's home environment and shall include an assessment of how the respondent's functional capacity would be affected by any proposed change in environment or living situation. The functional assessment shall include an assessment of the nature

and magnitude of any risks to respondent's life, health, or well-being due to any functional impairments.

11. "Functional Capacity" means the respondent's ability to carry out activities of daily living, either independently or with assistance, in the respondent's current home environment and living situation.

12. "Guardianship" means the appointment of an individual on an indefinite basis to make certain specified decisions on behalf of a protected person, as described in section V.

13. "Hearing" means a court proceeding to determine whether to grant a petition for protective proceedings, as described in section X.

14. "Incapacitated" means that a respondent is unable, due to severe mental impairment, to receive and comprehend relevant information, to make and express decisions, and to understand the probable effects of those decisions on respondent and others, and that as a result of this impairment, the respondent is unable to obtain the health care, food, shelter, clothing, personal hygiene, and other care without which serious and imminent harm is likely to occur.

15. "Interested Person" means a spouse, parent, adult child, adult sibling, any person who has lived with respondent in the past five (5) years, any person who has provided regular and substantial assistance for respondent in his activities of daily living in the last five (5) years, any person appointed by the respondent as a fiduciary or health care representative, any person who has filed a formal request with the court for notice in protective proceedings involving respondent, or the department.

16. "Interim Protective Order" means a protective order issued after a hearing on an emergency protective order, meeting the requirements for interim protective orders described in section III.

17. "Least Restrictive Alternative" means the protective order that will result in the fewest possible limitations on a protected person's autonomy but that will prevent serious and imminent harm likely to result from the protected person's incapacity.

18. "Objections" means any opposition to the petition for protective proceedings or any relief requested in the petition, on the part of the respondent or any interested person, as described in section IX.

19. "Petition for Protective Proceeding" means a petition filed by the department, or by a private person, initiating a protective pro-

ceeding and requesting a protective order. The petition shall meet all of the requirements outlined in section VII and shall be served as specified in section VIII.

20. "Protected Person" means an adult who has been found to be incapacitated in a protective proceeding and whose rights to autonomy are currently limited in some way by a protective order.

21. "Protective Proceeding" means a proceeding to determine whether a respondent is incapacitated and whether or not a protective order should be issued as the only available means of protecting a respondent from serious and imminent harm.

22. "Protective Order" means an order issued as the result of a protective proceeding.

23. "Residential Facility" means any facility that provides care or medical treatment, including but not limited to treatment for mental illness, on an inpatient basis. Residential facilities include, but are not limited to, hospitals, mental hospitals, nursing homes, residential care facilities, assisted living facilities, and adult foster homes.

24. "Respondent" means a person alleged in a petition in a protective proceeding to be incapacitated and in need of a protective order.

25. "Serious and Imminent Harm" means a currently existing, immediate, and substantial risk to the life or health of the respondent or protected person.

### SECTION III—EMERGENCY AND INTERIM PROTECTIVE ORDERS

1. An emergency or interim protective order may only be issued upon a finding that the respondent is incapacitated and as a result of his incapacity, is likely to die, or to suffer serious and irremediable harm to his health before the petitioner may obtain a protective order under sections VII through X.

2. A judge, law enforcement officer, medical provider, department caseworker, mental health professional, or interested person may request the community mental health program director or the branch office of the department in the county where the respondent resides to petition the court for an emergency or interim protective order.

3. Such requests and petitions shall be in writing in a form established by statute.

4. Upon receipt of a request, the community mental health program director or the department shall immediately initiate an investigation to determine whether the facts in the case are sufficient to support the findings required in subsection 1 of this section.

5. If it appears to the community mental health program director or the department that the request, or subsequent investigation, reveals a risk of serious and imminent harm to the respondent, which requires immediate action, either the director or the department may petition the court to issue an emergency protective order allowing the department to immediately place the respondent in a residential facility or make other immediate restrictions upon the respondent necessary to protect the respondent from substantial and imminent threat of death or serious and irreparable injury. The director may at the same time petition for an interim protective order.

6. The court shall issue an emergency protective order if it finds that there is probable cause to believe that the respondent is incapacitated and as a result of his incapacity is likely to die, or to suffer serious and irreparable harm to his health in the next ten (10) judicial days unless immediate action is taken as requested in the petition for an emergency protective order.

7. If it appears to the community mental health program director or the director of senior services that the request, or subsequent investigation, reveals a serious risk to respondent, which does not require immediate action, but which requires action before a protective order could be obtained under a regular protective proceeding, the director may petition the court for an interim protective order.

8. The court shall appoint an attorney for respondent as soon as an emergency protective order is issued or a petition for an interim protective order is filed.

9. Respondent and attorney for respondent shall receive notice as described in section VIII at the same time that an emergency protective order is issued or a petition for an interim protective order is filed. Respondent and attorney for respondent shall receive a copy of the investigation report as soon as it is completed.

10. While the emergency protective order is in effect, the department shall ensure that the respondent receives the care, custody, and treatment necessary for his health and safety. Physical and chemical restraints shall not be used upon the respondent against his will during this period, unless the treating physician specifically or-

ders them as essential to protecting the life or health of the respondent.

11. The community mental health program director or his designee shall complete the investigation into the need for an interim protective order and shall make an investigation report in a form established and approved by statute at least two (2) days before the hearing on the emergency and/or interim protective orders.

12. If an emergency protective order is issued, a hearing shall be held within five (5) judicial days to determine whether an interim protective order shall be issued. A continuance shall be granted at the request of respondent or the department. However, if a continuance is granted at the department's request, and contrary to respondent's request, the emergency protective order shall be vacated pending the hearing, and the matter shall thereafter be treated as a regular protective proceeding.

13. If no emergency protective order is issued, the hearing shall be held no later than ten (10) judicial days after the filing of the petition for an interim protective order, to determine whether an interim protective order shall be issued. A continuance may be granted at the request of respondent or the department.

14. No later than four (4) days before the date of the hearing on the petition for an interim protective order, the department shall file a petition for protective proceeding as provided in section VII and shall provide notice of the petition to respondent and all interested persons as provided in section VIII.

15. If, at the hearing on the petition for an interim protective order, it is determined by clear and convincing evidence that the respondent is incapacitated and, as a result of his incapacity, is likely to die, or to suffer serious and irreparable harm to his health, in the next fifteen (15) days, the court shall issue an interim protective order. The interim protective order shall embody the least restrictive alternative for protecting the protected person until the hearing on the petition for protective proceeding and shall remain in effect until the final determination on the petition for protective proceedings.

16. An interim protective order shall remain in effect no longer than fifteen (15) days. After the fifteenth day, the order shall be void, and the case shall proceed as a regular protective proceeding.

17. Only at the request of the respondent may the hearing on the petition for protective proceedings be heard at the time and place des-

ignated for the hearing on the petition for an interim protective order. If the respondent makes such a request, he or she waives the right to have a court expert make an investigation and report before the court decides the petition for protective proceedings.

18. If an interim protective order is issued, the court expert's investigation must be completed and the court expert's report must be filed within ten (10) days of the issuance of the interim protective order. The hearing on the petition for protective proceedings must be heard within five (5) days of the filing of the court expert's report.

19. If the interim protective order is denied, the matter shall thereafter be treated as a regular protective proceeding.

20. No irreversible action may be taken under an emergency protective order, including authorization of surgery, relinquishment of respondent's place of residence, and sale or disposal of any of respondent's property. No irreversible action may be taken under an interim protective order, except that emergency surgery may be ordered under an interim protective order if without such surgery the protected person would die or suffer serious, irremediable injury before a regular protective order could be issued.

#### SECTION IV—PROTECTIVE ORDERS

1. A court shall enter a protective order if the court finds by clear and convincing, competent and admissible evidence in the record that the respondent is incapacitated, that there is a substantial threat of serious and imminent harm to respondent as a result of the incapacity, that the provisions of the order are in the best interests of the respondent, and that the protective order represents the least restrictive alternative for protecting the respondent from the threatened harm.

2. A protected person under a protective order retains the presumption of legal competence and loses no rights or powers except as specifically stated in the protective order.

3. A protective order shall include all provisions of the care and treatment plan that are to be imposed upon the protected person and shall specifically state the limitations on the rights or powers of the protected person. Any protective order that does not state such specific limitations is void.

4. A protective order shall specify a certain date on which the order will terminate. A protective order shall be in effect for no longer than 180 days.

5. A protective order may not deprive a protected person of the right to retain counsel, to file motions or request relief of any kind in the protective proceedings, or to have access to medical or other treatment or care records.

6. A protective order may not contain provisions regarding issues related to the protected person's medical or mental health treatment if the protected person has a valid advance directive for medical or mental health treatment.

#### SECTION V—GUARDIANSHIP

1. Guardianship is a type of protective order as defined in section II. All of the requirements of section IV apply, except as otherwise provided in this section.

2. A court may order a guardianship only when there is evidence beyond a reasonable doubt that the respondent's incapacity is severe and permanent, that respondent is threatened with serious and imminent harm, that this threat is caused by the respondent's incapacity, and that guardianship is the least restrictive alternative to prevent this danger to respondent.

3. In appointing a guardian, the court shall ask the protected person if he or she has a preference. The court shall honor any preference of the protected person expressed either at the time of appointment or at some time in the past, unless the court finds that appointment of the person would likely result in significant harm to the protected person. Before naming a guardian other than the person preferred by the protected person, the court shall make specific findings regarding the nature, severity, and probability of the harm threatened by the appointment of that person.

4. If the court cannot honor the expressed preference of the protected person, or if the protected person does not and has not expressed a preference, the court shall appoint, from among those available and qualified to serve, the person with the greatest knowledge of the protected person's values, goals, and preferences, who will respect those values, goals, and preferences to the greatest extent possible without risking serious and imminent harm to the protected person.

5. The order of guardianship shall specify the powers of the guardian. Only those powers which are specifically found to be currently necessary to protect the protected person from a present threat of serious and imminent harm may be granted. Powers may not be granted to the guardian in order to avert hypothetical threats, or threats that may arise in the future. Any powers not specified in the order of guardianship are retained by the protected person.

6. A guardian may not place the protected person in a residential facility unless that power was specifically granted in the order of guardianship, or unless the guardian has the authority to do so under a valid health care advance directive.

7. If the protected person's mental or physical condition or living situation changes substantially, such that additional powers are necessary to protect the protected person, the guardian may petition the court for additional powers as provided in sections VI and VIII below. The court shall grant the additional powers without a hearing if the court finds, based on the court expert's report, that granting the requested powers would be in the best interests of the protected person and if there are no objections filed to the petition within fifteen (15) days. If objections are filed, a hearing shall be conducted as provided in section X.

#### **SECTION VI—AUTHORITY OF THE COURT**

1. A court in a protective proceeding has sole jurisdiction to determine whether the autonomy of an incapacitated adult should be limited solely in order to protect that adult from serious and imminent harm. Actions to limit the autonomy of mentally impaired adults alleged to be a danger to others shall be filed as police power civil commitments, under section \_\_\_ of the state code.

2. The court having jurisdiction over a protective proceeding may:

a. On its own motion, compel the attendance of any person who may have knowledge about the respondent, protected person, petitioner, or guardian and require those persons to produce information through discovery as authorized by the Rules of Civil Procedure.

b. On its own motion, or on the motion of any party, shorten the time available to request or provide discovery under the Rules of Civil Procedure.

c. On motion of the protected person or his attorney, enter orders restricting discovery or sealing documents filed with the court to protect the privacy of the respondent or protected person against unnecessary invasion.

d. On its own motion, or on the motion of any party or interested person, require immediate delivery of a protected person to the court or to a place it designates.

e. On its own motion, or on the motion of any party or interested person, require a respondent or protected person to submit to a functional assessment or to a medical examination pursuant to the Rules of Civil Procedure.

f. On its own motion, or on the motion of any party or interested person, appoint a successor guardian or modify a protective order if the court finds that it is in the best interests of the protected person.

3. The court having jurisdiction over a protective proceeding shall:

a. Appoint counsel for respondent in every case in which the court is not aware that the respondent has retained counsel of his choice.

b. Appoint a court expert to investigate the allegations of the petition, to conduct a functional assessment and diagnostic evaluation of the respondent, and to prepare a court expert's report. The court expert's report shall state the outcome of the functional assessment and diagnostic evaluation and state the court expert's evaluation of the care and treatment plan proposed in the petition. The court expert's report must explore and evaluate any less restrictive alternatives. The court expert's report shall state in what ways the respondent's mental condition affects his ability to perform necessary daily functions, in what specific ways the respondent is at risk due to functional deficits, and what resources are available in the community to assist the respondent. The court expert's report shall state any negative effects that protective proceedings are likely to have on the respondent and indicate the least restrictive alternatives for avoiding serious and imminent harm to the respondent as the result of incapacity.

c. On its own motion or on a motion of any party or interested person, terminate a protective order or remove a guardian, if the court finds that the protected person is no longer incapacitated, that the protective order or guardian is no longer necessary to protect the protected person from serious and imminent harm, or that termination or

removal is in the best interests of the protected person. The party moving for termination has the burden of production of evidence of a change in the protected person's condition or situation. Once this evidence is produced, any party supporting the continuation of the protective order or guardianship bears the burden of proof by clear and convincing evidence that the protected person is still incapacitated, that the protective order or guardian is still necessary to protect the protected person from serious and imminent harm, and that termination or removal would not be in the best interests of the protected person.

#### SECTION VII—INITIATION OF PROTECTIVE PROCEEDINGS

1. The department or any interested person may initiate protective proceedings by the filing of a petition with the court. The petition shall include:

a. The name, date of birth, residence address, and current location of the respondent.

b. The name, address, and, in the case of an interested person, the date of birth and current residence of the petitioner, and the nature of the petitioner's status as a representative of the department or as an interested person.

c. The name, date of birth, residence address, current location, and relationship to the respondent of any individual nominated as a guardian, as well as disclosures of any conflict of interest, criminal history, professional disciplinary history, and history of civil proceedings which may be relevant to his qualification as guardian.

d. If known, the name and address of any fiduciary appointed by the respondent, including a health care representative under an advance directive for health care, and of any guardian for respondent previously appointed by a court.

e. If known, the name and address of respondent's treating physician and any other person providing care or treatment to respondent.

f. Nonprivileged factual information regarding respondent, his current mental condition, his current functional ability, and his current living situation, sufficient to state a claim that respondent is incapacitated.

g. Nonprivileged factual information regarding respondent, his current mental condition, his current functional ability, and his cur-

rent living situation, sufficient to state a claim that respondent is in serious and imminent danger due to his incapacity.

h. A detailed description of the protective order requested, including a detailed care and treatment plan for respondent. If a guardianship is requested, a detailed description of the specific powers requested to be granted to the guardian shall be included.

i. A detailed discussion of less restrictive alternatives considered or attempted, and a description of why these alternatives are not able to prevent the threatened harm to respondent.

j. All legal privileges and rights of confidentiality, including physician/patient privilege of the respondent, must be respected and are not waived or abrogated by the filing of a petition for protective proceeding.

2. The court, on its own motion, shall appoint an attorney for respondent, at the state's expense if respondent is indigent, within two (2) days of the filing of a petition for protective proceedings, unless the court is aware that respondent has retained an attorney. Respondent may retain counsel of his choice and may refuse representation by any appointed counsel.

3. The court, on its own motion, shall appoint a court expert at the state's expense within two (2) days of the filing of the petition. The court expert's report shall be provided to the court, petitioner, respondent, and respondent's attorney within thirty (30) days of the filing of the petition.

4. The initiation of protective proceedings shall have no effect on the rights of respondent to make his own decisions and control his own affairs, unless an emergency protective order as described in section III has been issued.

#### SECTION VIII—NOTICE

1. The petitioner shall provide notice of the filing of a petition for a protective proceeding to the respondent, to any interested person, to any attorney currently representing respondent, and to any attorney who has represented the respondent in a prior protective proceeding.

2. Respondent shall be served personally with the notice and petition, as required by the Rules of Civil Procedure. The notice and petition shall be accompanied by an explanation of the proceeding and

the rights of the respondent in a form established and approved by statute.

3. Interested persons may be served by mail or by other alternative means of service as permitted under the Rules of Civil Procedure. Notice to interested persons shall state that, in order to intervene as parties, they must file written objections with the court within fifteen (15) days.

4. Notice shall be in a form established by statute and must state the date scheduled for hearing.

5. The court may not enter any order in a protective proceeding before proof of service of all required notices is filed by petitioner. Any protective orders entered in violation of this section are void.

6. If the notice is regarding a petition to grant additional powers to a guardian appointed previously, the notice shall specify that objections to the petition must be filed within fifteen (15) days, or the petition may be granted without further notice or hearing.

#### SECTION IX—OBJECTIONS

1. Objections to the petition may be expressed to the court or to the court expert by respondent in writing, in person, or by telephone. Oral objections shall be recorded in writing by the court and placed in the file. Objections expressed to the court expert shall be reported to the court and placed in the file. There shall be no filing fee for a respondent to enter an objection. Objections by all other persons shall be submitted in writing.

2. Objections do not need to be in any specific form, but should indicate the name and contact information for the person or department objecting and the relationship of the objector to the respondent.

3. The court shall provide information in a form established by statute about the nature and process of protective proceedings to any interested person who files an objection, including the right of interested persons to intervene in the proceeding and to be represented by retained counsel.

4. Notice of objections shall be provided immediately by the objecting party to respondent, attorney for respondent, petitioner or his attorney, the department, and any interested person, as provided in section VIII.

5. Any interested person who wishes to intervene as a party shall file objections within the time stated in the notice. Respondent

may file objections to the petition at any time during the pendency of the proceeding.

#### SECTION X—HEARINGS

1. A hearing shall be held in all protective proceedings. Except in the case of emergency protective orders, described in section III, a hearing shall be held before any protective order may be entered. Any protective orders entered in violation of this section are void.

2. Hearings shall be on the record. The Rules of Civil Procedure and Rules of Evidence apply to all hearings.

3. At the hearing, attorneys for the petitioner and the respondent may offer testimony of witnesses and other evidence, may compel production of evidence through subpoena, may cross-examine adverse witnesses, and may make arguments to the court.

4. The respondent shall be present at the hearing unless the court finds, upon submission from attorney for respondent, that the respondent has made a knowing and voluntary waiver of his right to be present or unless the court finds as a preliminary matter at the hearing, by clear and convincing evidence and upon motion of attorney for respondent that respondent would be harmed by attendance at the hearing.

5. Hearings shall be held where the respondent resides, unless the court finds, upon submission from attorney for respondent, that the respondent has made a knowing and voluntary waiver of the right to have the hearing held at his place of residence, or unless the court finds that respondent will not be present at the hearing pursuant to subsection 4 of this section.

6. Those parts of the court expert's report, describing the court expert's own observations and his properly qualified expert opinions, as well as the information on which such expert opinions are based, may be admitted into evidence at the hearing, if the court expert appears and is available for testimony and cross-examination.

#### SECTION XI—MEDIATION<sup>209</sup>

1. Upon the filing of a petition for protective proceeding, the court shall provide petitioner, respondent and all interested parties

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209. I borrow heavily here from Oregon's domestic relations mediation statute, OR. REV. STAT. § 107.755.

with notice of the availability of mediation services, including information about how to participate in a mediation orientation session.

2. The court shall provide mediation orientation sessions, which shall inform participants in protective proceedings of the nature of mediation, the mediation options available to them, the mediation process, their rights in mediation, the relationship of the mediation process to the court process, and the advantages and disadvantages of each method of dispute resolution.

3. If requested by respondent, all parties shall be required to attend a mediation orientation session before the court makes any final determination of the issues raised in the protective proceeding.

4. Any party may decline to participate in mediation. However, if the respondent agrees to mediate with one or more of the other parties, the refusal of other parties to participate in mediation shall not prevent the other parties from mediating.

5. The court shall provide mediation services at no charge to the parties.

6. The mediation services for protective proceedings shall:

a. Develop and implement a plan that addresses family abuse and other power imbalance issues in the context of mediation.

b. Develop and implement a plan that addresses issues related to mental illness or other mental disability in the context of mediation, accommodating the special needs of the mentally disabled while respecting their dignity and autonomy. All mediators shall obtain continuing education regarding mental disability and related issues.

c. Recognize that mediation is not an appropriate process for all cases and the agreement is not necessarily the appropriate outcome of all mediation.

d. Develop and implement a set of safety procedures intended to minimize the likelihood of intimidation or violence during mediation.

7. The existence or the provisions of a family abuse prevention order or an elder abuse prevention order shall not be subject to mediation.

8. All communications, oral or written, made in mediation proceedings are confidential and may not be used in any civil or criminal action without the consent of all parties to the mediation.

9. If the parties participating in mediation reach an agreement on some or all of the issues in the protective proceeding, the mediator

shall prepare a report of the agreement of the parties, which shall be submitted to the attorneys for the parties. After such submission, the report shall be signed by all parties who participated in the mediation and submitted to the department, if it has been a participant in the protective proceedings, and to the court. The court shall enter judgment in the protective proceedings in accordance with the provisions of the mediation agreement unless there is a party that did not participate in the mediation and does not accept the agreement reached by the mediating parties. In that case, the court shall consider the mediation agreement as rebuttable evidence of what constitutes the least restrictive alternative to protect the respondent, including an agreement that the protective proceeding be dismissed.

## VII. Conclusion

Adult protective proceedings have existed for centuries. They have gradually evolved over time, with development of greater appreciation for the civil rights of respondents and of the antitherapeutic effects of depriving individuals of their right to autonomy and self-determination. Research in recent years has also shown that the benefits of adult protective proceedings may be greatly overrated. It seems intuitively obvious that incapacitated people generally need help in order to maintain their well-being, even if they are unable to comprehend their need for such help. However, it is clear that such assumptions must be tested by examining empirically the effects of such involuntary assistance on the people it is meant to benefit. If, as research indicates, protective proceedings as they currently exist do not succeed in improving the well-being of many incapacitated people, then it is time to rethink the entire enterprise.

Past reform efforts have focused on adding due process protections, mainly developed in criminal law jurisprudence, to existing protective proceedings. Many such reforms appear to have been honored in the breach, and old, established patterns of doing business in protective proceedings have persisted, despite incremental changes in the laws. In order to bring the real world of protective proceedings into line with the requirements of *parens patriae*, the only justification for interfering with the autonomy rights of respondents, we must be ready to drastically rethink the entire procedure. By integrating the very different procedural structures of adult guardianship and *parens patriae* civil commitment, by borrowing from the strengths of each and

discarding the weaknesses, and by making use of recent research into the therapeutic and antitherapeutic effects of intervention, this article has attempted to break open current thinking about protective proceedings. By creating a fairly specific, concrete example of the kind of statute here described, I hope to generate useful discussion that will have a real effect on future reform efforts.

There will obviously be objections to specifics of the proposed statutory scheme. It is a broad-brush effort, with a great need for refinement. However, there will also be strong objections to the undertaking in general. One ongoing conflict deals with the costs of due process. The greater the protection for the civil rights of respondents, the greater the cost of protective proceedings. It is often argued that, in many cases, the need for protective proceedings is clear. Why should the cost of all protective proceedings be driven up to protect the rights of respondents in the minority of cases? Such an increase in costs will almost certainly result in more incapacitated people being deprived of the protection they desperately need.

As an initial response, consider again the research on guardianship discussed above, which indicates that the need for protective proceedings is often "clear" because there is no one to make sure that the issues are carefully examined. Also consider the research on both guardianship and *parens patriae* civil commitment, which indicates that the "help" that protected persons receive through current protective proceedings frequently leaves them worse off than they might have been without such proceedings. The real benefit of many current protective proceedings is not to the protected person, but to the rest of us, who feel more comfortable that the "problem" person has been properly "dealt with." In many cases, the fact of incapacity may be clear; in very few cases is the proper response to incapacity clear. Our current system tends to achieve clarity by ignoring these ambiguities, crucial to the well-being of the incapacitated.

Another general objection will be to the strong preference for specific, time-limited protective orders over general guardianships. Does it not make more sense to turn all the decisions for an incapacitated person over to a surrogate decision maker, as we do with minor children? Should people have to go to court every time an incapacitated person needs a medical decision made?

The problem is that incapacitated adults are not children. They have lived with the power of self-determination that is so central to

our rights as human beings. Taking away that power in a single global decision is literally dehumanizing. Minor children are treated by the law as human beings in training; they look forward to the time when they will exercise the autonomy to which their human heritage entitles them. Protected persons under guardianships are treated by the law as former human beings. Once a guardianship is established, the law takes vanishingly little further notice of them. The proposed statute does take into account the reality that guardianship is necessary in some cases. However, this statute holds out strongly for maintaining the legal humanity of all adults to the greatest extent possible.

A further objection may be derived from the cost objection. When protective proceedings become too expensive, more people and systems will try to get around them. More incapacitated people may find themselves making "voluntary" decisions to do whatever makes life easier for family members, medical providers, law enforcement, and social workers. Currently, many people are "voluntarily" admitted to care facilities or "voluntarily" consent to medical treatment, who, due to incapacity, are unable to comprehend the nature of the decision or the alternatives. This tendency will likely be exacerbated by any increase in the cost or difficulty of pursuing protective proceedings.

This objection is very difficult to meet. The problem is very real. Liability concerns will have some restraining influence, since it is well established that consent to medical treatment is not effective if it does not meet the requirements of informed consent. However, such concerns will not eliminate this problem, and the prospect of many lawsuits after the injury has already occurred is not appealing. Any corrective mechanism that relies largely on the ability of incapacitated people to pursue their rights through litigation is not going to be very effective. However, this problem must be addressed on its own merits. The problem cannot be solved by trying to water down the rights of respondents until it is as easy to obtain a protective order as it is to simply gull them into signing a release that they do not understand.

The proposed statutory scheme would clearly require the investment of more government resources than is currently devoted to adult protective proceedings. States will be reluctant, at best, to commit the necessary funds. However, as the country ages, we will see a greater and greater demand for an end to the disregard of the rights of the elderly in protective proceedings. We greedy and spoiled baby

boomers will insist on the best in our old age, as we have throughout our lives. We will have arguments of right and equity on our side that are hard to refute. The dehumanization and marginalization of the mentally disabled, and indeed of all elderly persons, is something of which our society should be ashamed. The calculation that it is cheaper to force people to accept decisions, which may or may not be in their best interests, than it is to take the time to figure out what will really benefit them, and to try to persuade them to agree to those decisions, is not one which is defensible in moral or ethical terms. Further, we may find some unexpected cost savings in creating a more therapeutic system of protective proceedings: fewer people may enter or remain in the system; less restrictive alternatives may often be less expensive alternatives; opportunities for mediation may forestall expensive litigation over what are essentially family fights.

Regardless of whether rational, integrated, and therapeutically designed protective proceedings will save or cost us money, we must act to protect the autonomy, the rights, and the well-being of the mentally disabled among us. It is simply the right thing to do.