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Defects, Due Process, and Protective Proceedings

Should the requirements of due process in protective proceedings be any lower than those in criminal, juvenile, or civil commitment cases? The authors argue emphatically no.

By Susan G. Haines and John J. Campbell

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. . . . Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹

The purpose of protective proceedings is to protect and assist those individuals who lack the capacity to care for themselves or manage their property.² However, from the perspective of the person to be protected, the appointment of a

guardian or conservator can be both harsh and humiliating. In a 1987 report, the House Special Committee on Aging eloquently described the consequences of appointment this way:

The typical ward has fewer rights than the typical convicted felon—[he] can no longer receive money or pay [his] bills. . . . By appointing a guardian, the court entrusts to someone else the power to choose where [he] will live, what medical treatment [he] will get and, in rare cases, when [he] will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen. . . .³

Under the 14th Amendment,⁴ the states may not deprive any person of liberty or property without due process of law. Since protective proceedings will usually restrict an individual's liberty or access to property, the protection sought must be applied through due process of law. Unfortunately, the application of due process to protective proceedings is often nonexistent, insufficient, or ignored.

This article discusses due process considerations⁵ in light of the holding in *Mathews v. Eldridge*,⁶ then discusses considerations of procedural due process in the context of adult guardianship and conservatorship proceedings.

Does Constitutional Due Process Apply to Guardianship and Conservatorship Proceedings?

Analysis of Mathews v. Eldridge: Due Process Considerations

When a state action, such as a conservatorship proceeding, impairs a constitutionally protected liberty or property interest, the state

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must institute procedures to safeguard that interest.⁷ The determination of whether a particular set of procedures is constitutionally adequate is governed, in part, by the holding of the U.S. Supreme Court in *Mathews v. Eldridge*.⁸

In *Mathews v. Eldridge*, the original plaintiff, Mr. Eldridge, had been receiving disability benefits under the Social Security Act. Four years after his benefits began, the Social Security Administration unilaterally determined that he was no longer disabled and discontinued his benefits without prior notice and a hearing.⁹ The issue addressed by the Court in *Mathews* was whether the Fifth Amendment due process clause¹⁰ requires that a recipient of Social Security disability benefits be afforded an opportunity for an evidentiary hearing before those benefits are terminated.¹¹ Mr. Eldridge argued that his entitlement to a hearing prior to termination of benefits was mandated by the Court's ruling in *Goldberg v. Kelly*.¹²

Relying heavily on its earlier due process analysis in *Goldberg*,¹³ the *Mathews* Court set forth a three-prong analysis to determine whether due process required such an advance hearing. The analysis involved (1) the private interest that will be affected by the official action; (2) 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 (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹⁴

In *Goldberg*, the plaintiff class asserted that the 14th Amendment due process clause required a full hearing before the state of New York could terminate their AFDC benefits.¹⁵ Prior to *Goldberg*, procedural due process analysis had progressed from the simple proposition that due process required only notice and an opportunity to defend.¹⁶ By the time the *Goldberg* case came before the Court, due process analysis had evolved to require the balancing of two factors: the individual liberty or property interest involved and the governmental interest involved.¹⁷ The Court in *Goldberg* weighed the individual interest in avoiding a wrongful loss of AFDC benefits against two governmental interests which actually were at cross purposes: the government's interest in not wrongfully depriving eligible AFDC recipients of their benefits; and the govern-

ment's interest in a speedy and summary adjudication.¹⁸

The *Goldberg* Court, relying on Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,¹⁹ then expanded the traditional due process analysis by holding that the extent of procedural due process protection required was also influenced by the extent to which the individual might be "condemned to suffer grievous loss."²⁰ The Court gave great weight to the fact that the plaintiffs had been receiving benefits based solely on financial need, such that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."²¹ The Court held that, in the case of these financial needs-based benefits, a pretermination hearing was required by the due process clause of the 14th Amendment.

By the time the Court decided *Goldberg*, the old two-factor balancing test was under severe criticism, as exemplified by Justice Black's dissent in that case.²² In practice, as Justice Black pointed out, the determination of applicable due process standards had come to depend almost exclusively on the importance of the individual interest involved.²³ Hence, the Court's subtle expansion of the traditional due process analysis in *Goldberg* was not only an attempt to assuage some of that criticism, but also the springboard for the next step in the evolution of due process analysis.

The three-factor analysis defined in *Mathews* was not a new approach to due process analysis at all. Rather, it was a recognition of the manner in which the old two-factor analysis had evolved and had actually come to be applied through *Goldberg*: that is, balancing individual liberty or property interests against the government's interests in exercising its powers and in preserving fiscal resources and, in addition, considering the risk of "grievous loss" to the individual.²⁴ The *Mathews* Court acknowledged the expanded analysis actually used in the *Goldberg* case and restated the parameters of due process analysis in recognition of this reality.

The year after *Mathews*, the Court specifically relied on the *Mathews* test in determining a 14th Amendment due process challenge directed at administrative procedures in the state of New York regarding the relocating of foster children, thus officially making *Mathews* applicable to 14th

Amendment cases.²⁵ In 1979 the *Mathews* test was given broad 14th Amendment applicability in the case of *Parham v. J.R.*,²⁶ which involved a challenge to Georgia's proceedings for institutionalizing disturbed children.²⁷ Four years later, in *Hewitt v. Helms*,²⁸ the Court held that "[u]nder *Mathews v. Eldridge*, we consider the private interests at stake in a government decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the 14th Amendment."²⁹

The three-prong analysis stated in *Mathews*, created originally to address 5th Amendment due process questions in the context of administrative procedures,³⁰ has since come to be recognized by the Court as the applicable analysis in all cases in which state procedures are challenged on due process grounds under both the 5th and 14th Amendments.³¹

Application of *Mathews v. Eldridge* to Due Process Analysis in Guardianship and Conservatorship Proceedings

The Court in *Mathews*³² observed that procedural due process must be accorded to any government action that deprives individuals of "liberty" or "property" interests within the meaning of the due process clause of the 5th and 14th Amendments.³³

Individual Interest

The first part of the *Mathews* balancing test requires that the individual liberty or property interests in question be identified and evaluated. In general, guardianships and conservatorships place a third party in control of the ward's person and property, respectively. That third party is then able to make decisions for the ward without the ward's input. The constitutionally protected individual interests implicated in a guardianship proceeding include the right to choose where to live and with whom to associate, the right to make medical decisions regarding one's body, the right to marry and to freely associate, the right to travel or pursue in privacy the activities of daily living, and the right to be free from unwanted constraints or incarceration.

Generally, a guardian has the same powers, rights, and duties respecting his or her ward that a parent has respecting an unemancipated minor child, except that the guardian is not required to provide for the ward and is generally not liable to third persons for acts of the ward.³⁴ The guardian

also may be empowered to give any consent or approval that may be necessary for the ward to obtain medical treatment or other professional care, counseling, or services,³⁵ including the placement of the ward in a locked environment. Thus, the appointment of a guardian can result in the deprivation of significant liberty interests, at least some of which may be fundamental in nature.³⁶

In a protective proceeding involving a conservator, the protected person may be deprived of the general right to own and use property (as distinguished from a specific property interest).³⁷ This right has been held to constitute "an essential precondition to the realization of other basic civil rights and liberties . . ."³⁸ and "no less than the right to speak or the right to travel, [it] is in truth a 'personal right.'"³⁹ The individual interests implicated in both guardianships and conservatorships would intuitively appear to be of the most fundamental importance, thereby justifying the application of the broadest due process procedures.

The Risk of Erroneous Deprivation of Individual Interest

The first and second prongs of the *Mathews* test focus on the individual's interest that is affected by the government's action. The second prong, in particular, examines the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional procedural safeguards."⁴⁰ When considering this factor, the court should examine the extent to which the procedure in question may reduce the risk that the individual will be erroneously deprived of fundamental liberties.⁴¹

It is not the deprivation of a liberty interest that is subject to due process scrutiny. Rather, it is the erroneous deprivation of that liberty interest that must be protected with due process. The risk of erroneous deprivation of an individual interest can be minimal, as in *San Diego Department of Social Services v. Moore*,⁴² where the state provided the ward with numerous opportunities to challenge the conservatorship and also the reestablishment of the conservatorship. However, in instances where a conservatorship or guardianship is issued *ex parte*, as in the case of *In re Evatt*,⁴³ and the ward does not have an opportunity to be present at a hearing or meaningfully object to the protective proceeding, the risk of erroneous deprivation of liberty is high.

The State's Interest

The third prong of the *Mathews* analysis involves identifying the government's interest that the state procedure in question is to further and balancing that interest against the individual interests. That is, if the state procedure is allowed to stand, what governmental interest will be preserved? And finally, if the governmental interest is important, but the risk of erroneous deprivation to the individual is high, what will be the fiscal and administrative costs to the state in changing its procedures? In the context of protective proceedings, the state's interest is most often in protecting the well-being of those individual citizens who are not able to care for themselves, where the sole criterion for the state is the "best interests" of the individual. This interest is commonly expressed as the state's *parens patriae* power and is the driving force behind protective proceedings.⁴⁴

The United States Supreme Court, in *Parham v. J.R.*,⁴⁵ recognized that there may be instances where the costs of additional procedures, including fiscal, administrative, and intangible costs, outweigh a significant intrusion on personal liberty. At issue in *Parham v. J.R.*⁴⁶ was the constitutionality of Georgia's procedures for admitting a child for treatment to a state mental hospital. Under Georgia's statute at the time, the following procedures were required to voluntarily admit a child to a state mental hospital: (1) A parent or guardian of the child must sign an application for hospitalization; (2) the superintendent of the hospital could temporarily admit the child for observation and diagnosis; and (3) upon a finding by the superintendent that there is evidence of mental illness and that the child is suitable for treatment, the child could be admitted.⁴⁷ The statute also provided that any patient who had been hospitalized for more than five days could be discharged upon the request of a parent or guardian. In the absence of such a request, the hospital had the affirmative duty to discharge any patient who has recovered or sufficiently improved so as not to need hospitalization as determined by the superintendent.⁴⁸

Georgia's scheme was challenged in a class action suit by patients of the state mental hospitals on the basis that Georgia's statute violated due process because the children were never given a hearing prior to or subsequent to hospitalization. The Federal District Court for the Middle District of Georgia held that the Georgia statute was

unconstitutional and that, at a minimum, due process required that the child receive notice and an adversarial-type hearing before an impartial tribunal.

The U.S. Supreme Court overruled the district court's decision and found that Georgia's procedures for admitting children to mental hospitals provided adequate due process. In reaching its decision, the Court balanced the impact of an adversarial hearing on the family unit, as well as the cost of overhauling Georgia's statutory scheme, against the risk that a child will be erroneously placed in the institution. The Court concluded that the "cost" of implementing an adversarial-type hearing, including both monetary costs and intangible costs to the family unit, outweighed the risks that a child would be erroneously institutionalized.

Applying the Mathews Test

Courts in various states have used the *Mathews* test to determine the constitutionality of statutes relating to wards or protected people as well as the constitutionality of statutes authorizing conservatorships and guardianships. In the case of *In re Branning*,⁴⁹ the Illinois Court of Appeals had to decide the constitutionality of a state statute that authorized a guardian to consent to electroconvulsive therapy (ECT) for an elderly ward with only court approval. In applying the *Mathews* test, the court found that the ward's liberty interest in refusing unwanted ECT was significant because the therapy was invasive and had significant side effects.⁵⁰ The risk of erroneous deprivation of the ward's liberty was substantial because the statute's only procedural requirements were that (1) the guardian's consent to the therapy must be informed, (2) the guardian must believe the treatment is in the ward's best interests, and (3) a court approve the guardian's consent.⁵¹ There were no requirements that the court receive input from any healthcare professional, or even require proof that the ward was incapable of making rational choices for himself. When compared against the state's *parens patriae* interest,⁵² the risk of erroneous deprivation of the ward's liberty outweighed the fiscal and administrative burdens that additional procedural safeguards would provide.⁵³

The Supreme Court of Arkansas in *In re Evatt*⁵⁴ used the *Mathews* test to determine whether that state's temporary guardianship statute was unconstitutional. In that case, an Arkansas probate court,

acting pursuant to a statutory provision, signed a 90-day *ex parte* order of temporary guardianship of the person without any notice to the proposed ward.⁵⁵ After the hearing, at which the ward was not present, the sheriff picked up the ward and detained him in the local jail. Arkansas' statute authorizing temporary guardianships did not require, or even authorize, an immediate hearing following the entry of the initial order, and so none was held. On appeal, the ward argued that the temporary guardianship statute denied him procedural due process because the statute authorizes temporary guardianships without notice and did not authorize a hearing after the guardianship was granted.⁵⁶ Applying the *Mathews* test, the court found that the private interests affected by the official action in a temporary guardianship of the person and of the estate are the rights to control the ward's person and property, respectively, for up to 90 days. The court stated that "[i]n essence, the interests affected are the freedom and property of the ward. To place a guardian in control of these interests is to deprive a ward of basic rights. . . . [T]he interests affected are sufficient to require procedural due process."⁵⁷

The *Evatt* court concluded that by not providing the prospective ward with notice of the proposed protective proceeding and an opportunity to be present at a hearing and to examine and cross-examine witnesses, Arkansas' temporary conservator statutes substantially increased the risk that the individual could be erroneously deprived of fundamental liberties. In balancing the *Mathews* factors, the court noted that the state's interest in exercising its benevolent *parens patriae* power to protect incapacitated persons from injuring themselves or others is compelling. In fact, the court noted that there might be situations where advance notice could defeat the statute's purposes; that is, the incapacitated person might flee or harm himself or herself or others before the hearing could be held. Therefore, the court held that advance notice of the *ex parte* hearing is not necessary to comply with due process because the state's *parens patriae* outweighed the individual liberty interest. However, the court found that the risk of someone being detained for up to 90 days without a hearing was substantial, and there were no procedural safeguards to prevent such an occurrence.⁵⁸ Procedural safeguards, designed to prevent the wrongful incarceration of an individual,⁵⁹ were administratively

feasible and did not outweigh the substantial risk that someone might be wrongfully deprived of his or her liberty.

State procedures were similarly examined by the California Court of Appeals, but with different results. In *San Diego Department of Social Services v. Moore*,⁶⁰ the California Court of Appeals was asked to decide whether that state's statute allowing a conservator to reestablish a mental health conservatorship, after the expiration of the initial conservatorship period,⁶¹ through *ex parte* procedures was unconstitutional.⁶² The court reasoned that while the reestablishment of a conservatorship intruded upon the ward's liberty interests, the statute provided for meaningful notice to the ward and an opportunity to oppose the new conservatorship. The court also found that the risk of erroneous deprivation was significantly reduced by the fact that the statute allowed the ward to directly and immediately challenge the *ex parte* reestablishment.⁶³ Unlike Arkansas, the California court found that California's procedures reduced the risk of erroneous intrusion on the ward's liberty.⁶⁴

In *State ex rel. McCormick v. Burson*,⁶⁵ the petitioner, Mr. McCormick, challenged the constitutionality of Tennessee's conservatorship statute on the basis that the statute did not provide for automatic review of the ward's incompetency after the establishment of the conservatorship. The statute at issue contained extensive procedural requirements prior to the appointment of a conservator, such as the right to a jury trial, the right to be present at all hearings and present evidence, and the right to an attorney.⁶⁶ In addition, the statute provided that (1) the court could discharge the conservator if it found that the ward was no longer disabled; (2) the ward or anyone acting on his or her behalf can petition the court at anytime for dissolution of the conservatorship; (3) the petition can be made by any means, including oral communication or an informal letter; and (4) upon receipt of the petition, the court is required to hold a hearing in which the ward has all of the rights that he or she had in the initial competency hearing.⁶⁷

Mr. McCormick did not challenge these state procedures for establishing the conservatorship. Rather, he contended that the statute did not provide a method for determining whether the ward remained incompetent after establishment of the conservatorship and that the state should have to prove that the ward is, and will remain, incompe-

tent in the future.⁶⁸ In particular, the petitioner contended that the statute should require that (1) annual physician affidavits be filed with the conservator's affidavit; (2) the state to give notice to each ward of his or her right to have a hearing to dissolve the conservatorship; (3) a ward have unlimited access to his or her medical records; and (4) the conservator bears the burden of proving in subsequent hearings that the ward remains incapacitated.

In examining McCormick's challenge, the court found that "[a]t some point, the benefit of an additional safeguard to the individual . . . and to society . . . may be outweighed by the cost."⁶⁹ The procedures requested by the petitioner were not justified, the court found, in light of the ease with which any ward could request a meaningful hearing at any time. In balancing the interests of both the state and the individual, the court stated that Tennessee's "simple procedure for contesting incompetency, especially in light of the interest in containing costs to the estate of wards and itself, affords adequate due process."⁷⁰ The McCormick court reasoned that the risk of erroneous deprivation of the ward's freedom was minimal because simple procedures were already available to the ward to request a hearing to reevaluate his or her competency. Therefore, those risks were outweighed by the monetary and administrative costs of additional procedures.

Courts May Not Impose "Protection" of Guardianship or Conservatorship Without Protecting Due Process Rights

The West Virginia Supreme Court, in *State ex rel. Shamblin v. Collier*,⁷¹ eloquently explained the relationship between protective proceedings and constitutionally protected liberty interests this way:

It is axiomatic that a declaration of incompetency and the resulting appointment of a committee, guardian, or conservator to oversee an individual's affairs may affect constitutionally guaranteed liberty interests: One of the historic liberties which is protected by the due process clauses . . . is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Appointment of a guardian results in a massive curtailment of liberty, and it may also engender adverse social consequences. The guardian becomes the custodian of the person, estate and busi-

ness affairs of the ward; the guardian dictates the ward's residence; the ward's freedom to travel is curtailed; and the ward's legal relationship with others is limited.⁷²

The appointment of a guardian or a conservator will always involve the deprivation of liberty or property interests to some degree. Therefore, *Mathews v. Eldridge*⁷³ would seem to require that some due process protections are necessary in every guardianship and conservatorship proceeding. Both the Tennessee and Arkansas supreme courts have recognized that the three-pronged analysis set forth in *Mathews* must be applied to determine what procedural due process is required constitutionally in guardianship and conservatorship cases.⁷⁴ The Tennessee Supreme Court, determining the constitutionality of Tennessee's conservatorship statute in *State ex rel. McCormick v. Burson*,⁷⁵ stated that "[i]n *Mathews*, . . . the United States Supreme Court outlined the factors to consider when analyzing a case such as this."⁷⁶ Thus, *Mathews* and its progeny, at both the state and federal⁷⁷ levels, would seem to require that the three-part analysis in *Mathews* be used to determine whether a particular set of procedures is constitutionally adequate in guardianship and conservatorship proceedings.

What Procedures Are Necessary to Adequately Protect Due Process Rights?

Assuming that an analysis of the three-prong test in *Mathews v. Eldridge* yields the conclusion that the doctrine of due process must be applied in protective proceedings, the question remains: What process is due? Depending upon the importance of the individual interest or interests at stake, the degree of due process required could range from the minimum of notice and a right to be heard⁷⁸ to the full panoply of due process rights afforded to criminal defendants.⁷⁹

The most fundamental of liberties are at stake for the individual ward or protected person in a protective proceeding. At stake for the government in this proceeding is its *parens patriae* power. The risk for wrongful deprivation of individual rights through use of that governmental power is enormous. What remains is to determine the particular due process protections necessary in guardianships and protective proceedings.

Civil Commitment Proceedings

In *In re Gault*,⁸⁰ the U.S. Supreme Court first held that the rights to counsel, to confrontation, to confront and cross-examine witnesses, to freedom from compulsory self-incrimination, and to exclusion of hearsay evidence, all required by the due process clause of the 14th Amendment in the criminal context, must also be applied in the context of juvenile court proceedings, where delinquency matters are determined.⁸¹ In so holding, the Court looked beyond the semantic differences between “criminal” and “civil” proceedings and focused on the fundamental liberties that are at stake in both proceedings. The Court added other 14th Amendment due process protections to juvenile proceedings in succeeding cases.⁸²

The opinion in *Gault*⁸³ opened the door for application of stricter due process protections in other civil cases. In *Heryford v. Parker*,⁸⁴ the U.S. Court of Appeals for the Tenth Circuit found the *Gault* case controlling when it held that defendants in civil commitment proceedings were entitled to be represented by counsel.⁸⁵ The court went even further *in dicta*, stating that all 14th Amendment due process protections should also be required in civil commitment cases.⁸⁶ In so holding, the 10th Circuit stated:

It matters not whether the proceedings be labeled “civil” or “criminal” or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.⁸⁷

In 1972 the U.S. Supreme Court held in *Humphrey v. Cady*⁸⁸ that the availability of a jury trial in civil commitment cases was required by due process and recognized the “massive curtailment of liberty” at stake in civil commitment proceedings.⁸⁹ That same year, the U.S. District Court for the Eastern District of Wisconsin required that civil commitment defendants be afforded the right to counsel, the right to freedom from compulsory self-incrimination, the right to meaningful advance notice and full evidentiary hearing, the right to exclusion of hearsay evidence, and the right to require the government to prove all of the elements

of its case beyond a reasonable doubt.⁹⁰ The *Lessard* court further required strict standards as to what constitutes “incompetency,” based on the issues of “vagueness” and “overbreadth” contained in the concept of substantive due process.⁹¹ Following the Supreme Court in *Humphrey v. Cady*, at least one state supreme court has held that all procedures required in criminal proceedings must be afforded in civil commitment cases as well.⁹²

In *People v. Lane*,⁹³ the Court recognized the holding in the *Humphrey* case and noted the importance of the constitutional right at stake when making a determination for long-term commitment for a minor. The Court stated that it must “carefully scrutinize”⁹⁴ the proof in every case, and held that “hearings before the court . . . shall be conducted in the same manner as other civil proceedings.”⁹⁵

Protective Proceedings

The rationale behind applying due process so vigorously in civil commitment cases is applicable to protective proceeding cases, as the same fundamental liberties are involved⁹⁶ and the state interest in protective proceedings is even less compelling. The interest is less compelling because civil commitment proceedings deal with society’s interest in protecting itself from dangerous individuals,⁹⁷ while in protective proceedings, rarely is the person to be protected a danger to anyone but himself.⁹⁸ For instance, the *Lessard* opinion continually refers to the *parens patriae* power by name, yet the court’s holding suggests that it is really talking about the police power.⁹⁹ The result is that judicial scrutiny of the exercise of the *parens patriae* power has been imprecise, and the state’s *parens patriae* power in guardianship and conservatorship proceedings has historically been exercised with little or no concern for due process protections.¹⁰⁰ However, the *parens patriae* power, whose purpose is to protect the incompetent individual’s best interests, constitutes a much less “important” power from the government’s perspective than does the police power, whose purpose is to protect society at large, as well as the individual, from actual danger. The duty to monitor and maintain state health rests with the state governments and their respective agents.¹⁰¹ The “police power” granted to each state is not formally given, accepted, or outlined in any particular state or federal constitution. It is not a

rule of law.¹⁰² In fact, the source of the power stems from the nature of our institutions and their obligation to protect their citizens.¹⁰³

The exact meaning of the term has been the cause of much debate. Because of its great scope and evolving nature, it is difficult for authorities to agree on one specific definition.¹⁰⁴ However, despite the lack of consensus as to the term's precise definition, many authorities seem to describe the gist of the term in a manner similar to the following:

This police power of the State . . . extends to the protection of the lives, limbs, health, comfort, and quiet of all persons. . . . And again [by this] general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state.¹⁰⁵

Finally, there is as great a risk in protective proceedings, if not greater, that less than the strictest procedures could result in wrongful deprivations of liberty and property. This is so because protective proceedings often result in "permanent orders" that endure for years, while civil commitment proceedings are often for "short-term" treatment. Further, protective orders often result in the complete loss of freedom for the ward and the complete deprivation of the ward's property.

Under the circumstances present in a protective proceeding, the authors postulate that the very highest due process protections must be required. As Judge Sprecher stated on behalf of the court in his opinion in *Lessard*, "The importance of the interests involved in this situation are the highest, in that the deprivation of liberty necessarily is one based on status and not on the alleged commission of an act deemed criminal by society."¹⁰⁶

Often, the ward is not completely incapacitated, nor has his condition led him to engage in criminal behavior. Despite this, the incapacitated person is afforded less stringent procedural protection than that afforded to the criminal defendant or the mentally ill. It is unclear which compelling state interest would justify the involuntary restriction of the innocent but feeble-minded with less due process than the mentally ill and/or the criminally minded.

There is no cogent reason why the due process standard in protective proceedings should be any lower than those applicable in juvenile, criminal, or civil commitment cases. From a constitutional per-

spective, the minimum requirement of due process in guardianships and protective proceedings requires every protection afforded to a criminal defendant or the mentally ill. Those protections are (1) proper notice and hearing;¹⁰⁷ (2) the opportunity to confront and cross-examine adverse witnesses;¹⁰⁸ (3) a mandated standard of proof beyond a reasonable doubt or clear and convincing evidence;¹⁰⁹ (4) appointment of counsel;¹¹⁰ (5) freedom from compulsory self-incrimination;¹¹¹ (6) the right to be present at any hearing;¹¹² (7) the right to exclusion of hearsay and other unreliable evidence;¹¹³ (8) the right to a jury trial;¹¹⁴ and (9) the right, on appeal, to a transcript of the record at the state's expense, if indigent.¹¹⁵

Conclusion

There may be instances in law where our intuitive, ethical sense about due process considerations should be suspended. For example, we suspend due process in the mental health arena when individuals are in danger of harming themselves or another. We apprehend the individual, halting the danger first, then concern ourselves with the autonomy of the individual and due process considerations.

Protective proceedings are an example of instances in the law when not only is due process suspended occasionally, but our intuitive, ethical sense tells us that in these instances due process should, on occasion, be suspended. When an individual's incapacity is such that, given the time for notice and a hearing, the individual will be grievously injured or his or her property will be dissipated, it seems proper that due process should then be temporarily suspended. However, absent such a dire emergency, all precautions must be taken to preserve and protect the individual's constitutional rights.

The abuses of due process have been, and continue to be, harsh and devastating to those whose rights are violated. Only broad, comprehensive statutory reforms, aimed at striking the delicate balance between the rights of individual liberty and the needs of those unable to exercise those rights due to disability or incapacity, can remedy the abuses.

Endnotes

1. John Stuart Mill, *ON LIBERTY* 11 (Gertrude Himmelfarb ed., Penguin Books 1985) (1930).

2. While guardianships and conservatorships can be established due to the legal disability of minority, this discussion of guardianships and conservatorships is confined exclusively to proceedings involving adults perceived to be incapacitated or unable to manage their property and affairs.
3. Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 MD. J. CONTEMP. LEGAL ISSUES 191, 197 (1995–96) (quoting the House Subcommittee on Health and Long-Term Care of the House Special Committee on Aging, H.R. DOC. NO. 100-641, at 4 (1987)).
4. U.S. CONST. amend. XIV.
5. Other constitutional issues presented in protective proceedings, such as equal protection, the right to counsel, and the privilege against self-incrimination, are beyond the scope of this article. In this article, the authors are concerned exclusively with procedural due process, but nevertheless, speculate that protective proceedings as applied in Colorado may discriminate against the elderly. That is, while not addressing the issue here, the authors theorize that Colorado statutes relating to protective proceedings may be unconstitutional on equal protection grounds as well. For a lengthy and recent analysis of equal protection, see *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, No. 95-1858, 1997 U.S. LEXIS 4038 (June 26, 1997). See also *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988); *Clark v. Jeter*, 486 U.S. 456 (1988); *Bowen v. Owens*, 476 U.S. 340 (1986); *City of Clerburne v. Clerburne Living Center, Inc.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Plyer v. Doe*, 457 U.S. 202 (1982); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1962); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *supplemented*, 349 U.S. 294 (1954).
6. 424 U.S. 319 (1976).
7. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968).
8. 424 U.S. 319 (1976).
9. See *id.* at 323–24.
10. Even though it was the Fifth Amendment due process clause that was technically invoked, the Court, *in dicta*, discussed its due process analysis in terms of the 14th Amendment as well. See *id.* at 332.
11. See *id.* at 323.
12. See *id.* at 325 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).
13. 397 U.S. 254 (1970).
14. See *Mathews*, 424 U.S. at 335.
15. See 397 U.S. at 256.
16. See *Simon v. Craft*, 182 U.S. 427, 437 (1901).
17. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).
18. See *Goldberg*, 397 U.S. at 263, 264–65, 266.
19. 341 U.S. 123 (1951).
20. *Goldberg*, 397 U.S. at 263.
21. *Id.* at 264.
22. Justice Black criticized the traditional balancing test, stating that it had degenerated into the “weighing of the government’s pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual.” *Id.* at 278.
23. See *id.*
24. See *Mathews*, 424 U.S. at 334–35.
25. See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).
26. 442 U.S. 584 (1979).
27. See *id.* at 584–89.
28. 459 U.S. 460 (1983).
29. *Id.* at 473 (citation omitted).
30. See *Medina v. California*, 505 U.S. 437, 444 (1992).

31. *See id.* at 444 (quoting *Parham* 442 U.S. at 599); *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Zinerman v. Burch*, 494 U.S. 113, 127–39 (1990). The *Mathews* analysis is used in all cases, that is, except where state criminal procedures are challenged. Although the Court began to apply the *Mathews* test in the context of 14th Amendment criminal due process analysis in two cases (*United States v. Raddatz*, 447 U.S. 667 (1980), and *Ake v. Oklahoma*, 470 U.S. 68 (1985)), the Court later backtracked and held that the *Mathews* test was not the proper analytical approach when there is a due process challenge to state criminal procedures. *See Medina v. California*, 505 U.S. 437, 445 (1992).
32. 424 U.S. 319 (1976).
33. *See id.* at 332.
34. Colo. Rev. Stat. § 15-14-312(1). Colo. Rev. Stat. § 15-14-312(1)(a) provides that to the extent consistent with the order appointing him, the guardian “is entitled to custody of the person of his ward and may establish the ward’s place of abode within or without this state.”
35. Colo. Rev. Stat. § 14-14-312(1)(c). The order appointing the guardian must specify the extent of this power.
36. *See Cruzan v. Director, Mo. Dep’t. of Health*, 497 U.S. 261 (1990); *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *In re Winship*, 397 U.S. 358 (1970); *Loving v. Virginia*, 388 U.S. 1 (1967); *In re Gault*, 387 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
37. An individual’s interest in property has historically been afforded less importance than his or her interest in personal liberty. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in a protective proceeding, it is more than the protected person’s interest in specific items of property that is affected; it is his or her right to own, use, or possess any property at all. While this is a subtle distinction, it is one that is vital to a proper due process analysis, especially where this right is specifically protected under the Colorado Constitution, art. II, § 3.
38. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972).
39. *Id.* at 552.
40. *Mathews*, 424 U.S. at 335.
41. John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, *CONSTITUTIONAL LAW* 490 (3d ed. 1986).
42. 229 Cal. Rptr. 875 (Ct. App. 1986).
43. 722 S.W.2d 851 (Ark. 1987).
44. *See People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). Both cases address due process considerations in the context of commitment proceedings.
45. 442 U.S. 584 (1979).
46. *See id.*
47. *See id.* at 591.
48. *See id.*
49. 674 N.E.2d 463 (Ill. App. Ct. 1996).
50. *See id.* at 468.
51. *See id.* at 469.
52. The *parens patriae* interest in this case is the state’s interest “in providing for persons who, while suffering from a serious mental illness or developmental disability, lack the capacity to make reasoned decisions concerning their need for medication.” *Id.* at 468 (quoting *In re C.E.*, 641 N.E.2d 345, 353 (Ill. 1994)).
53. *See id.* at 472. The court identified the following procedural safeguards: (1) A hearing must be held with the ward present, at which the ward must be allowed to present and cross-examine witnesses; (2) the ward must receive competent assistance at the hearing; and (3) at the hearing, the guardian must show that the treatment is in the ward’s best interest and that the treatment is the least restrictive alternative. *See id.*
54. 722 S.W.2d 851 (Ark. 1987).
55. *See id.* at 852.
56. *See id.*
57. *Id.*
58. *See Evatt*, 772 S.W.2d at 853.

59. The procedural safeguards that the court referred to included a full-scale hearing where the alleged incapacitated person has the right to an attorney and to cross-examine witnesses within 48 to 72 hours after the initial appointment of a temporary conservator and notice of the hearing to the alleged incapacitated person. The statute that the court examined contained a notice provision; however, the statute provided that the notice need only be made to the guardian, whose interests could be adverse to the ward's.
60. 229 Cal. Rptr. 875 (Ct. App. 1986).
61. Mental health conservatorships in California are established following a full evidentiary hearing for a set period of time. When that initial period expires, the conservator can petition the court to have the conservatorship reestablished. The procedures for the reestablishment of a conservatorship were challenged in this case.
62. In a mental health conservatorship in California, as distinguished from a probate conservatorship, the ward has some form of mental illness.
63. See *Moore*, 229 Cal. Rptr. at 882.
64. See *id.* at 881–82.
65. 894 S.W.2d 739 (Tenn. Ct. App. 1994).
66. See *id.* at 741.
67. See *id.*
68. See *id.* at 744.
69. *Id.* at 745 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).
70. *McCormick*, 229 Cal. Rptr. at 745.
71. 445 S.E.2d 736 (W. Va. 1994).
72. *Id.* at 739 (citing *In re Guardianship of Deere*, 708 P.2d 1123, 1125–26 (Okla. 1985)). See also *State ex rel. Owen v. Rea*, 929 S.W.2d 244, 245 (Mo. Ct. App. 1996) (guardianships and conservatorships necessarily “entail a deprivation of the fundamental liberty to go unimpeded about one’s ordinary affairs,” and “due process requirements apply to such actions”).
73. 424 U.S. 319 (1976). That due process is required, at least in guardianship proceedings, has already been conceded by the Colorado Court of Appeals. See *Sabrosky v. Denver Department of Social Services*, 781 P.2d 106 (Colo. Ct. App. 1989).
74. See *State ex rel. McCormick v. Burson*, 894 S.W.2d 739 (Tenn. 1995); *In re Evatt*, 722 S.W.2d 851 (Ark. 1987). The *Mathews* test has also been used to determine the constitutionality of statutes connected to protective proceedings but not the constitutionality of the proceedings themselves. See *San Diego Dept. of Soc. Servs. v. Moore*, 229 Cal. Rptr. 875 (Ct. App. 1986) (court determined constitutionality of statute authorizing the reestablishment of a mental health conservatorship); and *In re Branning*, 674 N.E.2d 463 (Ill. App. Ct. 1996) (court determined the constitutionality of statute allowing guardian to authorize electroconvulsive therapy or psychosurgery on behalf of the ward).
75. 894 S.W.2d 739 (Tenn. 1995).
76. *Id.* at 744.
77. See *Medina v. California*, 505 U.S. 437, 444 (1992) (quoting *Parham v. J.R.*, 442 U.S. 584, 599 (1979)); *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Zinerman v. Burch*, 494 U.S. 113, 127–39 (1990).
78. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Simon v. Craft*, 182 U.S. 427 (1901).
79. See *In re Gault*, 387 U.S. 1 (1967); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964).
80. 387 U.S. 1 (1967).
81. The Court in *Gault* thus took the next step following its statement in *Kent v. United States* that “the admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness.” *Gault*, 387 U.S. 1 at 30 (quoting *Kent v. United States*, 383 U.S. 541, 555 (1966)).
82. See, e.g., *In re Winship*, where the Court stated that “civil labels and good intentions do not themselves obviate the need for criminal due

- process safeguards.” 397 U.S. 358, 365–66 (1970).
83. Interestingly enough, the Court in *Gault* relied in part on *Lake v. Cameron*, in which the risk of deprivation of liberty in a civil commitment proceeding was held sufficient to require substantive due process protection. 364 F.2d 657, 660–61 (D.C. Cir. 1966).
 84. 396 F.2d 393 (10th Cir. 1968).
 85. *See id.* at 396.
 86. *See id.*
 87. *Id.*
 88. 405 U.S. 504 (1972).
 89. *Id.* at 509. This high standard of due process has been recognized by the Colorado Supreme Court in the context of civil commitment proceedings. In *People v. Lane*, the Court stated: “[T]he state’s power to confine persons . . . must be carefully restrained by procedural safeguards and can be invoked only by conditions ‘great enough to justify such a massive curtailment of liberty.’” 581 P.2d 719, 721 (1978) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)).
 90. *See Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *vacated on other grounds*, 414 U.S. 473 (1974).
 91. *See id.* at 1088.
 92. *See State v. Burnick*, 535 P.2d 352, 363 (Cal. 1975); *In re Lomax*, 367 A.2d 1272, 1278 (D.C. 1976); *In re Beverly*, 342 So.2d 481, 487 (Fla. 1977); *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. 1964); *State v. Collman*, 497 P.2d 1233, 1237 (Ore. 1972); *In re Helvenston*, 658 S.W.2d 99, 103 (Tenn. 1983); *In re Quesnall*, 517 P.2d 568, 573 (Wash. 1973).
 93. 581 P.2d 719 (Colo. 1978).
 94. *Id.* at 721.
 95. *Id.*
 96. A person is no less incarcerated in a locked nursing home ward than in a psychiatric hospital or juvenile detention center. Nor is that person any less stigmatized or deprived of the right to choose where to live and with whom to associate, the right to make medical decisions regarding his or her own body, the right to marry, the right to privacy, or the right to own, use, and possess property.
 97. Society’s interest here is exercised in the form of the state’s police powers.
 98. The state’s *parens patriae* interest, exercised in guardianships or protective proceedings, should not be confused with the state’s police power. Unfortunately, the state’s *parens patriae* power and police power have sometimes been commingled, causing confusion and imprecision in the language of court opinions on this subject.
 99. *See Lessard v. Schmidt*, 349 F. Supp. 1078, 1085–95 (E.D. Wis. 1972).
 100. *See, e.g.*, Jan E. Rein, *Preserving Self-Determination for the Elderly*, 60 GEO. WASH. L. REV. 1818 (1992); Alison Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-making in Long Term Care*, 41 EMORY L.J. 633 (1992); John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981); Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 221 (1975).
 101. *See Borough of West Caldwell v. Borough of Caldwell*, 138 A.2d 402 (N.J. 1958).
 102. *See Columbus v. Public Utilities Com.*, 133 N.E. 800 (Ohio 1921).
 103. *See Panhandle Eastern Pipe Line Co. v. State Highway Com.*, 294 U.S. 613 (1935); *reh’g denied*, 295 U.S. 768 (1935).
 104. *See Columbus v. Public Utilities Com.*, 133 N.E. 800 (Ohio 1921).
 105. Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 1225–26 (8th ed. 1927) (quoting *Redfeild, C.J.*, in *Thorpe v. Rutland and Burlington R.R. Co.*, 27 Vt. 140, 149 (1855)). Thus, a more restrictive due process environment is justified in the exercise of the *parens patriae* power.
 106. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

107. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Boddie v. Conn.*, 401 U.S. 371 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).
108. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).
109. See *Mathews*, 424 U.S. at 344; *In re Winship*, 397 U.S. 358 (1970); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).
110. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34 (1980); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).
111. See *In re Gault*, 387 U.S. 1 (1967); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).
112. See *Connecticut v. Doer*, 501 U.S. 14 (1991); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).
113. See *In re Gault*, 387 U.S. 1 (1967); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).
114. See *Humphrey v. Cady*, 405 U.S. 504 (1972).
115. See *Goedecke v. State Dep't of Institutions*, 603 P.2d 123 (Colo. 1979).