MEMORANDUM

To: Eka Lomtatidze, Free University of Tbilisi
From: Angel Romero, Lauren Schulz, Marissa Frederick, Washburn University School of Law, under the supervision of Professor Bill Rich
Re: Rights of Incompetent Persons in the United States
Date: March 8, 2012

QUESTION PRESENTED

What Due Process and Legal Guardianship rights are guaranteed to United States citizens, both generally and specifically in regards to incompetent and incapacitated persons?

INTRODUCTION

Questions about the rights of persons with intellectual disabilities raise both issues of both procedural and substantive due process. The 14th Amendment of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause ensures fundamental fairness by requiring notice, and an opportunity for a citizen to be heard in cases where deprivation of life, liberty, or property is at issue. In order to trigger due process protections, courts must first analyze whether there is a due process interest, and then determine which procedural protections to apply. *See id.*

While the Procedural Due Process Clause concerns the fairness of the government procedure before deprivation of a liberty, the Substantive Due Process doctrine concerns the extent of protection provided for certain liberties regardless of the fairness of the government procedure that accompanies the deprivation. In other words, certain liberties are considered to be fundamental rights that cannot be impaired unless the government has a compelling need to do so.

The interests that the United States seeks to protect through procedural and substantive Due Process seem analogous to the kinds of interests that the Georgian Constitutional Court is facing in the present case. Therefore, these Due Process protections could prove useful to the Court in evaluating the petitioner's current claim. In addition, the background provided on laws related to establishing and terminating a legal guardianship should prove useful in determining the details of establishing a legal guardian relationship. Finally, we have included a brief summary of new developments in international law on the rights of incompetent individuals. This summary gives additional context to our discussion of the rights of incompetent individuals. Throughout this document, we will use the word "incompetent individual" to refer to a person facing civil commitment, or in need of a legal guardian.

It is also important to note that our research is to be considered with the concept of federalism as a back-drop. In the United States, both the federal government and the individual state governments operate simultaneously to provide for the rights of U.S. citizens. In regards to civil commitment and mental illness, federal law is relatively scarce. The U.S. Supreme Court has decided a few key cases; however it has left the further development of this law to the state courts and state legislatures. In those situations, we have identified the most common practices amongst the states, and provided examples of various state interpretations of law.

ANALYSIS

We begin this memorandum by addressing the procedural due process rights afforded to citizens in situations where confinement or civil commitment is at issue. This discussion will center on procedural due process protection guaranteed by the 14th Amendment, as well as procedures for appointing and terminating legal guardians. We will then move to a discussion of the protection of individual's substantive rights. This will involve an analysis of how most states

protect their citizen's substantive rights, in addition to protections put into place by the Equal Protection Clause of the 14th Amendment. Finally, we will offer a brief international perspective on the rights of disabled individuals.

I. AMERICAN CITIZENS CANNOT BE DEPRIVED OF A LIBERTY INTEREST WITHOUT ADEQUATE PROCEDURAL DUE PROCESS PROTECTIONS. THIS INCLUDES APPOINTMENT OF A GUARDIAN FOR MENTALLY INCOMPETENT INDIVIDUALS.

A. Procedural Due Process Protections When Deprivation of Liberty is at Stake

When a right to property or liberty has been recognized, due process requires that the right in question cannot be deprived without certain procedural protections. In order to determine what procedural protections apply to the right in question, courts look to various factors including;

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Matthews v. Eldrige, 424 U.S. 319, 335 (1976). At a minimum, courts have found that these protections require that an individual be guaranteed a hearing of some kind, and notice of the hearing. *See Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). The details of the hearing (formality of the hearing, when it must be held, who can participate, etc), as well as the details of the notice (what it must contain, when it must issued, etc) are determined by the nature of the rights at stake. *See Matthews*, 424 U.S. at 333.

Prior to the 1960's, the U.S. Supreme Court did not involve themselves in determinations about the due process rights of citizens being held in confinement. *See id* at 1105. The case of *Wolff v. McDonnell*, 418 U.S. 539 (1974) was the first to concern the issue of due process rights applied to citizens being confined in a prison. In Wolff, the court applied the traditional due

process framework to find that the state had created a liberty interest in providing good-time credit for prisoners, and that prisoners were entitled to notice and a hearing before they were deprived of their good time credit, and thus faced longer imprisonment. *See id* at 558-559. Importantly, the Court's decision turned on whether the state had created a liberty interest through their good-time credit law. *See id*. The Court held;

> "…since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Id. The Court's decision paved the way for the Supreme Court to look to state statutes to see if they create a liberty interest, and to proscribe an appropriate procedural remedy to guarantee Due Process rights to citizens facing confinement in prison.

Specifically, in its landmark decision on the issue of involuntary civil commitments, the Supreme Court held in *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) that "There can be no doubt that involuntary commitment to a mental hospital…is a deprivation of liberty which the State cannot accomplish without due process of law." It is then the responsibility of courts to look to the liberty interest at stake when an individual is committed, and devise protections to ensure that this liberty interest is not deprived erroneously.

Often, those subject to civil commitment are placed in the care of a legal guardian. Legal guardianships in the United States can take many forms. Regardless of the form of guardianship, guardians have a special responsibility to their clients. Legal guardians have a responsibility to look out for the interests of their clients, and must do so in a way that is commensurate with their client's Due Process protections.

When a criminal defendant is being deprived of a liberty interest, such as in a civil commitment proceeding, defendants are entitled at the least to notice and an opportunity to be

heard. With regard to civil commitments, courts have interpreted this to mean that defendants are guaranteed the following procedural rights; the right to appointment of counsel or a guardian ad litem, right to notice, right to a hearing, right of confrontation, privilege against self-incrimination, right to a jury trial, and right to periodic review.

1. The Right to Appointment of Counsel or Guardian ad Litem

The United States Supreme Court has never explicitly stated the requirement to provide a defendant with counsel in a commitment case. Instead, in *Vitek v. Jones*, 445 U.S. 480, 498 (1980), the Court subscribed to Justice Powell's opinion that "qualified and independent assistance" must be provided to the defendant, but that a "licensed attorney" does not need to be provided. Justice Powell pointed out that;

> "The essence of procedural due process is a fair hearing. I do not think that the fairness of an informal hearing designed to determine a medical issue requires participation by lawyers. Due process merely requires that the State provide an inmate with qualified and independent assistance. Such assistance may be provided by a licensed psychiatrist or other mental health professional…I would not exclude, however, the possibility that the required assistance may be rendered by competent laymen in some cases. The essential requirements are that the person provided by the state be competent and independent, and he be free to act solely in the inmate's best interest."

Id. at 500. Since this decision, states have gone on to craft their own statutes and "all states currently provide a right to counsel prior to forced hospitalization" Coleman, Phyllis, *Ineffective Assistance of Counsel: A Call for a Stricter Test in Civil Commitments*, 27 J. Legal Prof. 37, 39 (2003).

In *In re Gault,* 387 U.S. 1, 41 (1967), the Supreme Court held that defendants in commitment proceedings were entitled to be notified of their right to counsel, and that counsel would be provided if the defendant were indigent. The court in *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala N.D. 1974) found that counsel must be available "far enough in advance of the final commitment hearing to ensure adequate opportunity for preparation." This preparation

includes making available to counsel the names of any physicians who have examined the defendant, and any person who may testify at the commitment proceeding. *See id.* In addition, counsel must be afforded an adequate amount of time to review documentation associated with the case. *See id.* This is to occur prior to the commencement of commitment proceedings.

It has been argued that while these rights exist on paper, the practical application of them has been lacking in the United States. Despite these protections, there are still instances where judges appear to act as more of a "rubber stamp" on the findings of medical experts. *See* Coleman, *supra,* at 40. The key factor affecting commitment proceedings tends to be effectiveness of counsel. *See id.* No amount of enumerated constitutional protections can protect against ineffective counsel. The effectiveness of counsel is critically important in the context of civil commitments, due to the nature of the proceedings. The job of the attorney is to advocate his or her client's interests. Issues arise when attorneys, sometimes due to the condition they see their client is in, take it upon themselves to argue what they feel is in the best interest of their client. *See id* at 55. The attorney then "'persuades' the client to 'voluntarily' agree to this choice". *Id.* These behaviors run afoul of a lawyer's responsibility in numerous ways;

> "First, he shirk[s] his professional duty to be a zealous advocate. Second, the attorney goes beyond his training and expertise and attempts to evaluate the presence of, and proper care for, serious mental illness. Third, the attorney assumes, erroneous in many instances, that because the client may have a mental disability, he is not competent to make rational decisions in his best interest. Fourth, the attorney usurps the court's prerogative to determine based on facts provided by both side—the least restrictive plan that will provide needed medical attention"

Id. Lawyers must remember that they are to act as zealous advocates for their client's position. Decisions about what is in the client's best interest are left to a guardian ad litem or other parties who may participate in the commitment proceeding. Whether represented by counsel or a guardian ad litem, the demands of due process specify that a defendant must have meaningful

representation during a commitment proceeding.

2. Right to Notice

Central to the idea of due process, where deprivation of liberty is at stake, is the requirement of notice and an opportunity to be heard. In *Gault*, the Court found that the potential loss of freedom in a juvenile commitment case is the same as with an adult. *See* 387 U.S. at 33. Therefore, the demands of due process call for timely and adequate notice of commitment proceedings. *See id.*

In *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (M.D. Wisc 1972), judgment vacated on other grounds, 414 U.S. 473 (1974), the court found that notice of a scheduled hearing is necessary to comply with the requirements of due process in a civil commitment setting. The court found that the notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *Id.* The notice must do more than just provide the date, time, and place of the hearing. *See id.* The notice must provide the defendant "of the basis for detention, his right to jury trial, the standard upon which he may be detained, and the names of examining physicians and all other persons who may testify." *Id.* Courts have struck down statutory notice procedures when a family member or guardian files the petition for commitment, and notice is not served on the individual who is the subject of the proceedings. *See Bell v. Wayne Co. General Hospital at Eloise*, 384 F. Supp 1085, 1091-1092 (E.D. Mich. S.D. 1974).

Lessard did recognize that emergency situations may exist where defendants may need to be detained if they're threatening themselves or others with physical violence. *See id* at 1091. This detention can only last long enough to arrange a hearing, and the individual detained must be given notice of the hearing. *See id.* Absent an emergency situation, however, adequate and

timely notice must be provided to individuals prior to the start of commitment proceedings.

3. Right to a Hearing

The right to a fair hearing is a critical due process guarantee that must take place before an individual is institutionalized. While this right is universally recognized in the United States, there are various interpretations as to the nature of the hearing.

The right to a hearing typically includes the right to be present at a hearing. The right to be present at a hearing is typically included with the notice of a hearing. In *Lynch*, the court recognized that individuals can waive their right to be present at a hearing, but that acceptance of the waiver by a court is contingent on "a judicial determination that he [the defendant] understands his rights and is competent to waive them." 386 F.Supp at 388-389. Courts also have maintained that it is not enough that the defendant merely be present in the courtroom, but that he or she has a meaningful opportunity to be heard. *See Lessard,* 340 F.Supp at 1092; *See also Lynch,* 386 F. Supp at 389. In addition, courts have recognized that family members of the individual subject to the proceedings can also participate in the hearing, even though their interests might be adverse. In *Heller v. Doe*, 509 U.S. 312, 332 (1993), the Court recognized that "these parties often will have valuable information that, if placed before the court, will increase the accuracy of the commitment decision."

The nature of a due process hearing, including the formalities and procedures, can vary greatly. For instance, there is no standard timeframe for when a hearing must commence following a petition or emergency confinement. Courts have stated that a hearing can be held within 10-15 days of emergency confinement, while also holding that a hearing must be within 5 days of a request by the patient, relative, or friend. *See Lessard,* 349 F.Supp at 1078 (upholding a 10-14 day period before a hearing is held); *see also Logan v. Arafeh,* 346 F.Supp 1265, 1269-

1270 (upholding a 15 day waiting period before a hearing is held); *Project Release v. Provost*, 722 F.2d 960, 967 (2nd Cir. 1983) (stating that a hearing must be granted within 5 days of request by an interested party, during an emergency commitment).

In addition, parties at the commitment hearing typically have the opportunity to present evidence on their behalf. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense…This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Included in this right is also the ability of parties facing confinement to bring forth their own experts, and to have an independent psychiatric examination conducted and admitted into evidence. *See Ake v. Oklahoma*, 470 U.S. 68, 86 (1985). Courts have also held that a record of the commitment proceedings should be kept in such a way as to make factual findings available for review. *See Specht v. Patterson*, 386 U.S. 605, 610 (1967).

To summarize, defendants subject to commitment are entitled to a fair and adequate hearing on the issue of their possible commitment. A hearing must be held within a reasonable amount of time from the emergency confinement or petition for a hearing. At the hearing, parties have the ability to present their own evidence, including the ability to compel witnesses, put on expert testimony, and enter into evidence results from their own independent psychiatric examinations.

4. Right of Confrontation

Due process also commands that those who are facing potential commitment have the ability to confront witnesses against them, and to cross-examine these witnesses. *See Millard v. Harris*, 406 F.2d 964, 973 (1968); *see also Specht v. Patterson*, 386 U.S. at 610. This right also implies that the party facing commitment be present at the hearing. However, the party's absence

may be justified "if, but only if, there has been a prior judicial determination, after an adversary hearing at which he was represented by counsel, that he is so mentally or physically ill as to be incapable of attending the hearing." *Lynch*, 386 F.Supp at 394. The state has the burden of proving by the "clear and convincing evidence" standard of proof that the defendant should be institutionalized. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

5. Privilege Against Self-Incrimination

The 5th Amendment's protection against self-incrimination also applies with equal force to civil commitment proceedings. These protections prevent parties subject to commitment from disclosing anything during psychiatric interviews, or other phases of the commitment proceedings that could be used against them in criminal proceedings or to find other evidence. Extending the privilege against self-incrimination to cover civil commitment proceedings follows the trend of applying other procedural safeguards typically found in criminal proceedings. This is due to the weight of the consequences stemming from a commitment proceeding.

The court in *Lessard* found that the state of Wisconsin could not commit an individual on the basis of a statement made to a psychiatrist without showing that the statements were made when the individual knew he didn't have to speak. 349 F.Supp at 1101. *Lessard* stated that "the patient should be told by counsel and the psychiatrist that he is going to be examined with regard to his mental condition, that the statements he may make may be the basis for commitment, and that he does not have to speak to the psychiatrist." *Id*. The court acknowledged that most patients are likely to speak to people they feel they can trust, but that fairness requires the patient be given notice that their statements "may indeed tend to incriminate them in the eyes of the psychiatrist and the trier of fact in a civil proceeding." *Id.* Therefore, if patients are not made

aware that their statements may be used against them, statements made to the psychiatrist during evaluation may not be used against the patients at a commitment proceeding.

6. Right to a Jury Trial

The Supreme Court and lower courts have generally held that a jury trial is not required in civil commitment proceedings. Specifically, the Supreme Court has held that trial by jury is "neither a necessary element of the 'fundamental fairness' guaranteed litigants by the Due Process Clause, nor an essential component of accurate fact finding." *Lynch*, 386 F.Supp at 394. Furthermore, many courts have found that trials by jury were meant only to apply to cases "where it existed at the time of the adopt of the constitution" and not "in special or statutory proceedings unknown to the common law". *Stizza v. Essex County Juvenile & Domestic Relations Court*, 132 N.J.L. 406, 408 (N.J. Ct. Err. & App. 1945); *Illinois v. Niesman*, 356 Ill. 322, 327 (1934).

Some courts have held that jury trials are preferred for civil commitment proceedings. Since civil commitment is based on the idea that an individual could be a danger to themselves or others, juries are favored for their ability to introduce their own judgment of what is best for the community. *See Lynch*, 386 F.Supp at 394-395. Courts have struck down using present confinement as the basis for making a determination of whether a jury trial will be afforded, based on the unfair treatment it affords under constitution. *See id.* at 395. Furthermore, the court in *Lynch* held that if jury trials are used in civil commitment proceedings, they should serve the same purpose throughout all jurisdictions within a state, i.e. "if the jury is the fact-finder in some jurisdictions, it must be the fact-finder in all jurisdictions." *Id.*

In summary, the right to trial by jury is typically not associated with civil commitment proceedings. However, when possible, jury trials are often favored for their ability to let lay

people introduce their own judgment about whether the defendant is a danger to the community. Equal protection necessitates that if jury trials are allowed in civil commitment proceedings, the basis for doing so is not arbitrary and the juries must be used for the same purpose throughout the jurisdiction.

7. Right to Periodic Review

The Court in *O'Connor* held that commitment cannot continue if the original basis for commitment no longer exists. 422 U.S. at 575. Therefore, states must have mechanisms set up to allow for periodic judicial review of commitment determinations.

In *Fasulo v. Arafeh*, 378 A.2d 553, 556 (Conn. 1977), the Connecticut Supreme Court rejected procedures that let officials at a state hospital have sole control over when an individual could be deemed as no longer mentally ill. The court noted that the State is the party responsible for the civil commitment and thus "the expiration of the state's power can only be determined in a judicial proceeding which tests patient's present mental status against the legal standard for confinement." *Id.* The court held that this determination could not be conducted by medical officials alone who are not bound by the safeguards of due process. *See id.* The court thus found that the burden of proof in all commitment proceedings remains with the state. *See id.* at 556-557. The court went on to discuss the serious practical challenges of requiring a patient to initiate periodic review proceedings on their own, including "the difficulties of overcoming an isolated environment to initiate and coordinate a challenge to one's confinement." *Id.* at 557. Therefore, states have the burden of establishing a system of periodic review of a patient's status to ensure that the reason for the original confinement still exists. Patients cannot be expected to initiate these proceedings, and the state cannot deputize other actors to carry out this responsibility for them.

B. The Standards and Termination of Guardianship for an Incapacitated Individual

In the United States, guardianship laws and relations are controlled by the states. The courts must use the state statutes from where the individual lives as the authority when appointing, monitoring, and terminating guardianships. Yet, guardianship laws were heavily overlooked by the states until 1987 when the Associated Press developed a series of articles based on guardianship court cases that showed systematic flaws infringing on incapacitated individuals' rights. *See* Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 Stetson L. Rev. 941, 963-64 (2002) (explaining that only three-fourths of the individuals had a hearing, fewer than half were present, only 44% were represented by counsel, and unqualified experts were forming opinions on incapacity). This sparked the Wingspread Conference in 1988 by the American Bar Association (ABA) and followed with a hearing by the U.S. House Committee on Aging. *See* Pamela B. Teaster et. al., *Wards of the State: A National Study of Public Guardianship* 16 (2005). This caused state legislatures to take notice and begin to reform guardianship laws.

Currently states are more progressive with guardianship laws with the help of agencies such as the National Guardianship Association (NGA), the American Bar Association Commission (ABA Commission), and the U.S. Government Accountability Office (GAO). In addition, legislation such as the Uniform Probate Code (UPC), the Uniform Guardianship and Protective Proceedings Act (UGPPA), and the Protected Proceeding Jurisdiction Act (UAGPPJA) have assisted states in creating statutes that set standards and provisions for guardianships. *See* Center for Elders and the Courts, *Probate and Adult Guardianship*, http://eldersandcourts.org/guardianship/state-laws.html (2011). However, since the regulations are not mandated, various modifications are made depending on the state. To further investigate

guardianship law this section will examine the different standards courts apply when appointing a guardian to an incapacitated individual and how to terminate those guardianships in order to restore the individuals' rights.

A. What standards do state courts apply when considering a guardian for an incapacitated individual?

The basic definition of a legal guardian in the United States is someone who "Ha[s] the potential of providing the most inclusive form of substitute decisions making [.] [G]uardianship is a legal process or arrangement under which one person (a guardian) is granted the authority, legal right, and duty to care for another person (the ward) and his or her property." 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, 37 (1999).

Historically, the rights of incapacitated individuals have been ignored, but society has now taken a more humanistic approach by focusing on the restoration of rights and the *Olmstead* ruling on providing the least restrictive environment. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). This paradigm shift to a more humanistic theory towards incapacitated individuals has largely to do with the changes in guardianship laws. When guardianship reform began, the UGPPA and UPC aligned and were amended in order to protect the rights of individuals subject to guardianship. *See* Center For Elders, *supra*. Although each state creates its own authority regarding guardianship laws, 16 states have adopted the UPC in full, and numerous other states have adopted either the UPC or the UGPPA in part with some modifications. *See id.* Accordingly, this section will examine both of these guardianship regulations and identify certain state alterations. Additionally, in order to examine the rights of incapacitated individuals under guardianship, this section will discuss the procedural process of

guardianship appointment, the types of guardians the courts may appoint, and the standards state courts apply to appointed guardians.

1. The Procedural Process of Guardianship Appointment

The basic procedural aspects of guardianship appointment are fairly similar throughout the states, consisting of filing a petition for a guardian appointment, pre-hearing activities including notifying and evaluating the respondent, and a court hearing. *See* Unif. Probate Code §§ 5-301-11 (1969). The state courts follow the general policy that guardianship is a "last resort," mainly because all persons have the right to participate and make decisions in their own lives in the least restrictive environment. *See* Pamela B. Teaster et. al., *Wards of the State: A National Study of Public Guardianship,* 37 Stetson L. Rev. 193, 206 (2007).

The first step in appointing a guardian for an individual is to file a petition. *See* Unif. Probate Code § 5-304. Anyone may file a petition who is interested in the welfare of the individual, including the individuals themselves. *See id*. In the petition, a request may be made for a determination of incapacity and for a limited or unlimited guardianship. *See id.* It requires various statements regarding the individual including the name, age, residence of the respondent, family members or caregivers, and a statement regarding why guardianship is necessary. *See id.* After the petition is received, the court will set a date and time for a hearing and require certain pre-hearing activities depending on the individual. *See id*. § 5-305.

The court first requires the notification of the respondent, which includes giving a copy of the petition to the respondent and informing him or her on the proceedings and their due process rights. *See id.* § 5-308. The court may then order a professional evaluation of the

respondent by a physician or other qualified individual who will prepare a written report for the court. *See id.* § 5-306. The qualifications and extent of the evaluation differ in each state.

Lastly, a hearing is held in order to address the guardianship issues. Both the proposed guardian and the respondent are required to attend unless the court waives the condition of attendance. *See id.* § 5-308. The respondent may present evidence to the court by providing documentation, subpoenaing witnesses, and cross-examining any witness including an examiner or visitor appointed by the court. *See id.; see also In re Orshansky,* 804 A.2d 1077, 1093 (2002). The standards of proof set for guardianship appointment are usually high; the petitioner must "present clear and convincing evidence that the appointment . . . is warranted." *In re Orshansky,* 804 A.2d at 1099 (citing D.C. Code § 21-2003*).* The court or the probate judge will then make determinations on the individuals' incapacity, the chosen guardian, the guardian's required duties, and restrictions on the independence of the individual. *See* Conference of State Court Adm'rs, *The Demographic Imperative: Guardianships and Conservatorships,* 7 (2010).

The determination of incapacity has gone through significant changes through U.S. history, previously using symptoms to make subjective diagnoses and relying on opinions of experts not in the mental or developmental field. *See* Teaster, supra at 35. The majority of states now turn to behavioral judgments on how an individual functions in the society rather than bright line rules based on medical labels. *See id.* The UGPPA defines an incapacitated individual as a person who is "unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self care, even with appropriate technological assistance." Unif. Guardianship and Protective Proceedings Act § 102(5) (1997).

Based on the type of guardianship the court then requires monitoring and annual reports regarding guardian duties and activities. *See* Unif. Probate Code § 5-317. According to the UCP, a guardian must file a report to the court on the condition of the respondent, and account for money and assets in the respondent's control. *See id.* The final step in the court process is the termination or transfer of the guardianship, which is addressed in the second half of this section. Overall, the procedural aspect of guardianship appointment has improved since the Wingspread Conference. All of the states follow a similar process to ensure that individuals' due process rights are protected through a notice, hearing, right to counsel and a requirement of attendance by the court. The next section will expand on the different types of guardians a court may appoint if it is found that the individual is incapacitated.

2. Types of Guardianship

Legal guardianship takes many forms in the United States, and determining the proper form for a particular incapacitated individual often depends on the amount and type of authority that is given to the guardian, and the relationship between the incapacitated individual and the guardian.

Depending on the amount of authority granted, an incapacitated individual could have a guardian, limited guardian, guardian ad litem, a representative payee and/or a conservator appointed. A guardian ad litem tends to represent the client's best interests in any situation, while a conservatorship is solely limited to the representation of business and property matters. *See* Johns, *supra*, at 147, n.26, n.28. The states have taken the lead in formulating specific laws that establish the particular type of guardian appointed.

One distinction is between an appointed counsel and a guardian ad litem. Courts have recognized that counsel tend to advocate for their clients, in the sense that they represent only their client's wishes and consult only with the client during proceedings. *See In re M.R.*, 638 A.2d 1274, 1284 (N.J. 1994). Meanwhile a guardian ad litem may be a non-attorney who advocates in the best interest of the incapacitated individual, but this could mean taking an adverse position. *See id.* In addition, counsel is typically limited to just consulting with their client, while guardian ad litems may consult with any number of people in order to determine what is in the best interest of the incapacitated individual. *See id.*

In the 1970s, the American Bar Association's Committee on the Mentally Disabled began to advocate a policy of "limited guardianship." *See* Johns, *supra,* at 75. While guardianship typically strips an individual of their legal rights and vests them in the guardian, the concept of "limited guardianship" would only give guardians legal authority to the extent needed to adjudicate the present matter. *See id.* This policy has been enacted in 14 states. *See id.*

Besides the amount of authority granted, courts also appoint different types of guardianship categorized by the relationship they have with the incapacitated individual. Specifically, an incapacitated individual may obtain a personal or a public guardian. Most states prefer personal guardianship, which consists of family members and friends, because of the close relationship with the individual. *See* Barnes, *supra,* at 953. States that follow the UPC and UGPPA regulations, categorize personal guardians in order of priority. *See In re Orshansky,* 804 A.2d at 1099. It is prioritized by the respondent's personal choice of guardian, then a spouse, an adult child, and finally a parent. *See* Unif. Probate Code § 5-310. Regardless the priorities are not absolute, and the court still examines the best interest of the incapacitated individual and most qualified individual based on their knowledge and experience. *See id.*; *see also In re*

Orskansky 804 A.2d at 1099. In the majority of states, there are few if any standards or requirements for a family member to become a personal guardian. *See* Barnes, *supra*, at 954. Rather the personal guardian only needs to be of legal age, capable of satisfying requirements of the guardianship plan, and lack a conflict of interest. *See id*.

In the absence of a family member, or friend, the court may appoint a public guardian, who consists of professionals in private practice and for-profit or non-profit corporations that may take on the responsibilities of guardianship. *See* Teaster, *supra*, at 1. They are usually funded by a governmental entity through state appropriations. *See id.* at 5. The courts rarely appoint limited guardianship with public guardians. *See id.* at 8. Most serve as a guardian of the person and their property, but might also have financial planning, case management, social services, and educational responsibilities as well. *See id.* at 5.

States put stricter requirements on public guardians to prevent abuse, neglect and exploitation, which has a reputation of occurring more often with individuals who do not have a close relationship with the respondent. As of 2011, 44 states have statutory provisions on public guardianship. *See* Comm'n on Law and Aging, Am. Bar Assoc., *State Adult Guardianship Legislation: Directions of Reform* (2011). The most common exclusion of guardianship throughout the states are corporations that are involved in the individuals' care, housing or services or that have ownership of an adult care facility. *See* Barnes, *supra* at 954. Due to a conflict of interest, these types of corporations are usually prohibited from guardianship appointment. *See id.*

Overall, the court has discretion to determine whether or not an individual is appointed a guardian, how much authority the guardian is given over the incapacitated individuals' rights,

and the specific person or corporation that shall serve as guardian. Depending on the individual's relationship with the incapacitated individual certain states have enacted certain qualifications or standards the guardian must meet.

3. Determining Standards and Qualifications of Guardians in State Courts

Undoubtedly, guardianship creates an inherent tension because it protects and provides for at-risk individuals, but simultaneously removes fundamental rights of grown individuals to the potential status of a child. *See* Teaster, *supra*, at 2. For these reasons, states require assorted amounts of protection to the individual during guardianship proceedings through due process rights, required monitoring after the appointment of guardianship, and certain qualifications for the appointed guardian.

All states require that individuals petitioned for guardianship are given due process protection through notification about the proceedings, appointment and representation of counsel, a required presence at the hearing, and rights to a fair hearing. *See* Unif. Probate Code §§ 5-301-11. However, even though these protections are provided, consistent issues arise regarding the standards and qualifications or the lack there of, for personal and public guardians. As stated above, it is rare that states enforce any qualifications for personal guardians, however new guardianship legislation is adopted every year regarding specific qualifications for public guardians. The progressive view according to the National Guardian Association (NGA) is that states should treat guardianship as a profession in order to provide a level of quality and prevent instances of abuse, neglect or exploitation. *See* Barnes, *supra*, at 971. This is why the NGA has created *Standards of Practice* and a *Code of Ethics* for guardianships, as well as the Center for Guardianship Certification (CGC) that focuses on "a course of education, a demonstration of

knowledge and skill, and licensing or certification by the state to engage in practice of profession." *Id.* Although not all of the states have adopted *Standards of Practice* and *Code of Ethics*, many states are adopting legislation that coincide with the NGA's goals.

Arizona, California, Texas and Washington passed legislation in 2011 that require public guardians to register certain personal information to the courts. *See* Barnes, *supra*, at 972. Arizona and Washington specifically require that guardians need to receive certification before they may be appointed by the courts. *See* Barnes, *supra*, at 971. Additionally, four other states, Arkansas, Kentucky, Nebraska and Nevada, passed legislation that enact criminal and financial background checks for prospective guardians. *See* Comm'n on Law and Aging, *supra* at 7-8. Three of those states passed additional measures specifying guardian qualifications.

In Arkansas, the guardian has to pass an evaluation by the Department of Human Services according to the state law and Department policy. *See id.* Additionally, Nevada now requires every guardian to file an acknowledgement of their duties and responsibilities as a guardian before they are appointed. *See id.* The acknowledgement must include a summary of the guardian's duties, functions, responsibilities, Nevada state statutes, regulations, rules and standards, accurate record keeping and the actions that require prior court approval. *See id.* As another example, Washington law requires guardians to complete a standardized training video, unless they are state certified professional guardians, financial institutions or the court granted a waiver due to the guardians' knowledge or experience. *See id*.

If states do not require certification or licensing, they instead look more to the individuals' particular needs in order to determine the requirements of the guardian. Courts will look at the complexity of an individual's finances, health care, and living routine to determine

the guardian's responsibilities, dependant on the individual's level of capacity. *See* Barnes, *supra*, at 949. "The diversification of living circumstances and the complexity of financial need make it increasingly advantageous to appoint a guardian with knowledge of the community's resources . . . , the health-care choices preferred . . ., what residence and associates are likely to be suitable . . . and the government benefits for which the ward might be eligible." *Id.* The UPC and several states embrace these types of guardianships through limited guardianship statutes. *See* Johns, *supra* at 75. The statutes generally encourage granting the guardian only responsibilities necessitated by the individual's limitations and needs to make sure the individual is in the least restrictive environment and receiving maximum self reliance and independence. *See* Unif. Probate Code §5-311(b); *see also* Johns, *supra* at 75 (discussing Texas limited guardianship statute where the court will only assign duties that the ward is incapable of exercising.)

Ultimately, guardianship is a complicated area of the law that leaves large discretion to individual states and the courts. Although there is not an extended amount of consistency between the states, besides procedural aspects, the majority is proposing legislation that exemplify the humanistic approach of protecting as many rights as possible for an incapacitated individual. The last section regarding guardianship will address the process of terminating a guardianship and granting the restoration of rights.

4. How does an incapacitated individual terminate guardianship?

Guardianships are usually appointed for a substantial amount of time if not for the entirety of an individual's life mostly due to rarity of capacity restoration. This is entirely contingent on the progression and particular type of disability or the level of incapacity.

However, it makes the "substitution of the guardian (short of wrongdoing) or restoration of rights . . . generally an uphill battle for the individual under guardianship." *See* Comm'n on Law and Aging, *supra* at 18. Yet, due to the procedural protections in guardian termination proceedings, the burden of evidentiary proof, and newly reformed termination laws, the states are making it more of a fair fight.

A guardianship terminates upon the death of the incapacitated individual, when a minor becomes an adult, or upon an order of the court. *See* Unif. Probate Code § 5-318; *see also* Kan. Stat. Ann. § 59-3092 (2002**)**. According to the UGPPA a guardianship may also terminate due to the resignation or removal of the guardian. *See* Unif. Guardianship and Protective Proceedings Act § 112(a). The order of the court occurs when the need for a guardian is unnecessary, because the incapacitated individual has been restored to competency, mental soundness, or no longer needs the assistance or protection of the guardian. *See* Kan. Stat. Ann §59-3092; *see also* 39 Am. Jur. 2d Guardian and Ward §77 *(*2011).

The incapacitated individual or any person interested in the individual may make a petition for termination in most states. *See* Unif. Guardianship and Protective Proceedings Act § 112(b). This is due to the guardian's removal being the best interest of the individual or for another good cause. *See id.* Under certain statutes the right to petition is only delegated to the incapacitated individual. *See* 57 C.J.S. Mental Health § 181 (2011). Additionally, a guardian may petition to resign and request a new appointed guardian for the incapacitated individual. *See id.*

The petition is then reviewed for good cause to warrant further proceedings of the case. *See* Kan. Stat. Ann. § 59-3091(c). Often good cause is established if the court has a reason to

believe that a termination of the guardianship would be in the best interest of the ward. *See id.*; *see also* 39 C.J.S Guardian & Ward § 45 (2011). If the court finds good cause it will issue a date, time and place for a hearing, no later than 30 days after the petition is filed. *See id.* Even if the court finds no good cause it may order an investigation and reporting on the circumstances of the individual. *See id.*

At the hearing, the court must adhere to the same procedural safeguards that occur in guardianship appointment in order to protect the incapacitated individual's rights. *See* Unif. Probate Code § 5-318, *comment*. The petitioner needs to only meet a prima facie case for termination in order for the burden to shift to the respondent to provide clear and convincing evidence that a guardianship is needed. *See id.* If the court finds there is not clear and convincing evidence that the individual is in need of a guardian, the court will terminate the guardianship. *See* Kan. Stat. Ann. § 59-3091(h). "Given the constriction on rights involved in a guardianship, the burden of establishing a guardianship should be greater than that for restoring rights." Unif. Probate Code § 5-318, *comment*.

The court may assign additional duties and responsibilities to the guardian to prepare for termination or if the individual is deceased in order to handle his or her affairs. *See id.* If the court does not decide to terminate guardianship, it is given the option to modify the type of powers given to the guardian if it is "currently excessive or insufficient of the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action." Unif. Probate Code § 5-318.

State laws are continuing to progress in guardianship termination proceedings by encouraging incapacitated individuals to strive for lesser restrictions and more self-

independence. In 2011, Arizona passed a senate bill that provides that an individual may petition for termination or substitution of a guardian at any time, regardless if there was any inappropriate action or not. *See* Comm'n on Law and Aging, *supra* at 18. In the same year, Colorado adopted a law that a guardian could not take an active oppositional role at the termination hearing. *See* Comm'n on Law and Aging, *supra* at 18. Instead the guardian should file a written report describing the issues that are relevant to the termination. *See id.*

In order to provide further evidence for guardianship terminations or transfers, the GAO has made two recommendations for future actions: "1) The U.S. Department of Health and Human Services should consider funding evaluations of practices for monitoring guardians, and 2) SSA should determine how it can, under current law, disclose certain information about beneficiaries and fiduciaries to state courts upon request." Comm'n on Law and Aging, *supra* at 7-8. These actions might allow an incapacitated individual to become more successful in restoring their rights in guardianship proceedings. Overall guardianship reform has made strong strides in the United States over the years. Due to procedural safeguards, higher qualifications for guardians, and policy recognition of restoring incapacitated individual's rights through guardian termination, we are eliminating the barriers drawn between incapacitated individuals and the rest of society, and beginning to respect their thoughts, rights and actions as part of society.

II. THE 14TH AMENDMENT PROVIDES SUBSTANTIVE DUE PROCESS PROTECTIONS FOR AMERICAN CITIZENS FACING A DEPRIVATION OF LIBERTY. THESE PROTECTIONS ARE GUARANTEED AT THE STATE LEVEL, AS WELL AS THROUGH THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

The Courts will determine whether a fundamental right exists by considering whether the right is deeply rooted in the history and tradition of the nation, implicit in the concept of ordered

liberty. *Snyder v. Massachusetts*, 291 U.S. 97, 105(1934), or is part of an emerging consensus. *Lawrence v. Texas*, 539 U.S. 558 (2003). The United States Supreme Court has recognized various personal rights as fundamental rights implicit in the U.S. Constitution such as the right to terminate pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), the right to refuse unwanted medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967), the right to bring up children, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and the right to intimate relations *Lawrence v. Texas*, 539 U.S. 558 (2003). However, the extent of these rights afforded to citizens varies. The United States Supreme Court determines whether a fundamental right exists and the extent of that right. The question becomes who is entitled to these fundamental rights derived out of the Substantive Due Process doctrine of the 14th Amendment.

A. Substantive Rights of Incompetent Individuals

The 14th Amendment of the U.S. Constitution provides protection for all "persons" against deprivation of "life, liberty, and property". U.S. Const. Amend. XIV. The question is whether United States jurisprudence considers the word "person" to include those who are disabled. U.S. Supreme Court case law provides that Constitutional protection attaches to all people at birth. *See Roe v. Wade*, 410 U.S. 113, 158 (1973). Thus, the courts will find persons with disabilities are entitled to the same constitutional rights and protections as all citizens.

The 14th Amendment protects "liberty" for all "persons". The U.S. Supreme Court recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), certain personal choices were considered fundamental to the concept of "liberty", and thus found that the 14th Amendment protected certain unenumerated fundamental rights. The Court recognized constitutional

protection for the following fundamental rights; the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to engage in intimate relationships, *Lawrence v. Texas*, 539 U.S. 558 (2003), the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the right to raise children without government interference, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), the right to terminate a pregnancy, *Roe v. Wade*, 410 U.S. 113, and the right to refuse unwanted medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). These fundamental rights receive strict scrutiny review by the courts. In other words, these fundamental rights may not be deprived by the government unless the government has a "compelling state interest" in doing so and the "legislative enactments are narrowly drawn to achieve the compelling state interest." *Roe v. Wade*, at 155. If the court finds the government fails to pass the strict scrutiny test, then the government's action is declared to be an unconstitutional deprivation of a fundamental right. Thus, the government must have a compelling state interest before depriving a disabled person, or any other person, of a fundamental right.

The 14th Amendment labels the above mentioned personal choices as fundamental rights and protects them from government invasion. These fundamental rights are premised on the recognition that people have the cognitive ability to make personal choices. All people are presumed competent to make such personal choices and thus, afforded the full extent of their constitutional rights. However, as discussed above, guardianship is granted in cases where a person does not have the ability to make such choices. In the case of an incompetent person, who has an appointed guardian, the question becomes whether the guardian may make these personal choices on behalf of the incompetent person and to what extent, without violating the incompetent person's constitutional rights.

1. Right to Refuse Medical Treatment

The following two state decisions lead the way on guardians exercising constitutional rights on behalf of incompetent persons in matters of refusing medical treatment. In the case of *In re Quinlan,*70 N.J. 10 (1976) an unconscious patient was found to have the same right as a competent patient to a constitutionally protected right to decline or accept lifesaving medication. The court found that the incompetent patient had a privacy right in refusing medical treatment and concluded that the guardians of the unconscious patient must be allowed to decide whether the patient would exercise her right to privacy under those circumstances in order to prevent the loss of the patient's privacy right due to her incompetence. *See Id*. at 41. This case allowed a surrogate decision maker to exercise rights on behalf of a now incompetent person. A surrogate's decision was permitted only if it was based on what the now incompetent person would have decided when she was competent. It was six months later when the rationale was extended to people that were incompetent since birth.

In *Superintendent of Belchertown State School* v. *Saikewicz,*373 Mass. 728 (1977) an institutionalized patient born with mental retardation and the mental capacity of a two year old was dying of leukemia and the Massachusetts court ruled that a court of law was best suited to make a determination of whether to provide the patient life -saving treatment. The standard in which to make the decision would be substituted judgment which required a determination of what the patient would have wanted to do if he were somehow competent and able to weigh the alternatives. The court held that the incompetent persons have "the same panoply of rights and choices" as competent persons because the mentally incapacitated share the same "dignity and worth" as the capacitated. *Id.* at 737 -738.

There is no uniform federal law on guardianship or the extent of guardianship decision making. A number of Courts have followed these decisions. See *Rasmussen v. Fleming*, 741 P.2d 674, 686 (Ariz. 1987); *see also In re Foody*, 482 A.2d 713, 718 (Conn. 1984) (following *In re Quilan*, 355 A.2d 647); See *Guardianship of Ruth E.J.*, 514 N.W.2d 213, 217 (Wis. App. 1995); *Bush v. Schivao*, 2004 Fla. LEXIS 1539 (Fla. 2004) (following *Saikewicz*, 370 N.E.2d 417). However, the Courts continue to face the challenge of balancing the concern of providing the profoundly disabled person the ability to exercise his constitutional rights against the concern the surrogate may not make a decision in the best interest of the disabled person, subsequently violating a constitutional right. States have enacted safeguards in an attempt to strike a balance. The states vary on the extent of safeguards provided for surrogate decisions. For example, in cases of life sustaining decisions, some states have required the guardian's decision be accompanied by clear and convincing evidence of the incompetent's wishes before there can be a withdrawal of life-sustaining treatment.

In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the United States Supreme Court held that a state requiring clear and convincing evidence of an incompetent's wishes to withdraw life- sustaining treatment did not violate the United States Constitution nor did the state violate due process by rejecting the guardian's substituted judgment minus the substantial proof that their decision reflected that of the patients. The State of Missouri required that the guardian's decision to withdrawal life-sustaining treatment from their daughter be supported by clear and convincing evidence that the now incompetent daughter would have made the same decision. *See id*. at 268 -269. In this case, the Supreme Court acknowledged that in the past they have recognized incompetent individuals possessed the same constitutional liberties as competent individuals. *See id*. at 279 -280 (See *Parham v. J.R.*, 442 U.S. 584 (1979);

Youngberg v. Romeo, 457 U.S. 307 (1982). However, the Courts had to determine whether the U.S. Constitution forbid the State of Missouri from enacting a procedural requirement that placed an evidentiary burden on a surrogate in exercising a right on behalf of the incompetent. *Id.* at 280. The Courts found that Missouri was not taking away the right to refuse medical treatment, but only requiring clear and convincing evidence that the surrogate's decision "conform as best it may to the wishes expressed by the patient while competent" because it had a legitimate interest in guarding against potential abuses on behalf of the surrogate which could result in a violation of the incompetent's liberty rights. See *id.* 280 -281.

The effect of *Cruzan*, *In re Quilan*, and *Saikewicz*, has allowed now- incompetent persons and born- incompetent persons to retain their constitutional right to refuse medical treatment, but those rights will be exercised through the surrogate decision maker, which may be the guardian. Additionally, the States are allowed to vary the extent of safeguards provided to protect against potential abusive decisions that might result on an infringement of rights in situations of life-sustaining treatment where the decision is death.

2. Right to procreate

As mentioned before, the fundamental right to procreate and not be sterilized is afforded to all "people". In the context of the right to bear children, it is important to note that this right is double sided in which there is a right to bear children, but there is also a right to not bear children. Thus, the history of our jurisprudence demonstrates the development of this concept. In 1927 the U.S. Supreme Court wrote an opinion which implicitly supported a eugenic theory and upheld an involuntary sterilization statute for incompetent individuals. *See Buck v Bell*, 274 U.S. 200 (1927). The right to procreate was generally recognized as early as the 1940's. *Skinner v.*

State of Okla. ex rel. Williamson, 316 U.S. 535, 544. However, incompetent persons would not get this right until the 1960's and 70's. The trend towards sterilization changed in the 1940's when procreation was established as a fundamental right and the view on sterilization was that courts lacked the authority to authorize sterilization procedure in absence of legislation. *See e.g., Hudson v. Hudson*, 373 So.2d 310, 312 (Ala. 1979); *In re M.K.R.*, 515 S.W.2d 467, 471 (Mo. 1974); *Skinner*, 316 U.S. at 544. During this time the courts feared a possible deprivation of a constitutional right, even when guardians argued that sterilization was in the incompetent's best interest, and thus refused to authorize sterilization.

Currently, most states take a different view; states now permit sterilization upon a court finding that the surgery will serve the person's best interests. Norman L. Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 Annals Health L. 37, 53 (2004). Various courts have recognized a mentally incapacitated person's right of medical choice in regards to contraception and sterilization and authorized surrogate choice based on the best interest of the incompetent when accompanied by appropriate safeguards such as an evidentiary requirement of clear and convincing evidence. *See e.g., Wentzel v. Montgomery Gen. Hosp*., 447 A.2d 1244, 1258 (Md. App. 1982); *In re Grady*, 426 A.2d 467 (N.J. 1981). Additionally, the surrogate not only must show that sterilization is in the best interest of the incompetent individual, but must show that sterilization is necessary and is the least intrusive means of contraception without unconstitutionally depriving the individual of her privacy rights to her body. *Conservatorship of Valerie N*., 40 Cal. 3d 143(1985). Only one state appears to continue to exclude all surrogate authorization of sterilization. *Supra* at 53. (citing Martha A. Field & Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children* 87 (1999). A possible reason for why the majority of states allow guardians to

choose sterilization on behalf of the incompetent individual is because the right to not bear children still exists for the incompetent individual. As mentioned before, incompetent persons have "the same panoply of rights and choices" as competent persons because the mentally incapacitated share the same "dignity and worth" as the capacitated. *Saikewicz,* 373 Mass. 728 (1977). Thus, states provide necessary safeguards to ensure the incompetent individual retains the same rights as a competent individual; the right to bear children and the right to not bear children.

3. Right to Raise Children

The U.S. Supreme Court has held the right to raise a child is a fundamental right and must receive strict scrutiny protection from state regulation. *See Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that children cannot be taken from unwed father's custody in a dependency proceeding without father having a hearing on his parental fitness); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding there is a parental right to place children in religious schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (noting there is a parental right to "establish a home and bring up children" as a fundamental right). There is no question as to whether an incompetent parent retains the same rights as a competent parent in our jurisprudence because the U.S. has already recognized that incompetent and competent individuals retain the same constitutional rights.

However, in this context, parental rights involve the interest of the child and the state has a fundamental interest in protecting the interest of the child. "State regulation of the parent-child relationship has become so common that it is often unquestioned." Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled*

Developmentally Disabled or Mentally Retarded, 83 Cal. L. Rev. 1415, 1431 (1995). An incompetent parent will have the same parental rights as a competent parent. The most apparent tension of parent rights will occur when the state attempts to terminate parental rights. In this situation, the incompetent parent is afforded the same termination procedures and evidentiary standards as a competent parent.

The grounds for termination of parental rights may vary from state to state. Nevertheless, the grounds are the same for every parent regardless of the level of competency. Termination of parental rights can occur upon: abandonment of the child; abuse or neglect of the child; failure of the parent to remedy the conditions which led to the child's removal from the home; and incapacity of the parent to adequately care for the child due to mental disability, physical disability, substance abuse, incarceration or institutionalization. The status of incompetence is not grounds for termination of parental rights. Rather, the courts will look at the ability of the person to care for the child and rule on termination of parental rights on the above mentioned grounds, regardless of competency status.

Evidentiary standards for a termination of parental rights are the same for all parents, regardless of competency level. In assessing whether standards are met and termination required, the courts will first determine whether there is clear and convincing evidence that one of the statutory grounds for termination has been met. *Santosky v. Kramer*, 455 U.S. 745 (1982) (ruling that the 'clear and convincing' standard of proof is constitutionally required in parental rights termination hearings). Additionally, the courts will determine whether termination rights are in the best interest of the child by assessing several factors, including the child's age, the child-parent relationship, the parent's ability to parent, and incident that triggered the hearing.

See Kramer, *Legal Rights of Children* § 28.15 (2d ed., McGraw Hill 1994). If the evidentiary standards are satisfied, then the courts will terminate the parent's rights.

4. Right to Marry

As mentioned before, the right to marry is a fundamental right with strict scrutiny protections from state regulation by the 14th Amendment. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Cooper v. State of Utah*, 684 F. Supp. 1060 (D. Utah 1987). "Numerous States categorically restricted the rights of persons with disabilities to marry, without any determination of individual capacity, in a manner that cannot withstand strict scrutiny." *United States v. State of Georgia*, 2005 WL 1812484. Many restrictive statutes still remain long after the American Disability Act was enacted. *See* Tenn. Code Ann. §36-3-109 (2001) (forbidding issuance of a marriage license "when it appears" that an applicant may be "insane or an imbecile"); D.C. Code Ann. §46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void). A number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). The State of Kentucky even criminalizes the marriage of incompetent persons. *See* Ky.Rev.Stat. Ann. § 402.990(2) (West 1992 Cumulative Service). Additionally, as if the states didn't vary enough in legislation concerning marriage for the incompetent, the fact that the states definitions of incompetence differ adds another layer of complexity and inconsistency among the states. Thus, the constitutionality of each State's statute concerning marriage of an incompetent person can only be determined through a close analysis of each state's mental health laws.

Disabled people have the right to marry, right to procreate, and all other rights afforded to every citizen. A disabled person determined incompetent and appointed a guardian will not lose

her constitutional right. Rather, in cases of medical decisions, the guardian will act as a surrogate decision maker and exercise the constitutional right on behalf of the incompetent individual. In cases involving the right to procreate, the guardian may exercise the constitutional right to not bear children on behalf of the incompetent individual; however, the courts will require by clear and convincing evidence that the decision conforms with the best interest of the incompetent individual, the procedure is necessary, and it is the least intrusive means of contraception without unconstitutionally depriving the individual of a privacy right in her body. Additionally, incompetent individuals have the right to marry, but the right may be limited when states have a compelling interest. Thus, states have varied across the board on regulating marriage of incompetent individuals. Furthermore, states continue to apply legislative safeguards in situations where the guardians are exercising crucial fundamental rights such as medical decisions in order to protect against abuse and ensure the incompetent's best interest is being served and she receives her constitutional right.

B. Equal Protection for Incompetent Individuals

The 14th Amendment serves as an additional safeguard to assess the constitutionality of regulations that may affect the free exercise of an individual's fundamental rights. Essentially, the equal protection clause bars the government from engaging in discriminatory conduct. However, if this were to be strictly enforced, no law would be constitutionally valid since every law affects a particular group of individuals by conferring burdens or benefits. More accurately, the Equal Protection Clause prohibits the government from engaging and enforcing arbitrary or invidious discrimination: meaning the government has logical and ample reasoning for the discrimination of the law.

As such, courts have developed tests and standards for the application of the Equal Protection Clause and systematic review for allegedly invalid and discriminatory legislation. For the government to treat people differently and bestow burdens and benefits on specific groupings, they will need to show that the legislation is not arbitrarily discriminatory to a particular classification or grouping. In their application of the Equal Protection clause to such allegations of invalid legislation, courts must answer three basic questions: (1) what type of discrimination is involved; (2) what type of scrutiny will the courts apply to the discrimination; and (3) has the defender justified the discrimination under the applicable standard of review.

The Equal Protection Clause has been applied to mentally disabled individuals as a specific grouping; however, they have not received a higher level of protection or scrutiny. Since the landmark case of *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the mentally disabled have not been considered a distinct classification, and legislation that discriminates against them will only be subject to the rational basis test. In other words, the state enactment must be reasonably related to a legitimate state interest.

In *City of Cleburne*, a land owner bought a piece of property with the intent to lease it to the Cleburne Living Center (CLC) so that they could operate a group home for the mentally retarded. The property in question was in a residential neighborhood. The City of Cleburne refused to issue a special use permit to the CLC based on the City of Cleburne zoning regulations which required permits, subject to annual review and renewal, for "[hospitals] for the insane or feeble-minded, or alcoholic, or drug addicts, or penal or correctional institutions." The city determined that that the CLC operations would classify as a hospital for the "feebly minded" and refused to offer a permit to the CLC.

The Court did not find mentally retarded persons to be of a suspect or quasi-suspect class, meaning they were not a "discrete and insular minority that is the victim of societal prejudice and unable to achieve adequate protection through the ordinary operation of the political process." Thus, the Court did not extend the protections and strict scrutiny status to persons with mental retardation. Strict scrutiny review requires an enactment to be narrowly tailored to a compelling government interest. Rather, the Court analyzed the city regulation under rational basis review. Rational basis review, a lower level of review, requires legislation to be *rationally related* to a *legitimate* government interest. The U.S. Supreme Court invalidated the city zoning regulation and held that the denial of the permit was based on irrational prejudice against the mentally retarded and contrary to the fundamental rights of the Equal Protection Clause. Any state enactment concerning the persons with disabilities or incompetent persons will be analyzed under rational basis review.

Rational basis is the lowest standard of review, and legislation is more likely to be upheld under rational basis review. However, the City of Cleburne was evidence that the U.S. Supreme Court is willing to invalidate irrational legislation, especially when evidence of prejudice or hostility motivated the discriminatory government action. Nevertheless, the U.S. Supreme Court is not willing to invalidate legislation merely because less discriminatory policies could have been enacted.

In *Heller v. Doe*, 509 U.S. 312 (1993), the U.S. Supreme Court applied rational basis review to a Kentucky statute that was challenged by an Equal Protection claim alleging the statute discriminated against "mentally retarded" individuals. Unlike the result of *City of Cleburne,* the Kentucky statute was held to be constitutional. The discrepancy among the Kentucky statutes provided: (1) a lower standard of proof for committing adults with mental

retardation than the standard required for committing persons with mental illness, and (2) in commitment proceedings for persons with mental retardation, unlike for mental illness, family or guardians may participate as a party to the proceedings with all attendant rights, including the right to present evidence and to appeal. *Heller*, 113 S. Ct. at 2641. The Heller Court justified the two differing standards of proof and procedures as necessary to equalize the risks of improper judicial determination in such proceedings. Susan Lee, *Heller v. Doe? Involuntary Civil Commitment and the "Objective" Language of Probability*, 20 Am. J.L. & Med. 457, 459 (1994)

The Court based its justification on the premise that the difference was explained by the differences in the risk of error due to the difficulty of diagnosis for mental illness, the accuracy of the prediction of future dangerousness, and the invasiveness of treatment received after commitment. *Id*. at 2645. Thus, the Court concluded a lower standard of proof for persons with mental retardation satisfies constitutional requirements. *Id*. at 2643 – 47. The court found the provision permitting guardians and family members to participate as parties in the proceedings to commit mentally retarded individuals was justified because mental retardation can result in deficits or impairments in adaptive functioning, unlike mental illness, and thus, "relatives or guardians who have intimate knowledge of the mentally retarded person's abilities may have valuable insights that should be considered during the involuntary commitment process." *Id.* at 329. Kentucky found that family members or guardian for people with mental illness by contrast would be less beneficial to a hearing because usually family members will either not have knowledge or have ceased to provide care. *Id.*

Additionally, the Court was not willing to invalidate the statutes merely because less discriminatory policies could have been enacted. *Id*. at 333. Rather, the Court found the rationales for each of the statutory distinctions to be arguable and thus "sufficient, on rational

basis review, to 'immunize' the [legislative] choice from constitutional challenge." *Id.* at 333 (quoting *FCC v. Beach Communications, Inc*., 508 U.S. 307,320 (1993). The Court upheld the statutes and concluded the statutes did not violate the Equal Protection Clause.

State legislation that makes a distinction between incompetent persons or "mentally retarded" individuals and any other class may be challenged under the Equal Protection Doctrine. However, the Courts will apply rational basis review, the lowest standard of review, and determine whether the legislation was rationally related to a legitimate government interest. While the Courts are willing to strike an enactment because it is irrational, especially when based on prejudice or hostility toward the target group, they will not strike the enactment merely because other less discriminatory policies could have been enacted. Rather, the Courts will uphold legislation as long as there are plausible arguments to be made for the rationale underlying the legislation and it can be determined that it is a rationale means to achieve a legitimate government purpose.

III. RECENT DEVELOPMENTS OF INTERNATIONAL VIEWS ON THE RIGHTS OF PERSONS WITH DISABILITIES

The United Nations Convention on the Rights of Persons with Disabilities (the Convention) was created to alter the approach of how nations viewed individuals with disabilities. Historically, there have been conflicting ideas on how individuals with disabilities fit into societal norms. Society dealt with its conscience by forming charitable, medical or societal models in order to provide safeguards and protections for these individuals. *See* Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change,* 45 Val. U. L. Rev. 1271 (2011). This created the view that persons with disabilities needed protection, rather than being considered as right-holders. *See*

Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 Ga. St. U.L. Rev. 527, 538 (2009). This resulted in barriers between persons with disabilities and the rest of the world. The Convention seeks to protect the human rights of individuals with disabilities through broad, international unity. It will shift the paradigm that directs domestic laws and policies of nations including in the United States. Harpur, *supra*, at 1272.

The Convention was adopted in December of 2006 at the United Nations Headquarters in New York. *See* United Nations Enable, *Convention on the Rights of Persons with Disabilities,* http://www.un.org/disabilities/countries.asp (2011). It was then ready for signing in March of 2006, binding nations to the first international treaty that addresses persons with disabilities. *See* Kanter, *supra,* at 527. It was accompanied by an Optional Protocol which provided procedures "aimed at strengthening the implementation and monitoring of the Convention." United Nations Enable, *supra*. This international treaty had the highest number of signers in UN history with 82 signatories for the Convention and 44 signatories for the Optional Protocol. *See id.*

The Convention's purpose is to acknowledge the fundamental freedoms of those with disabilities as well as adjust societal attitudes and tactics towards them. *See* Kanter, *supra* at 549. Unlike legislation before it, the Convention addresses political, civil, social, cultural and economic rights. *See id.* at 553. It's distinguished by the humanistic approach towards persons with disabilities by recognizing their rights, and their ability to make choices and act on those rights. *See*, Harpur, *supra* at 1273-77. The Convention's humanistic approach forms an overriding policy framework, which certifies that all persons with disabilities will have the freedoms to exercise their rights. *See* Harpur, *supra,* at 1278. Additionally, the Convention distances itself from medical models by not including a definitional statement of the term

disability. *See* Kanter, *supra,* at 550. The Convention took into account that this word might alter overtime and may also be construed in different ways depending on the community. *See id.*

Regardless of the exclusion, the Convention covers a vast amount of areas that affect individuals with disabilities including "accessibility, personal mobility, health, education, employment, habitation, rehabilitation, participation in political, social and cultural life, and perhaps most significantly, equality and non discrimination." *Id.* at 552. Countries that adopt the Convention are expected to promote the progressive realization of the rights of individuals with disabilities projected in the Convention to the maximum of their available resources, and "requires Governments to [do] much more than merely abstain from taking measures which might have a negative impact on persons with disabilities." *Id.* at 527.

Yet, not every country was prepared to subject its own judgment for a worldwide consensus. The United States is a prime example of a country that strongly advocates human rights, but is reluctant to adopt international treaties regarding human rights. *See id.* at 568. In fact, the United Stated did not sign the Convention until 2009 joining the other 153 countries that had signed the treaty by that date. *See* United Nations Enable, *supra.* Presently, the United States has held its tradition by refusing to join the 110 nations who have ratified the Convention and the 63 who have ratified the Optical Protocol. *See id.* This was largely due to the government's insistence on retaining its national power of creating and enforcing its own laws, instead of conforming and abiding by an international doctrine. *See id.* at 557. The United States has defended its actions of not ratifying by claiming that "domestic law provides more protection than its international counterparts." *See id at 806.* However, international human rights standards would provide a consensus of what fundamental rights are for disabled individuals and should be adopted by state and federal courts. *See* Strossen, at 805. The Convention would provide

"guiding principles for interpreting federal and state constitutions and statutes." *See id.* Hopefully, in the near future nations will begin to recognize that constitutions should represent UN treaties and use it to create an explicit text for what the law is.

Overall the creation of the Convention is acclaimed as the "Declaration of Independence" for individuals with disabilities. *See id.* at 549. The world is now recognizing that individuals with disabilities have rights and instead of barricading and diminishing those rights, society may alter its approach to invest and seek inclusion of those rights. Through the unity of numerous nations, the Convention demonstrates that the protection of rights for individuals with disabilities is no longer being ignored by the international community.

CONCLUSION

In the United States, civil commitment represents a curtailment of an individual's liberty. Therefore, an individual cannot be institutionalized without the procedural guarantees of the Due Process Clause. The Supreme Court and lower courts have defined seven key procedural rights that are guaranteed to individuals subject to civil commitment. The details of each of these rights have largely been left to the states to develop, within constitutional boundaries.

Any individual subject to a civil commitment proceeding is guaranteed the right to representation either through an attorney or guardian ad litem. Attorneys bear a special responsibility in civil commitment cases to zealously advocate for their client, and to make his wishes known to the court. A guardian ad litem has the responsibility to act in the best interests of the individual, which may run counter to the express desires of the individual facing confinement. The legal representative must have ample opportunity to prepare for the commitment hearing, including reviewing documents associated with the individual's case, and witness lists.

Individuals facing commitment also have the right to notice of an upcoming commitment hearing, as well as a fair and adequate hearing. The contours of what exactly are required in the hearing are defined by each state. Generally, the individual facing commitment has the opportunity to present evidence, call witnesses, and submit their own independent psychiatric evaluation. Individuals also have the right to be present at their hearing, and to have a record prepare to preserve factual issues for appeal.

The privilege against self-incrimination applies in civil commitment cases. The privilege can be asserted in situations where a patient is treated by a psychiatrist, but is not advised that the statements he or she is making can be used against them by the psychiatrist or the trier of fact. In such case, none of the statements the patient makes to the psychiatrist can be used against them. Additionally, the right to trial-by-jury is not required by most courts, however lower courts can decide to grant jury trials for commitment proceedings. In such cases, the decision to accord trials must be applied evenly, and juries must serve the same purpose throughout the jurisdiction. Many patients want jury trials because it allows for lay people to make a determination about whether the individual is truly a threat to their community.

Finally, institutionalized individuals in the United States have the right to periodic review of their confinement. This periodic review must be initiated by the State and the burden of proof in these proceedings rests with the state. If the original justification for confinement no longer exists, then the individual's liberty would be unduly restrained if they were confined any longer, and they must be released.

There are also procedures in place to provide for the appointment and termination of legal guardians for incompetent individuals. Laws affecting legal guardianships are developed by the states. In developing these laws, states in recent years have moved to craft a narrow process that

allows individuals to surrender only as much control over their affairs as is deemed necessary. In order to appoint a legal guardian, most states follow a process that requires the individual requesting guardianship to file a petition, requires the incompetent individual to be subjected to medical evaluation, and concludes with a hearing. Following this process, the court then requires monitoring and annual reports on the guardian's duties and activities.

There are numerous forms of legal guardians, including a guardian, guardian ad litem, a representative payee and/or a conservator appointed. The guardian ad litem represents the client's best interest, which may not always match with the wishes that the incompetent person expresses. Guardian ad litems may also consult with numerous other people, besides the client, to determine the client's best interest. Meanwhile, a conservatorship is solely limited to the representation of the business and property matters of an individual. The type of guardian appointed may also differ based on the incompetent individual's relationship with the guardian. For instance, "personal guardians" include family members and friends, as opposed to "public guardians" which could be any professional or non-for-profit corporation. Ultimately, it is up to the court to determine if a guardian will be appointed, what the scope of their representation will be, and the specific person who will act as the guardian.

During the course of a guardianship, states set requirements that govern the conduct and qualifications of legal guardians. These requirements vary from state to state, however all states require that individuals subject to guardianship are given due process protection through notification about the proceedings, appointment and representation of counsel, required presence at the hearing, and the right to a fair hearing. Beyond these requirements, various states have requirements pertaining to registration of guardians, regular evaluations, and even certification and licensure. Despite the differences between the states, the common trend is towards a more

humanistic and limited form of guardianship that lets the incompetent individual retain as much control over their affairs as possible.

Guardians tend to be appointed for a very long time, if not forever. Typically, a guardianship terminates upon death of the incompetent individual, when a minor becomes an adult, or on court order. A guardianship may also be terminated dependent on the progress of the particular type of disability or incapacity that the individual has. An incompetent individual can petition to terminate his or her guardianship relationship, and is entitled to a hearing on their request. The process of showing that a guardian is no longer needed was once very difficult, but has become increasingly easier through better procedural protections, refinement of burdens of proof, and new termination laws. This is an ever-evolving area of law.

Though individuals may be deemed incompetent, the Due Process Clause of the 14th Amendment also protects the substantive rights of these individuals. There are several fundamental rights that courts have identified as needing protection during the guardianship process. These include the right to refuse medical treatment, the right to procreate, the right to raise children, and the right to marry.

Case law allows incompetent individuals to retain their right to refuse medical treatment, but those rights are exercised through a surrogate decision-maker, such as a legal guardian. States are also entitled to craft safeguards that prevent abusive decisions by guardians, particularly in situations where ending life-sustaining treatment might be at issue. Incompetent individuals may be subject to sterilization if it is deemed to be in the incompetent individual's best interests. The surrogate decision maker must show that sterilization is in the best interest of the incompetent individual and that it is necessary and is the least intrusive means of contraception.

The right to raise children is also a fundamental right that must be protected. While the incompetent individual still has the same parental rights as any other citizen, the state also has a fundamental interest in protecting the interest of the child. Therefore, the state may terminate parental rights if it deems that it is in the best interest of the child. However, the incompetent parent still has the same rights during the termination process as any other parent. The right to marry is also guaranteed to incompetent individuals. However, the right may be deprived in certain states depending on their definition of incompetence. Laws that ban incompetent individuals from marrying are evaluated with strict scrutiny.

The Equal Protection Clause of the 14th Amendment also provides protections for the substantive rights of incompetent individuals. The Equal Protection Clause prohibits the government from engaging in and enforcing arbitrary or invidious discrimination, therefore the government must have logical and ample reasoning for discriminating in its laws. In evaluating laws pursuant to the Equal Protection Clause, the courts ask 1) what type of discrimination is involved, 2) what type of scrutiny will the courts apply to the discrimination; and 3) has the defendant justified the discrimination under the applicable standard of review. Based on the application of this test, the court will determine whether a law as it pertains to incompetent individuals is valid.

Finally, the United Nations Convention on the Rights of Persons with Disabilities was created to alter how countries treat persons with disabilities. The Convention seeks to promote international unity for how persons with disabilities are treated. The gathering of countries came together with the purpose of acknowledging the freedoms of those with disabilities. The Convention is seen as a symbol for international recognition of rights of those with disabilities, and to promote inclusion of those with disabilities. The United States has signed the treaty but,

similar to the Republic of Georgia, has yet to ratify it.

The procedural and substantive protections provided for incompetent individuals under the 14th Amendment's Due Process and Equal Protection Clause's serve as a comprehensive guide to how law in the United States treats the rights of incompetent individuals. In addition, the procedures and standards for appointment and termination of a guardianship provide an additional layer of understanding as to how the United States views the rights of incompetent individuals. Much of this law is determined by each of the 50 states, and many parts of the law are still evolving in each state. Finally, the recent UN Convention demonstrates a growing international consensus in regards to recognizing and taking action to protect the rights of incompetent individuals.

CASE APPENDIX

***O'Connor v. Donaldson*, 422 U.S. 563 (1975)**

Facts: Respondent Kenneth Donaldson was civilly committed as a mental patient in the Florida State Hospital in 1957. Donaldson's commitment was initiated by his father, who thought that Donaldson suffered from "delusions". A hearing was held before a local judge, who found that Mr. Donaldson was suffering from "paranoid schizophrenia", and ordered him to be committed to the Florida State Hospital. He was held at the hospital, against his will, for 15 years. Throughout the course of his confinement, Mr. Donaldson pleaded for his release, arguing that he was not mentally ill, did not pose a threat, and was not being treated anyway. In 1971, Donaldson bought suit against the hospital administrator, arguing that he had been maliciously deprived of his constitutional rights.

Issue: May a state continue to hold a mentally ill individual in confinement, even if they are not a danger to society, and can live safely in freedom?

Holding: A state cannot constitutionally continue to hold a nondangerous defendant, who can live safely in freedom.

Rationale:

- The court said that mere mental illness is not enough to justify confinement.
- The purpose of involuntary hospitalization is to provide treatment, and not merely to confine people. Therefore, if a person is not being provided treatment, and is not a danger to society, there is no constitutional reason for holding the person in custody.

***In re M.R.*, 638 A.2d 1274 (N.J. 1994)**

Facts: M.R. was a mentally-retarded 21-year-old woman with Down Syndrome. As M.R. got close to turning 21, she expressed a desire to move from her mother's house to her father's house. M.R.'s mother wanted M.R. to continue to stay with her, and therefore filed an action for legal guardianship of M.R. M.R. believed that her father would be more likely to heed her wises, and doctors who examined M.R. believed that M.R.'s social skills would develop more fully if she lived with her father.

Issue: Whether M.R. has the burden of proof to show that she has the capacity to choose which parent she would like to live with?

Holding: If M.R. expresses a preference to live with her father, the burden of proof is on the mother to show, by clear and convincing evidence, that M.R. is not competent to make that choice.

Rationale:

- The court cited a growing movement, evidenced by acts of Congress, and other New Jersey court cases, to recognize the voice of mentally ill in making their own decisions.
- The court also recognized that mental disability affects each individual differently. Therefore, persons with disabilities can differ widely in their ability to make decisions.
- Guardianship can be a drastic curtailment of liberty. Therefore, in some situations, it may be appropriate to appoint only a limited guardian, whether than a general guardian.
- If it is determined that M.R. needs a legal guardian, she may still be able to make some of her own decisions, and therefore, on remand, the lower court should decide whether to appoint a limited guardian or general guardian.

***Vitek v. Jones*, 445 U.S. 480 (1980)**

Facts: Jones was convicted of robbery and sentenced to a term of three-nine years in state prison. Jones was placed in solitary confinement where he subsequently lit his mattress on fire, and suffered severe burns. Jones was found to be suffering from mental illness, and, pursuant to Nebraska state law, was transferred to a state mental hospital, after determining that the state prison could not adequately provide for his treatment. Jones was not accorded any procedural Due Process rights before being transferred from the prison to the state mental hospital. Nebraska law provides that an inmate is only entitled to a hearing if the state wishes to keep him in the hospital following the expiration of their prison sentence.

Issue: Does the Due Process Clause of the 14th Amendment entitle Mr. Jones to procedural Due Process protections, such as notice, hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment?

Holding: Jones' involuntary commitment and transfer to the state mental hospital implicated Jones' liberty interest, and therefore he was entitled to the Procedural Due Process protections.

Rationale:

- Conviction for a crime does not give a state broad authority to not only confine persons in prison, but also subject them to involuntary commitment in a mental institution without Due Process.
- Commitment to a mental institution carries with it more of a burden then confinement in a prison. Commitment in a mental institution can trigger adverse social consequences for the committed individual that can result in having a stigma attached to them.
- If an ordinary person were to be subjected to this kind of involuntary civil commitment, without Procedural Due Process protections, it would certainly be an unconstitutional action. The same is true even for a convicted felon within a state prison. Even after being convicted and sentenced to prison, Jones still maintained a liberty interest.

***In re Gault,* 387 U.S. 1 (1967)**

Facts: A minor, Gerald Francis Gault, and his friend, Ronald Lewis were arrested as a result of a verbal complaint by the boys' neighbor wherein she alleged that the boys had called her via telephone and made lewd sexual remarks. Gault's parents were both gone at the time he was

arrested. No notice of Gault's arrest was left for his parents at their home. No other steps were taken to provide notice to the parents concerning their son's arrest. The parents did not learn that their son was in custody until that evening. Once the parents finally arrived at the detention facility, they were told that there would be a hearing on their son's matter the next day. A petition was filed with the court on June 9th, the day of the hearing, but not served on the Gaults. The petition contained no factual basis for a judicial action, saying only that the minor needed protection from the court. The initial hearing took place in Judge's chambers without the complainant. No one was sworn in, there was no transcript produced of the proceedings, and no memo or record of the substance of the proceedings was prepared. The Juvenile Court Judge who presided over the hearing, as well as the Gaults and a probation officer were the only source of information about the hearing. Gault's mother testified at the hearing that Gault told her that he merely dialed his neighbor's number, but that his friend Ronald was the one who made the remarks. The judge concluded the hearing by saying he would "think about it." Gault was taken back to the detention home that he was being held in, and was finally released on June 11th or June 12th. No explanation was offered as to why Gault was being detained, or why he was being released. Following, Gault's release, Gault's mother received a notice on plain paper stating that the judge had set June 15th at the next date for future hearings.

At the June 15th hearing, Gault was present with his parents, along with Lewis and his father, and the Superintendent of the Detention Center holding Gault. The complainant was not present at the hearing. The judge noted that the complainant didn't have to be at the hearing, and he made no effort to communicate with her. At this hearing, probation officers prepared a "referral report" and filed it with the court. This report was not shared with Gault or his parents. At the end of the hearing, the judge committed Gault to confinement in a juvenile delinquent facility for the duration of his minority, or unless released sooner by due process of law. Appeals are not permitted in juvenile cases arising out of Arizona. On August 3rd, a petition for a writ of Habeus Corpus was filed with the Superior Court of Arizona. At the hearing concerning the Habeus Corpus petition, the Juvenile Court judge who presided over Gault's previous hearings was cross-examined. When asked under what section of the code the judge found Gault delinquent, the judge responded that he used an Arizona statute that defines a delinquent child as one who is "habitually involved in immoral matters". When pressed to provide the basis for determining that Gault was "habitually involved in immoral matters", the judge cited an incident Gault was allegedly involved with two years earlier. There was no hearing and no accusation relating to the prior incident, but the judge still considered it a relevant factor.

The Superior Court dismissed the writ, and the Gault's appealed to the Arizona Supreme Court. The Arizona Supreme Court affirmed the dismissal of the writ.

Issue: Does the Juvenile Code of Arizona violate the Due Process Clause of the 14th Amendment because it allows juveniles to be confined to a state detention facility following a hearing in a Juvenile Court which has virtually unlimited discretion?

Holding: The Juvenile Code of Arizona does violate the Due Process Clause by 1) not providing adequate notice of the particular alleged misconduct in advance of court proceedings, such that the parties have a reasonably opportunity to prepare, 2) failing to make parties aware that they have the right to counsel in juvenile proceedings and that one will be provided for them if they

cannot afford one, and 3) testimony in juvenile cases should be under oath, and only competent, material and relevant evidence should be admitted into evidence.

Rationale:

- Juveniles are still subject to the same protections as adults. The safeguards that an adult in Gault's position would have, are not provided for in the Arizona Judicial Code. Just because judges in junvenile court's act in a "parental" role, it does not mean that proper procedural safeguards can be thrown out the door.
- An adult in Gault's position would be entitled to notice of charges, adequate time to decide how to respond, notice that he would be represented by counsel, and the opportunity to cross-examine and confront witnesses against him and to not incriminate himself.
- There is no risk of exposing the juvenile to public knowledge of the allegations against him by providing him with notice of the charges against him.
- The issue of whether a minor is found to be "delinquent" is akin to a felony prosecution for an adult, in that both pose a substantial risk of loss of liberty. Minors need the guidance of counsel to help them adequately prepare to face the charges against them, and to guide them through the criminal process.
- Laws in other states, and other collectives of legal professionals have recognized that the right to counsel is essential to aiding a minor in the criminal process.
- The manner in which the supposed statements were elicited did not have the certainty and order necessary for a proceeding with such severe consequences. There is nothing to suggest that a different rule concerning sworn testimony should apply to juvenile cases, as opposed to adult cases.
- Even though the juvenile might require special assistance, there is nothing to say that the privilege against self-incrimination should not apply in juvenile matters. The fact that juveniles also have a right to counsel in these proceedings should alleviate any concerns associated with granting this right to juveniles. The court cited other cases supporting the proposition that, absent a privilege against self-incrimination, minors may feel pressured in interrogation situations to admit to statements against their interest.

***Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala N.D. 1974)**

Facts: The plaintiff, Jean P. Lynch, was arrested pursuant to a warrant issued by a local Probate Judge. The warrant specified that Lynch did not have control of herself, and that an evaluation needed to be conducted to determine if she was insane. On that same day a panel of six jurors was summoned to the Court House for the purpose of determining whether Lynch should be confined to a mental institution. The plaintiff was not present at the hearing, was not represented by counsel, and was not advised of her right to counsel.

Issue: Does Alabama's involuntary civil commitment system violate the 14th Amendment Due Process protections of its citizens?

Holding: Alabama's system for formal commitment and emergency commitment to a mental institution violates the 14th Amendment Due Process rights of its citizens. Emergency detention is justified only for as long as it takes to conduct a probable cause hearing. If probable cause is

found, temporary detention may only last such time as it takes to arrange a full hearing on the need for commitment. Formal Commitment Proceedings must guarantee all basic Due Process Rights including; notice, presence of the person proposed to be committed, right to counsel, requisite finding to support an order of commitment, least restrictive alternative must be chosen, the opportunity to offer evidence and confront witnesses, have a trial by jury, maintaining a full record of proceedings, and being able to waive rights.

Rationale:

- Emergency detention of citizens may be necessary from time to time. If a citizen is detained in an emergency, there is a heavy burden on the state to justify this burden. The state must act without delay to bring this person before a judge for a probable cause determination.
- Due process is not characterized by the formality of the procedures. At the least it requires notice of the exact charges brought against you, the opportunity to be represented by counsel, and the opportunity to be present at hearings.
- Notice must be given with sufficient time to alert the parties to prepare.
- Due Process requires the presence of the person to be committed at any and all proceedings. This also includes the right to participate in the hearing.
- The individual subject to commitment has the right to have counsel represent them, and to be advised that counsel will be appointed if they cannot afford one.
- There are only certain circumstances where someone can be involuntarily committed, including whether that person is a threat to themselves or others.
- There also must be evidence of a recent over act that the defendant has committed that gives rise to a belief of dangerousness.
- The proposed commitment must be the least restrictive alternative necessary and available for the person's illness.
- The person subject to commitment must be able to offer evidence on his own behalf. This necessitates also, the right to confront and cross-examine witnesses. In addition, the right against self-incrimination is also present at each level of the process.
- A persons defined as insane who demands a writ of habeas corpus to determine his sanity is entitled to a trial by jury. Even though a constitutional right to trial by jury doesn't exist, it is preferable in most jurisdictions.
- A record must be prepared and maintained by the court and individuals subject to commitment can make a knowing and intelligent waiver of that right.

***Lessard v. Schmidt,* 349 F. Supp. 1078 (M.D. Wisc 1972)**

Facts: Alberta Lessard was picked up police officers at her residence and taken to a mental health center in Milwaukee. Lessard was then detained on an emergency basis at the center. At a hearing three days later, the arresting officers appeared before a judge at a hearing, without Lessard present, to make the case for Lessard's continued detention. The judge issued an order allowing Lessard to be confined for an additional ten days. Three days later, a petition was filed calling for Lessard's permanent confinement, stating that she suffered from schizophrenia. The judge ordered a physical exam of Lessard and issued another temporary detention order to extend Lessard's detention by 10 more days. The next day, the judge held an interview with Lessard. The judge informed Lessard that she would be undergoing an exam and that a guardian ad litem

would be appointed to represent her. Following this meeting, Lessard retained counsel on her own. Six days later, Lessard was notified that a commitment hearing had been scheduled for 8:30 AM the next day. The hearing was delayed in order to allow Lessard's attorney a chance to appear. At the resulting hearing, Lessard was allowed to testify, along with a police officer and three doctors. The judge ordered Lessard's commitment for 30 more days, and gave no reason for the order, except that he found Lessard to be "mentally ill". The judge then continued to extend Lessard's 30 day commitment order each month since the hearing.

Issue: Was Lessard denied her procedural due process rights through Wisconsin's procedure for emergency detention?

Holding: The Wisconsin civil commitment procedure is constitutionally defective due to the failure to provide for timely notice of the charges against the party and of the party's rights under the law, the ability to detain citizens for longer then 48 hours without a hearing on probable cause, detention longer than two weeks without a full hearing on the necessity for commitment, allows commitment based on a hearing in which the person charged is not represented by counsel, allows hearsay to be admitted, does not protect the citizen's right to be free from self-incrimination, allows commitment without proof beyond a reasonable doubt that the citizen is "mentally ill" and dangerous and doesn't allow less restrictive alternatives to commitment to be considered.

Reasoning:

- Notice and opportunity to be heard is a cornerstone of Procedural Due Process. The notice provided must be given far enough in advance to let parties prepare. In addition, in cases of emergency or sudden confinement, there must be an initial hearing, following confinement to determine if there is probable cause to continue to hold the individual. This hearing need not be formal, but must provide the chance for an evaluation of the probable cause to confine the individual. Also, since this is an emergency confinement, the scope of the initial hearing can be limited to just a probable cause determination, and the rest of the issues related to long-term confinement can be sorted out at another hearing shortly thereafter.
- By definition, "mental illness" means a mental disease that requires treatment in order to protect the individual or the protection of the community. The U.S. Supreme Court has said that this implies that courts should evaluate the person's potential to do harm. The potential harm must be large enough justify the deprivation of liberty that takes place through civil commitment.
- Civil commitment hearings should be held to the most stringent burden of proof because an individual will be deprived of basic civil rights and stigmatized by the lack of confidentiality of the adjudication. States set their own standards of proof, and many choose "beyond a reasonable doubt", which is the proper standard of proof in this case.
- Full-time hospitalization in a mental institution should be a last resort for courts, and other less restrictive alternative should be considered first.
- The assistance of counsel for a person facing commitment is essential at each stage of the proceedings, and should be made available as soon as possible. Counsel must have access to all reports, statements, and other documents related to the proposed commitment of

their client. The right to a jury by trial also necessitates having counsel early on to advise the client as to their rights and help the decision to pursue a jury trial.

- Statements made during the course of a physical exam should not be used to incriminate an individual is they are not informed of that possibility beforehand. Studies show that patients are more open with practitioners they feel they can trust. Criminal cases in which the privilege has been denied as it relates to mental exams are not applicable in the context of commitment proceedings.
- Hearsay evidence is weak, no matter what the nature of the proceeding is. There is no reason for distinguishing why hearsay evidence that would excluded during regular civil cases should not be excluded in commitment proceedings.

***Bell v. Wayne Co. General Hospital at Eloise*, 384 F. Supp 1085 (E.D. Mich. S.D. 1974)**

Facts: Plaintiffs bought a facial challenge to Michigan's statutory scheme for civil commitment. Michigan's scheme for civil commitment allows for three forms of commitment. The first form, known as "emergency detention" allows for the immediate detention of individuals when the lives of others are at stake, for a period of 5 days or 48 hours. This form of civil commitment was not challenged. The remaining two were challenged by the plaintiffs. The second form, otherwise known as "Temporary Detention", takes effect after commitment proceedings have been started, but before a final ruling on the issue of mental illness. This provision allows for consecutive confinements of 120 days at a time, making it possible to confine an individual for 240 days without a final determination of mental illness. The third form of commitment, not directly at issue, was indefinite commitment. This allows indefinite commitment of an individual following a determination of mental illness at a hearing.

Issue: Does Michigan's statutory scheme, specifically the "Temporary Detention" provision, violate the 14th Amendment's Due Process protections?

Holding: The Michigan Statute violates the Due Process Clause by being deficient in it's procedural protections. Though the plaintiffs focus their challenge on the "Temporary Detention" provision, parts of that provision are linked to other provisions of the statute and thus the entire statute fails to protect individuals' due process interest.

Reasoning:

- The statute does not provide for notice to be served on the individual facing commitment, therefore leaving them unaware of upcoming proceedings. There is also no rule of statutory construction that would allow a court to read the statute to provide for such service. Such service is necessary in order to give proper notice to the individual facing commitment.
- There is no provision in the statue providing for the right to counsel, and references to other sections of Michigan law are not sufficient.
- In addition, provisions providing for a guardian ad litem are not enough to interpret a right to counsel.
- The statute's language excusing a defendant from appearing in court in situations where a physician can certify that the defendant is not fit to come into court is premature, and

does not allow for case specific determinations of whether the individual is fit to appear in court.
- While the statute accords the right to a jury trial, it does not provide for informing the individual facing commitment of that right.
- The Michigan statute defines mental illness in an extremely broad way that doesn't get at the specific issue of dangerousness.

***Heller v. Doe*, 509 U.S. 312 (1993)**

Facts: Suit brought by respondents alleging that the state of Kentucky did not provide adequate procedural protections before institutionalizing people. Kentucky's statute provides avenues for citizens to petition for the commitment of an individual citizen for mental retardation or mental illness. The statute provides that the court must provide counsel for the individual facing commitment, unless he already has counsel. The court looks at the person who filed the petition and if there if probable cause to believe that the subject of the petition should be involuntarily committed, the court will order an exam of that individual by two physicians. The subject of the exam also has the option of having his own physician present to observe the exam.

If both physicians find that the individual meets the criteria for civil commitment, the court must conduct a preliminary hearing. A number of things happen at the preliminary hearing. The physicians reports must be accepted as evidence, and the person subject to the proceedings has the ability to call witnesses and to testify on their own behalf. In matters involving mental retardation, the Kentucky statute allows participating in the proceeding by family members and guardians. If probable cause to commit is found, the proceedings move to a final hearing. The statute provide that the rules governing this hearing are the same as those of a criminal proceeding. The standard of proof for commitment based on mental retardation was clear and convincing evidence. For commitment based on mental illness, the standard of proof was proof beyond a reasonable doubt.

Issue: Does the providing of a higher standard of proof for confinement based on mental illness as compared to confinement based on mental retardation, in addition to the provision allowing family members and guardians to participate in proceedings violate an individual's 14th Amendment Due Process protections?

Holding: Each challenged provision in the statute has a plausible rationale. This is enough to survive a rational-basis review of the challenged statute.

Rationale:
- Allowing family members and guardians to participate in the process can increase the accuracy of the proceedings. This is because these people tend to know the individual subject to commitment best, and will most likely have their best interests at heart.
- Family members and guardians may even have interests that are opposite of the person facing commitment, however it is presumed that family members and guardians have the best interests of the subject of the proceedings in mind.
- The purpose of due process is to provide a process that is fair and open, not one that favors one side or the other.

- The difference in the burdens of proof for mental retardation and mental illness can be explained by difference in the ease of diagnosing each form of illness, and the accuracy of future predictions about dangerousness, in addition to the type of treatment that will be required after commitment.

***Logan v. Arafeh,* 346 F.Supp 1265 (2nd Cir. 1983)**

Facts: Plaintiffs challenge Connecticut's civil commitment statute as being unconstitutional. Specifically, the plaintiff challenges the state's "emergency commitment" statute, contending that the waiting time between a determination that a person is a danger to themselves or others and a final declaration by the court is unreasonably long. Connecticut's statute allows for a 45 day period of confinement between a finding of dangerousness and a final ruling as to commitment.

Issue: Does Connecticut's civil commitment statute violate citizens' Procedural Due Process protections?

Holding: The 45 day allowance is not unreasonable and does not violate the constitution.

Rationale:

- The court acknowledged that there could be some benefits in allowing a slightly longer wait time, such as allowing medical professionals time to conduct a thorough analysis of the individual's medication condition, in order to determine mental health.
- In addition, there is a mechanism set up to allow an individual to challenge their confinement while they are waiting for a final determination on their commitment.

ADDITIONAL SOURCES ON THE ISSUE OF LEGAL GUARDIANSHIPS

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