

A THERAPEUTIC JURISPRUDENTIAL APPROACH TO GUARDIANSHIP OF PERSONS WITH MILD COGNITIVE IMPAIRMENT

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Independent functioning is not simply the ability to do something, but also the ability to decide what to do. It is not only the ability to take care of oneself. It is also the ability to take responsibility for oneself. Autonomy and independence do not grow out of being told what to do and when to do it. It is only by having his needs considered, by becoming a participant in the decision-making process, that a child develops the capacity for autonomy.¹

American psychiatrist Elaine Heffner offered the preceding insight in the specific context of early childhood psychological development. Her message, however, rings true for others—specifically, adults with mild cognitive impairment. Persons with mild cognitive impairment are a unique constituency, possessing various abilities and special needs.² These persons are often subject to guardianship arrangements in which their autonomy is compromised to protect their best interests. This Comment explores guardianship proceedings and arrangements involving persons with mild cognitive impairment through a therapeutic jurisprudence lens, with the hope that such an approach will ultimately increase autonomy in these arrangements.

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¹ ELAINE HEFFNER, *MOTHERING: HOW WOMEN CAN ENJOY A NEW RELATIONSHIP WITH THEIR CHILDREN—AND A NEW IMAGE OF THEMSELVES* 103 (Anchor Books 1980).

² Mild cognitive impairment, also known as mild mental retardation, is a developmental disability that involves low intelligence test scores (also known as IQ scores) and difficulty adapting to the demands of living. See discussion *infra* Part III.B.

Therapeutic jurisprudence (TJ)³ is a psycho-social-legal theory that can meaningfully inform aspects of guardianship⁴ proceedings and arrangements involving adults with mild cognitive impairments.⁵ Applying TJ principles in this setting can enhance the accuracy of incompetency proceedings, increase wards' participation and feelings of control, and generate greater overall ward satisfaction with guardianship arrangements—thereby creating a unique opportunity for autonomy-maximizing arrangements.⁶ As a legal theory, TJ emphasizes the impact of case law and legislation on participants in the legal system, particularly in the context of mental health law.⁷ A TJ perspective seeks to understand how legal rules, procedures, and roles influence and affect participants in the legal system.⁸ It is important to determine the extent to which guardianship proceedings and arrangements incorporate therapeutic principles and allow for the ward's participation and feelings of control over life decisions, because participation and feelings of control are likely to positively influence levels of satisfaction among wards.⁹ Ward participation and attendant feelings of control create the potential for autonomy-maximizing arrangements and can help to combat feelings of help-

³ TJ is defined as:

an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects. Therapeutic jurisprudence suggests that these positive and negative consequences be studied with the tools of the behavioral sciences, and that, consistent with considerations of justice and other relevant normative values, law be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones.

PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 7 (Dennis P. Stolle et al. eds., 2000).

⁴ Guardianship is defined as "the delegation, by the state, of authority over an individual's person or estate to another party." GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 339 (2d ed. 1997).

⁵ See discussion *infra* Part III.B.

⁶ See discussion *infra* Part V.A.I.

⁷ See *supra* note 3.

⁸ See DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 4 (1990).

⁹ Psychologists define personal control as a sense that one has a degree of control over their environment, as opposed to feeling helpless. DAVID G. MYERS, PSYCHOLOGY: MYERS IN MODULES 539 (6th ed. 2001). Studies have shown that people who believe that they can control their fate and destiny are more successful, independent, and healthy. See, e.g., Margie Lachman & Susan Weaver, *The Sense of Control as a Moderator of Social Class Differences in Health and Well-Being*, 74 J. PERSONALITY & SOC. PSYCHOL. 763-73 (1998).

lessness and disengagement that can result in, among other things, the phenomenon of learned helplessness.¹⁰ Further, research suggests that when persons are actively involved in decision-making, they are more likely to consider decisions fair and to comply with them.¹¹

This Comment will apply a TJ framework to understand how legal rules (actual laws), legal procedures (legal processes), and legal roles (behaviors of legal actors such as judges, lawyers, guardians, and wards) associated with guardianship proceedings and arrangements influence the participation, feelings of control, levels of satisfaction, and, ultimately, the personal autonomy of wards with mild cognitive impairment. Part I of this Comment introduces the major tenets of TJ. Part II examines contexts in which TJ has been applied, namely, drug and mental health courts. Part III.A discusses the history of guardianship and the current approaches to making guardianship determinations. Part III.B then describes mild cognitive impairment and guardianships involving persons with mild cognitive impairment. Part IV discusses legal rules and procedures in this context while analyzing New York's approaches to guardianship, concluding that the functional and objective approach of New York's Article 81 is superior to other approaches. Part V analyzes legal procedures and legal roles, focusing on the effects of procedures and roles in both the "front-end" and "back-end" of guardianship proceedings and arrangements. Part VI presents counterarguments to the TJ approach in this context. Finally, Part VII concludes that the application of TJ principles in this context can increase feelings of participation, control, and satisfaction and can help to create optimal outcomes for this population.

¹⁰ Learned helplessness is a phenomenon in which persons and animals stop attempting to exert control over their environment because past attempts have proven fruitless. MYERS, *supra* note 9, at 540. This result tends to lead to dissatisfaction and stress. *See, e.g.*, MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975). Mentally disabled individuals experience paternalism in various legal—as well as social—contexts and, as a group, are likely to develop feelings of helplessness and loss of control. *See, e.g.*, 42 U.S.C. § 12101(a)(5) (1990) (citing "overprotective rules and policies" as one form of discrimination confronting disabled individuals).

¹¹ Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439–40 (1992).

I. INTRODUCTION TO THERAPEUTIC JURISPRUDENCE

Professor David B. Wexler has described TJ as “the study of the use of the law to achieve therapeutic objectives.”¹² Professor Wexler and Professor Bruce J. Winick, the movement’s founders, have written extensively on the topic, applying its tenets in a number of mental health law contexts.¹³ TJ considers the law (i.e., legal rules, legal procedures, and the functions of legal actors) as a social force that shapes behaviors and outcomes.¹⁴ The law may have “therapeutic,” healing, positive, and workable effects.¹⁵ On the other hand, the law may produce “anti-therapeutic” or detrimental outcomes.¹⁶

The TJ perspective also offers another important observation—some laws that are intended to protect vulnerable persons may have the unintended consequence of harming those persons.¹⁷ The potentially harmful effects of purportedly protective laws have been explored in contexts outside of the guardianship realm. For example, Kay Kavanagh has considered the unintended impact of the military’s “Don’t Ask, Don’t Tell” policy regarding homosexuality.¹⁸ She states that the “Don’t Ask, Don’t Tell” policy is intended to integrate homosexuals into the military and also to protect them from the long-held belief that “homosexuality is incompatible with military service.”¹⁹ The author concludes, however, that the policy does more harm than good for homosexual members of the military, because required nondisclosure of sexual orientation may leave them feeling socially isolated and marginalized.²⁰ This is because sexual orientation, homosexual or heterosexual, is significantly intertwined with aspects of daily life.²¹ For example, under the “Don’t Ask, Don’t Tell”

¹² WEXLER, *supra* note 8, at 4.

¹³ See, e.g., Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 17 (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY]; David B. Wexler, *Some Therapeutic Jurisprudence Implications of the Outpatient Civil Commitment of Pregnant Substance Abusers*, in LAW IN A THERAPEUTIC KEY, *supra*, 145.

¹⁴ David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Kay Kavanagh, *Don’t Ask, Don’t Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL’Y & L. 142, 143 (1995).

¹⁹ *Id.* at 144 (citation omitted).

²⁰ *Id.* at 151–53.

²¹ *Id.* at 153.

policy, homosexuals in the military are precluded from discussing topics that may divulge their homosexual status.²² Thus, the policy forecloses the possibility of discussions about many aspects of one's personal life, including discussions about with whom one lives, spends time, and celebrates important occasions.²³ The requirement of nondisclosure therefore has an anti-therapeutic, chilling function that does not effectuate positive or beneficial outcomes.²⁴

The potential for the law to have anti-therapeutic outcomes has also been observed in the disability setting.²⁵ Some argue that the confidentiality provision of the Americans with Disabilities Act (ADA) can have the unintended and detrimental consequence of creating a secretive, less effective, and less integrated work environment.²⁶ The ADA prohibits an employer from discriminating against a disabled employee by failing to make reasonable accommodations for the employee's disability.²⁷ The confidentiality provision—in the context of a request for a reasonable workplace accommodation—enables the disabled worker to reveal his or her disability to the employer or supervisor, but not to co-workers.²⁸ This confidentiality provision, while intended to protect the employee from discrimination by co-workers, can create an environment of misunderstanding and inefficiency because co-workers are unable to participate in the integration of the disabled worker.²⁹ Conversely, the participation of co-workers will likely decrease speculation about the disabled worker and any attendant accommodations and can create a work environment in which the disabled employee can most effectively benefit from the knowledge and experience of co-workers.³⁰

The same concept may be applied in the context of guardianship. A legal system (i.e., legal rules, procedures, and roles) fails to offer the appropriate protections and functions of guardianship when it neither promotes the participation of wards, when appropriate, nor attempts to create autonomy-maximizing arrangements

²² *Id.* at 146.

²³ *Id.* at 154.

²⁴ See Kavanagh, *supra* note 18, at 143.

²⁵ Rose A. Daly-Rooney, *Designing Reasonable Accommodations Through Co-worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89, 90–91 (1993–94).

²⁶ *Id.*

²⁷ 42 U.S.C. § 12112(a), (b)(5)(A) (1993).

²⁸ *Id.* § 12112(d)(3)(B)(i) (allowing disclosure of information pertaining to restrictions on job duties and necessary accommodations).

²⁹ Daly-Rooney, *supra* note 25, at 92.

³⁰ *Id.* at 93.

among guardians and wards.³¹ Because mildly cognitively impaired persons are particularly capable of assuming an active role in decisions about their person and property, a legal system that disenfranchises this group will not produce optimal outcomes and may have the unintended consequence of promoting disengagement among wards.³²

II. THE APPLICATION OF THERAPEUTIC JURISPRUDENTIAL PRINCIPLES IN OTHER AREAS: DRUG COURTS AND MENTAL HEALTH COURTS

The tenets of TJ have been applied in both criminal and civil contexts. A brief overview will demonstrate the goals and practical applications of the perspective while providing a framework for understanding the appropriate application of TJ in the civil guardianship context.

Principles of TJ have long been applied in the criminal arena. Myriad scholarly works have applied tenets of TJ to a range of criminal matters,³³ including domestic violence,³⁴ juvenile delinquency,³⁵ and most notably, substance abuse.³⁶ Regarding the latter, much of the literature focuses on drug courts.³⁷

Drug courts were developed under the premise that combining rehabilitative and treatment goals with the traditional goals of retribution and deterrence can reduce subsequent drug abuse and lower recidivism rates amongst offenders.³⁸ In order to effectuate this goal, the drug court model places new duties on judges, requiring them to assume a more active role in the proceedings.³⁹ While common law

³¹ See *infra* Part IV for a discussion of the guardianship reform movement and its goal of preserving autonomy in guardianship arrangements.

³² See discussion *infra* Part V.A.1.

³³ See, e.g., Wexler, *supra* note 14, at 131–34.

³⁴ See, e.g., Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 33–35 (2000).

³⁵ See, e.g., Georgia Zara, Essay, *Therapeutic Jurisprudence as an Integrative Approach to Understanding the Socio-psychological Reality of Young Offenders*, 71 U. CIN. L. REV. 127, 128 (2002); Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 13, at 113, 113–14.

³⁶ See, e.g., John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 930 (2000).

³⁷ See JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001) for a thorough introduction to the literature in this area.

³⁸ Candace McCoy, *Community Courts and Community Justice: Commentary: The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1518 (2003) (citing rehabilitation and efficiency, as well as economics, as goals of the drug court model).

³⁹ Goldkamp, *supra* note 36, at 930.

(as opposed to civil law) judges typically exemplify detachment, passivity, and restraint in the adjudicative process,⁴⁰ judges in drug courts become actively involved in the process “in a manner more like proactive therapists than dispassionate judicial officers.”⁴¹ Further, attorneys assume a less significant role in the drug court.⁴² This re-configuration of traditional criminal procedural and substantive law is intended to increase effectiveness, efficiency, and therapeutic outcomes.⁴³ Drug court judges have acknowledged that the traditional criminal justice system can have anti-therapeutic consequences and that the philosophy behind drug courts can encourage long-term solutions to problems of drug abuse and addiction.⁴⁴

Some research findings demonstrate the effectiveness of drug courts and the value of implementing a TJ model.⁴⁵ One comprehensive study concluded that drug courts reduce drug use and recidivism rates, and lessen the direct and indirect costs of dealing with drug-related crime.⁴⁶ Drug courts’ success can be attributed to long-term offender engagement,⁴⁷ as well as a therapeutic methodology that attempts to treat the underlying problem.⁴⁸

Like drug courts, mental health courts apply TJ principles to maximize positive outcomes in the mental health setting. Similar to drug courts, mental health courts emphasize treatment for those who become involved in the criminal justice system due to mental health issues.⁴⁹ The mental health court model is cooperative and primarily

⁴⁰ NOLAN, *supra* note 37, at 92.

⁴¹ *Id.* at 40.

⁴² *Id.*

⁴³ *Id.* at 58–60.

⁴⁴ *Id.* at 50 (citing Judges Peggy Hora and William Schma, who argue that the traditional criminal justice response to drug abuse and addiction keeps offenders in denial because it does not encourage them to accept responsibility for their actions or to sufficiently realize the impact of their drug abuse, and because it lowers their self-esteem).

⁴⁵ See, e.g., Steven Belenko, Ph.D., *Research on Drug Courts: A Critical Review 2001 Update*, THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, June 2001, <http://www.casacolumbia.org/absolutenm/articlefiles/researchondrug.pdf>.

⁴⁶ *Id.*

⁴⁷ JUDGE JEFF TAUBER & C. WEST HUDDLESTON, *DUI/DRUG COURTS: DEFINING A NATIONAL STRATEGY* 4 (1999).

⁴⁸ See, e.g., NOLAN, *supra* note 37, at 34.

⁴⁹ RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 850 (4th ed. 2004).

non-adversarial.⁵⁰ As with drug courts, the legal players take on new roles; prosecutors, defense attorneys, law enforcement personnel and representatives of correctional and treatment facilities all collaborate to create a positive, long-term result for the mentally ill offender.⁵¹

At initial hearings in mental health courts, the judge will typically use expert testimony by mental health professionals to evaluate the offender's mental state and determine competency.⁵² Judges in mental health courts may order necessary treatment for mentally ill offenders and some jurisdictions have created "functional conditional release plans" in which offenders are treated in the least restrictive setting (usually in the community) and are closely monitored by the mental health court.⁵³ The mental health court's emphasis on treating the underlying illness, the court's intimate familiarity with issues of mental illness, and its careful monitoring schemes function to facilitate the treatment of mentally ill offenders and their reintegration into society.⁵⁴ Such a system is consonant with the goals and objectives of TJ.

Drug and mental health courts apply therapeutic principles with much success. By focusing on the helping or therapeutic aspects of legal intervention in the lives of drug abusers and mentally ill offenders, these courts provide nuanced approaches to complicated problems.⁵⁵ While not without their critics,⁵⁶ such courts and the theories they embrace tend to minimize anti-therapeutic and unintended consequences of the legal system.⁵⁷ The success of these specialty courts counsels for applying the principles of TJ in other settings, such as guardianship.

⁵⁰ LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 291 (2001).

⁵¹ *Id.*

⁵² *Id.* at 292–93.

⁵³ *Id.* at 298–302.

⁵⁴ *Id.* at 322.

⁵⁵ NOLAN, *supra* note 37, at 50.

⁵⁶ See, e.g., Judge Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2072 (2002) (arguing that the TJ movement and courts that implement its principles, including drug courts, are both ineffective and dangerous because among other things, legal actors are unfit to devise therapeutic outcomes). See discussion *infra* Part VI.

⁵⁷ NOLAN, *supra* note 37, at 50.

III. GUARDIANSHIP IN THE CONTEXT OF INDIVIDUALS WITH MILD COGNITIVE IMPAIRMENT

A. *Introduction to Guardianship*

Guardianship is the “delegation, by the state, of authority over an individual’s person or estate to another party.”⁵⁸ Guardianship has ancient origins in Roman and English common law, under which the sovereign had the power to safeguard the property of incompetent persons.⁵⁹ This power was derived from the state’s interest in its own wealth preservation, and is the basis of the state’s *parens patriae*⁶⁰ authority.⁶¹ The appointment of a guardian is typically contemplated when persons are unable to appropriately care for themselves or when they are unable to manage their property or assets.

The determination of incompetency/incapacity and the process of appointing a guardian comprise what is known as the “front-end” of guardianship⁶² and will be discussed in more detail.⁶³ Presently, there are three main statutory approaches to making a guardianship determination.⁶⁴ The first approach considers whether the individual is capable of taking proper care of himself or his property.⁶⁵ State statutes that use this approach also tend to emphasize the ability (or lack thereof) to provide for a family, and to fend off predatory behavior.⁶⁶ The Uniform Probate Code (UPC) provides another approach to determine if guardianship is appropriate.⁶⁷ State legislatures have incorporated “[t]he operative wording for incapacity in UPC statutes,” which is “the lack of ‘sufficient understanding or capacity to

⁵⁸ MELTON ET AL., *supra* note 4, at 339.

⁵⁹ *Id.*

⁶⁰ The definition of *parens patriae* is “[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

⁶¹ MELTON ET AL., *supra* note 4, at 339.

⁶² Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 867 (2002).

⁶³ See discussion *infra* Part V.A.

⁶⁴ Phillip B. Tor, Ph.D. & Bruce D. Sales, J.D., Ph.D., *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCHOL. REV. 1, 4 (1994).

⁶⁵ *Id.* at 4–5. This approach provides vague standards for incompetency that can result in inaccurate assessments of competency as well as disparate adjudications of similarly situated persons. *Id.* at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 6 (citing UNIF. PROBATE CODE § 5-103 (Supp. 1993)). This approach is arguably more progressive than the first approach, but it still suffers from vagueness and does not allow for a full functional assessment. *Id.* at 6–7.

make or communicate responsible decisions concerning his person.”⁶⁸ The third approach is known as the functional approach, and statutes drafted using this approach tend to emphasize the results or effects of specific impairments or limitations.⁶⁹ Such statutes include references to the likelihood of imminent harm due to cognizable events or occurrences.⁷⁰ New York guardianship law, for example, exemplifies the functional approach to guardianship determinations.⁷¹ The statute provides that in reaching a determination of incapacity, “the court shall give primary consideration to the *functional level* and *functional limitations* of the person.”⁷² This includes consideration of factors such as “management of the activities of daily living” and an “understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living”⁷³ This Comment will discuss the functional approach in more detail.⁷⁴

There are a variety of guardianship arrangements. In some jurisdictions, a guardian may be appointed over the ward’s “person” or over the ward’s estate, or both.⁷⁵ A guardian of the ward’s person has authority over health and medical decisions, while a guardian of the ward’s estate has authority over various aspects of the ward’s property, including decisions to sell property.⁷⁶ The latter form of guardian is typically called a *conservator*.⁷⁷ Further distinctions exist in which some jurisdictions restrict guardians’ powers to specific decisions.⁷⁸ This so-called *specific*, as opposed to *plenary* or *general* form of guardianship, is intended to allow for the guardian’s intervention only when necessary, such as when the ward must make a novel or complicated decision.⁷⁹

⁶⁸ Tor & Sales, *supra* note 64, at 6 (quoting UNIF. PROBATE CODE § 5-103(7) (Supp. 1993)); *see also* MONT. CODE ANN. § 72-5-101 (2003). The Montana statute is illustrative of the UPC approach, as Montana has adopted the UPC in its entirety.

⁶⁹ Tor & Sales, *supra* note 64, at 7.

⁷⁰ *Id.* at 7–8. The functional approach is the most progressive approach to determining incapacity and is likely to lead to the most objective and accurate assessments of competency. *Id.* at 9.

⁷¹ *See* N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1996).

⁷² *Id.* § 81.02(c) (emphasis added).

⁷³ *Id.*

⁷⁴ *See* discussion *infra* Part IV.

⁷⁵ MELTON ET AL., *supra* note 4, at 339.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Once appointed, a guardian has the power to make decisions for the ward, subject to the limitation that the guardian acts only in the “best interests” of the ward.⁸⁰ Thus, the guardian and the ward are in a fiduciary relationship that requires the guardian to act with loyalty and care in dealings concerning the ward.⁸¹

B. Guardianship and Individuals with Mild Cognitive Impairment

This Comment focuses on guardianship arrangements and proceedings that involve adults with mild cognitive impairment. This class of persons is unique due to their abilities to learn academic skills up to a sixth-grade level,⁸² to develop sophisticated communication skills,⁸³ and to develop socially desirable behaviors.⁸⁴ While persons with a *mild* degree of cognitive impairment may seem to be least in need of any intervention, many persons with mild cognitive impairment may find themselves in need of some form of guardianship arrangement in order to best care for themselves and their property.⁸⁵ Mild cognitive impairment, also known as mild mental retardation,⁸⁶ is a developmental disability that involves low intelligence test scores (also known as IQ scores) and difficulty adapting to the demands of living.⁸⁷ Persons with cognitive impairment tend to

⁸⁰ *Id.* at 344.

⁸¹ See generally Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 243 (1995) (“[F]iduciary relationships include guardians to wards, lawyers to clients, corporate officers and directors to shareholders, government officials to the public, and financial advisors, brokers, and money managers to clients.”).

⁸² See discussion *infra* Part III.B.

⁸³ See discussion *infra* Part III.B.

⁸⁴ See discussion *infra* Part III.B.

⁸⁵ Guardianship arrangements may be necessary depending on the degree of impairment of social skills and impairment in the areas of self-care and communication. See discussion *infra* Part III.B.

⁸⁶ This Comment uses the terms “cognitive impairment” and “mental retardation” interchangeably. Recently, the vernacular associated with issues of intellectual impairment has shifted to what many conceive to be the more sensitive and appropriate terminology of “impairment” rather than “retardation,” but the term mental retardation is still widely used. See generally The Life Span Institute, Research and Training Center on Independent Living, Guidelines for Reporting and Writing about People with Disabilities, <http://www.lsi.ku.edu/lsi/internal/guidelines.html> (last visited Jan. 8, 2006).

⁸⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) [hereinafter DSM-IV]. Research indicates that the causes of mild cognitive impairment may be categorized as follows: (1) genetic problems, such as Down syndrome or Fragile X syndrome; (2) problems during pregnancy, such as maternal alcohol or drug use; (3) problems at birth, such as temporary oxygen deprivation; (4) diseases in early childhood, such as measles and chicken pox that can lead to meningitis and encephalitis; and (5) malnutrition. The

have some degree of impairment of social skills as well as problems functioning in other areas, such as self-care and communication.⁸⁸ Of all persons with cognitive impairment, eighty-five percent are classified as mildly cognitively impaired.⁸⁹ Intelligence test scores that fall below a score of seventy⁹⁰ evidence mild mental retardation; specifically, scores in the range of fifty to seventy are indicative of mild mental retardation.⁹¹

The vast majority of persons with cognitive impairment tend to have a mild form of such impairment.⁹² Just as it is difficult to speak generally about the abilities of persons with average intelligence, it is also difficult to speak generally about the abilities of persons with mild cognitive impairment. Even in this relatively narrow category of persons, a range of propensities and aptitudes exist.⁹³ For example, persons closer to the high-end of the category (those with IQ scores of approximately seventy) may differ in significant ways from those at the low-end of the category (those with IQ scores of approximately fifty).⁹⁴

While the abilities of those with mild cognitive impairment vary, sometimes considerably, they may be generally classified to give a framework for analysis. Generally, persons with mild cognitive impairment can learn academic skills up to a sixth-grade level.⁹⁵ This means that persons in this category have many of the skills necessary to meaningfully contribute and participate in important decisions about themselves and their lives.⁹⁶ For example, many mildly cogni-

Arc, Q&A: Causes and Prevention of Mental Retardation, <http://www.thearc.org/faqs/causesandprev.pdf> (last visited Jan. 8, 2006).

⁸⁸ DSM-IV, *supra* note 87, at 41.

⁸⁹ *Id.* at 43.

⁹⁰ The average intelligence score on the most widely used intelligence test in the United States is one hundred. MYERS, *supra* note 9, at 412. Sixty-eight percent of persons who take this test fall within fifteen points (either above or below) of one hundred. *Id.* Ninety-six percent of persons test within thirty points (either above or below) of one hundred. *Id.* Thus, most of the population has an IQ of somewhere between a score of seventy and a score of one hundred and thirty. *Id.* Scores of seventy and below indicate mental retardation. *Id.*

⁹¹ DSM-IV, *supra* note 87, at 42.

⁹² The other three levels or degrees of cognitive impairment are moderate, severe, and profound, with ten percent, three to four percent, and one to two percent of the cognitively impaired population, respectively, falling into each category. DSM-IV, *supra* note 87, at 43–44.

⁹³ See discussion *infra* Part III.B.

⁹⁴ See discussion *infra* Part III.B.

⁹⁵ DSM-IV, *supra* note 87, at 43.

⁹⁶ See discussion *infra* Part III.B.

tively impaired persons are able to read and write by their late teens.⁹⁷ Frequently, they develop a level of sophisticated communication skills.⁹⁸ In fact, the Arc, a national organization dedicated to promoting and improving support for persons with cognitive impairment, notes that persons with mild cognitive impairment possess skills that make them competitive for various types of employment, including numerous types of clerical and factory work.⁹⁹ The abilities to read, write, and communicate create a tremendous advantage for this group and enable many persons with mild cognitive impairment to understand the nature of their impairment and to effectively communicate their desires, needs, wishes, and preferences.¹⁰⁰ This ability is of the utmost relevance and importance to creating autonomy-maximizing guardianship arrangements.¹⁰¹

Further, because of the nature of their impairment, persons in this category are frequently able to learn self-supportive and socially desirable behaviors.¹⁰² Additionally, they may have the ability to understand and comprehend rules and directions.¹⁰³ These abilities often allow persons with mild cognitive impairment to live with minimal assistance, in either supportive living systems or small group homes.¹⁰⁴ These abilities create the likelihood that persons who are in need of some form of guardianship arrangement will be able to maintain maximum levels of autonomy.¹⁰⁵

Guardianship arrangements and guardianship proceedings involving persons with mild cognitive impairment present a phenomenon within the law in which principles of TJ may be applied to effectuate optimally therapeutic outcomes. These principles, some of which are demonstrated in the philosophies and practices of the

⁹⁷ See DSM-IV, *supra* note 87, at 43 (discussing academic skills).

⁹⁸ *Id.*

⁹⁹ The Arc, Employment of People with Mental Retardation, <http://www.thearc.org/faqs/emqa.html> (last visited Jan. 8, 2006).

¹⁰⁰ See Sigan L. Hartley & William E. MacLean, Jr., *Perceptions of Stress and Coping Strategies Among Adults with Mild Mental Retardation: Insight Into Psychological Distress*, 110 AM. J. MENTAL RETARDATION 285, 286 (2005) (discussing research that has shown that persons with mild mental retardation can identify and describe the coping efforts they use to deal with stress).

¹⁰¹ See *infra* Part IV for a discussion of guardianship reform efforts that focus on functional assessments in creating guardianship arrangements.

¹⁰² DSM-IV, *supra* note 87, at 43.

¹⁰³ *Id.*

¹⁰⁴ The Arc, Community Living, <http://www.thearc.org/faqs/compliv.html> (last visited Jan. 8, 2006).

¹⁰⁵ See discussion *infra* Part IV for a discussion of guardianship reform efforts that focus on functional assessments in creating guardianship arrangements.

specialty courts discussed above,¹⁰⁶ can inform guardianship law both procedurally and substantively. A careful and nuanced application of TJ principles in this area can lead to arrangements that maximize autonomous decision-making and minimize feelings of detachment and helplessness.

IV. LEGAL RULES, OR ACTUAL LAWS, AND LEGAL PROCEDURES, OR LEGAL PROCESSES

Guardianship statutes vary by state, but a common thread to state guardianship statutes is the influence of guardianship reform efforts.¹⁰⁷ The guardianship reform movement has indeed had influence, and perhaps the most important of which is an enhanced focus on preserving autonomy in guardianship arrangements.¹⁰⁸ The legislative trend favoring increased autonomy in guardianship arrangements involves changes in the definition of “incapacity” and encouragement of limited guardianships, as well as improved assessment methods and enhanced procedural safeguards in guardianship proceedings.¹⁰⁹ Efforts to change the definition of “incapacity” have focused on defining incompetence or incapacity by way of objective standards that focus on actual abilities, as opposed to labels or “mere diagnosis” that place primary emphasis on a diagnosis or determination of mental retardation.¹¹⁰ Limited guardianships are designed to preserve individual autonomy by narrowly tailoring the guardianship arrangement to meet the individual’s specific needs, and leaving those areas that are within the individual’s competence to his or her discretion.¹¹¹ All of these trends, and the developments that they have spawned, are consistent with the goals of TJ in that they aim to improve the impact of guardianship law on the lives of the persons the laws affect.

The laws themselves, however, are only one part of the legal system, and, standing alone, they cannot improve the quality of life for persons involved in guardianship arrangements. Judges, lawyers, legislators, guardians, and wards are all players in the legal system; each player must do his or her part to bring about optimal outcomes in the guardianship setting. Even in the age of guardianship reform,

¹⁰⁶ See discussion *supra* Part II.

¹⁰⁷ See Neil B. Posner, Comment, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 607–10 (1996).

¹⁰⁸ *Id.* at 607.

¹⁰⁹ *Id.* at 607–10.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 609.

the application of TJ principles—and the similar philosophies underlying the drug and mental health court movements—can improve guardianship arrangements involving persons with mild cognitive impairment.

An examination of New York's guardianship statutes will illustrate both the law governing the process of making a determination of incapacity and appointing a guardian (the “front-end”), and the law governing guardian accountability and court monitoring of the guardian (the “back-end”).

New York guardianship law is among the most progressive in the nation due to its emphasis on functional, objective assessment.¹¹² Despite having extremely progressive provisions governing the appointment of a guardian for “persons with incapacities,” a different, arguably less progressive, set of laws governs the appointment of guardians for persons with mental retardation or developmental disabilities.¹¹³ Article 17-A of the Surrogate's Court Procedure Act (SCPA)¹¹⁴ governs guardianships for persons with mental retardation or developmental disabilities. Section 1750 of the SCPA states:

When it shall appear to the satisfaction of the court that a person is a mentally retarded person, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the mentally retarded person.¹¹⁵

More specifically, under section 1750, a court may appoint a guardian upon certification that the individual is incapable of managing him or herself or affairs due to the mental retardation.¹¹⁶ An incapacity determination under Article 17-A appears to focus on the label, or “mere diagnosis,” of mental retardation. Such an approach differs significantly from an objective or functional evaluation, as

¹¹² See *id.* at 618, 621.

¹¹³ See N.Y. MENTAL HYG. LAW § 81.01, Practice Commentaries by Rose Mary Bailly 248, 250 (McKinney 1996).

¹¹⁴ N.Y. SURR. CT. PROC. ACT §§ 1750–61 (Consol. 2004).

¹¹⁵ *Id.* § 1750. The statute defines “mentally retarded person” as:
a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with mental retardation, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely.

Id.
¹¹⁶ *Id.*

seen in New York's Mental Hygiene Law Article 81¹¹⁷ which governs proceedings for the appointment of a guardian for personal needs or property management of incapacitated persons. Article 81 begins with legislative findings and purposes;¹¹⁸ the statute immediately acknowledges the finding that persons with incapacities have varying needs.¹¹⁹ Such a realization is simple yet profoundly important if persons with mild cognitive impairment are to be successful in structuring guardianship arrangements that are most appropriate for their individual needs. This section of the statute seeks to balance maintaining individual autonomy with designing an adequately flexible guardianship regime capable of providing assistance to those in need.¹²⁰ The legislature states that conservatorships tend to be insufficient to meet the needs of many persons with incapacities and that a judicial committee's findings of complete incompetence are often unnecessary for many persons with disabilities.¹²¹ The legislation acknowledges that many persons in need of some type of guardianship arrangement will not require either of these "drastic remedies," and it adopts a "least restrictive form of intervention" standard designed to allow for maximum autonomy.¹²²

Under Article 81, a court may appoint a guardian for an individual if the court "determines: 1. that the appointment is necessary to provide for the personal needs of that person . . . and/or to manage the property and financial affairs of that person; and 2. that the person agrees to the appointment, or that the person is incapacitated . . ." pursuant to the statute.¹²³ Under the statute, a determination of incapacity must be supported by clear and convincing evidence, and the determination must demonstrate that:

- (b) . . . a person is likely to suffer harm because:
 - 1. the person is unable to provide for personal needs and/or property management; and

¹¹⁷ N.Y. MENTAL HYG. LAW §§ 81.01–81.44 (McKinney 1996).

¹¹⁸ *Id.* § 81.01.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* The legislature further states that the New York guardianship statute seeks to establish a system "tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." *Id.*

¹²³ N.Y. MENTAL HYG. LAW § 81.02(a)(1) (McKinney 1996). Personal needs include "food, clothing, shelter, health care, or safety . . ." *Id.*

2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

(c) In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. Such consideration shall include an assessment of that person's:

1. management of the activities of daily living . . . ;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.¹²⁴

Article 81 provides further for a thorough assessment of the individual that considers the demands that the individual's various needs (personal, property-related, financial management) place upon him or her.¹²⁵ The statute further provides for consideration of the presence of and prognosis associated with any physical illness or mental disability, alcohol or substance dependence, as well as any medications that the individual is taking and their effects on the individual's behavior, cognition, and judgment.¹²⁶ The last part of section 81.02 stresses that the court shall consider "all other relevant facts and circumstances regarding the person's: (1) functional level; and (2) understanding and appreciation of the nature and consequences of his or her functional limitations."¹²⁷

¹²⁴ *Id.* § 81.02(b)–(c). Section 81.03(h) provides: "[A]ctivities of daily living' means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management." *Id.* § 81.03(h). The commentary to this section states that the court should look to these types of activities "to determine the person's functional level." *Id.* notes (Law Revision Comm'n Commentary).

¹²⁵ *Id.* § 81.02(c).

¹²⁶ *Id.*

¹²⁷ N.Y. MENTAL HYG. LAW § 81.02(d) (McKinney 1996). For an application of the functional evaluation, see *In re Hammons*, 625 N.Y.S.2d 408 (N.Y. Sup. Ct. 1995). In this case, the Supreme Court of New York, Queens County found that, despite the fact that the allegedly incapacitated persons suffered from no mental impairment, Article 81's focus on functional limitation required the court to give primary consideration to functional level and functional limitations, and to appoint a guardian where the individuals were unable to care for themselves and their property and were likely to suffer harm as a result. *Id.* at 411. The court stated that "[a]n individual's intelligence is not a deciding factor in an article 81 proceeding." *Id.* at 412.

Article 81 of New York's Mental Hygiene Law appears to take a more aggressive approach to ensure that courts assess individuals subject to potential guardianship arrangements in an objective manner, and that courts tailor the guardian's authority to the specific needs of the individual (so-called limited guardianship).¹²⁸ Article 81's emphasis on functional, objective assessment is crucial to the accuracy and appropriateness of the "front-end" of guardianship arrangements. Conversely, Article 17-A's provisions governing incompetency determinations resemble pre-reform efforts that merely use a label or diagnosis of mental retardation as the assessment mechanism.¹²⁹ Such provisions are inferior to the functional and objective-assessment provisions of Article 81, because mere labels of diagnoses of mental disability do not necessarily provide meaningful information about an individual's ability to function autonomously.¹³⁰

Further, because the use of labels or diagnoses does not allow for a true understanding of an individual's functional capacities, "arbitrary findings of incapacity" may result.¹³¹ Evidence of *actual* incapacity in *specific* areas of life is necessary to ensure that courts do not deprive individuals who need some assistance of autonomy, control, or the ability to use the discretion that they are capable of exercising. Article 17-A does in fact include a provision related to limited guardianships (limited guardian of property); however, this provision does not resemble Article 81's "least restrictive form of intervention"¹³² standard, and it only applies to an individual who is age eighteen or over and "wholly or substantially self-supporting by means of his or her wages or earnings from employment"¹³³ In the case of such an individual, the limited-guardian-of-the-property provision states that the mentally retarded person "shall have the right to receive and expend any and all wages or other earnings of his

¹²⁸ N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1996).

¹²⁹ Posner, *supra* note 107, at 608.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1996). Section 81.03 states that "least restrictive form of intervention" under Article 81:

means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person's personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations.

Id. § 81.03(d).

¹³³ N.Y. SURR. CT. PROC. ACT § 1756 (Consol. 2004).

or her employment . . .”¹³⁴ while the limited guardian of the property “shall receive, manage, disburse, and account for only such property . . . as shall be received from other than the wages or earnings”¹³⁵ Article 17-A’s limited-guardian provision is substantially less flexible than the limited-guardianship provision in Article 81, as it allows for significantly less individualized tailoring of the guardian’s authority to the ward’s specific needs.¹³⁶ Article 17-A can benefit from revisions based on the Article 81 standard.

Article 81’s “least restrictive form of intervention” standard derives from the “least restrictive alternative” doctrine established by the Supreme Court in *Shelton v. Tucker*.¹³⁷ In *Shelton*, the Court stated that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹³⁸ The United States Court of Appeals for the District of Columbia Circuit applied the doctrine in the civil commitment context in *Lake v. Cameron*,¹³⁹ and the New York Court of Appeals applied it in the context of incapacity determinations in *Rivers v. Katz*.¹⁴⁰

In *Rivers*, the court dealt with the issue of the involuntary administration of antipsychotic drugs to patients in a psychiatric center.¹⁴¹ The patients brought an action to declare their right to refuse the drugs, and the New York Court of Appeals reversed the lower court’s dismissal of the patients’ action and remanded the matter to the trial court.¹⁴² The Court of Appeals instructed as follows:

If . . . the [trial] court concludes that the patient lacks the capacity to determine the course of his own treatment, the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient’s liberty interest, taking into consideration all relevant circumstances, including the patient’s best interests, the benefits to be gained from the treatment, the

¹³⁴ *Id.* The statute continues and places limitations on the amount of money for which an individual can legally or contractually bind himself or herself. *Id.* It states that the individual “shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month’s wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.” *Id.*

¹³⁵ *Id.*

¹³⁶ See *supra* notes 109–30 and accompanying text.

¹³⁷ 364 U.S. 479, 488 (1960).

¹³⁸ *Id.*

¹³⁹ 364 F.2d 657 (D.C. Cir. 1966).

¹⁴⁰ 495 N.E.2d 337, 339 (N.Y. 1986).

¹⁴¹ *Id.*

¹⁴² *Id.* at 341.

adverse side effects associated with the treatment and any less intrusive alternative treatments.¹⁴³

In *Rivers*, the New York Court of Appeals demonstrated a concern for maintaining autonomy and liberty by requiring narrowly tailored remedies.¹⁴⁴ Article 81 of New York's Mental Hygiene law also expresses this preference.¹⁴⁵ Article 17-A, however, grants mentally retarded individuals substantially *less* protection against infringement on individual autonomy.¹⁴⁶ While at least one group has looked into the possibility of revising Article 17-A to more closely resemble Article 81, no current proposals exist.¹⁴⁷

V. LEGAL PROCEDURES AND LEGAL ROLES

The legal process, including encounters with judges and lawyers, can be intimidating, overwhelming, and somewhat incomprehensible, even to adults with above-average intellectual functioning. For those with mild cognitive impairment, a guardianship proceeding can have serious negative effects. First, while guardianship proceedings and the legal actors involved intend to help an individual who may be incompetent, a challenge to an individual's competence can have negative effects on mental well-being, confidence, and morale.¹⁴⁸ Second, the behaviors and practices of judges and lawyers involved in the guardianship proceedings can cause confusion, alienation, and loss of control among participants.¹⁴⁹ Furthermore, stereotypes frequently influence judges' and lawyers' perceptions of, and behavior toward, disabled individuals.¹⁵⁰ If traditional stereotypes about persons with cognitive impairment color the perceptions of judges and lawyers, they may fail to listen to and communicate with these individuals in an appropriate manner.¹⁵¹

¹⁴³ *Id.* at 344.

¹⁴⁴ *Id.*

¹⁴⁵ N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1996).

¹⁴⁶ *Id.* § 81.01, Practice Commentaries by Rose Mary Bailly 248, 250.

¹⁴⁷ *Id.*

¹⁴⁸ See *infra* Part V.A.1.

¹⁴⁹ See *infra* Part V.A.2.

¹⁵⁰ See, e.g., Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 134 (1999). Rubinson argues that attorneys' perceptions of elderly clients risk being influenced by stereotypes that the elderly are forgetful, declining in competence, and senile. *Id.* at 134-35. Rubinson cites works by other scholars that suggest that race, socioeconomic status, ethnicity, sexual orientation, gender, and physical disability are also likely to impact an attorney's view of a client. *Id.* at 134 n.61 (citations omitted).

¹⁵¹ See, e.g., *id.* at 134.

Both the autonomy-limiting nature of a guardianship determination and the abilities of persons with mild cognitive impairment coalesce to create a unique opportunity to apply the principles of TJ in order to provide optimal outcomes in guardianship determinations for persons with mild cognitive impairment. To create such outcomes, the legal system should impose additional procedures, and its actors should make concerted efforts to ensure that: (1) legal actors listen to and understand the needs and desires of the ward or potential ward; and (2) learn about the nature of his or her impairment and how the impairment impacts his or her cognitive, judgmental, and other capacities. While seemingly simplistic, the ability of judges and lawyers to listen to the desires and needs of individuals has been linked to increased satisfaction with legal outcomes.¹⁵²

A. *The “Front-End”: Determining Incompetency*

The importance of participation, accuracy, and objectivity at the “front-end” of guardianship is crucial to the success of the guardianship arrangement. If an individual is not appropriately and objectively assessed to determine abilities, desires, and preferences, the guardianship arrangement is likely to be ill-suited to the individual’s needs.¹⁵³ Even under progressive guardianship regimes, like New York’s Mental Hygiene Law Article 81, which mandate evidence of actual incapacity prior to a determination of incapacity,¹⁵⁴ there is room for improvement. Principles of TJ can provide assistance in this area.

1. The Psychology of Guardianships of Persons with Mild Cognitive Impairment: Effects of Incompetency Labeling and Restrictions on Autonomy

First, legal actors must understand that a legal determination of incompetency or incapacity can have a devastating personal and emotional impact on the individual deemed incompetent.¹⁵⁵ Bruce Winick observes:

Labeling individuals as incompetent usually has the effect of removing their ability to make decisions for themselves, at least in

¹⁵² Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 3, at 309, 309–10; *see infra* Part V.A.2.

¹⁵³ *See supra* text accompanying notes 107–09.

¹⁵⁴ *See supra* text accompanying notes 116–28.

¹⁵⁵ Winick, *supra* note 13, at 26.

the particular area in which their capacity is thought to be lacking. Individuals considered to be incompetent find that their choices and preferences are ignored and that others make choices for them. They often are treated as objects, rather than as people. As a result, events in their lives are perceived to be outside of their control. They are treated as children, subject to the authority, even if benevolently intended, of others.¹⁵⁶

For persons with mild cognitive impairment, the impact of unnecessary infringements on personal autonomy can be particularly devastating. Because individuals in this group tend to have various intellectual and practical abilities, even a narrowly tailored guardianship arrangement can have the effect of undermining the individual's confidence and morale, both in the area or areas in which the individual is deemed incompetent, as well as in the areas still left to the individual's discretion.¹⁵⁷ While the arrangement may in fact be appropriate and necessary and is intended to help the individual, it can have a negative effect, especially if the incompetency label is attributed to an area that is important to the individual's self-concept or identity.¹⁵⁸

Further, researchers have found that labels of incompetency can create feelings of powerlessness and loss of control, the most serious of which is the phenomenon of learned helplessness.¹⁵⁹ Individuals who are deemed incompetent may begin to feel that their actions cannot influence outcomes, and, thus, they feel a loss of control.¹⁶⁰ If individuals attribute the inability to control outcomes to immutable personal limitations, they may feel unable to meaningfully contribute to *any* decisions. This feeling of loss of control can wreak havoc on self-esteem, motivation, and morale, while causing the individual to feel that his or her inability is a personal failure that affects all areas of functioning and that will always be present.¹⁶¹ This can cause the individual to stop trying to exert influence, or to become more passive, in their attempts to control their own lives.¹⁶² Such a result

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 26–27.

¹⁵⁸ See, e.g., EDWARD E. JONES ET AL., SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS 116 (1984).

¹⁵⁹ See, e.g., SELIGMAN, *supra* note 10.; Lyn Y. Abramson et al., *Learned Helplessness in Humans: An Attributional Analysis*, in HUMAN HELPLESSNESS: THEORY AND APPLICATIONS 3 (Judy Garber & Martin E.P. Seligman eds., Academic Press, Inc. 1980).

¹⁶⁰ Winick, *supra* note 13, at 29.

¹⁶¹ *Id.* at 29–30.

¹⁶² *Id.*

demonstrates how a seemingly protective law or system can have unintended and unfortunate effects.¹⁶³

Recent research further affirms the importance of perceptions of control amongst persons with mild cognitive impairment.¹⁶⁴ Researchers assessed stress, coping strategies, perceptions of control, and psychological distress in a sample of eighty-eight adults with mild cognitive impairment.¹⁶⁵ The researchers found that the subjects were most likely to use the most desirable method of coping with stress, active coping,¹⁶⁶ in stressful situations appraised as controllable.¹⁶⁷ The researchers concluded that “this may mean that attempts to foster effective coping among people with mild mental retardation are contingent upon increasing perceptions of control.”¹⁶⁸

While not all persons with mild cognitive impairment who are placed under some form of guardianship arrangement experience feelings of loss of control or learned helplessness, it is important for legal actors to recognize and understand the effects of the incompetency or incapacity determination on the psychological state of the individual. The drug and mental health courts provide insights into ways to minimize the negative effects of such a determination.¹⁶⁹

2. Minimizing Anti-Therapeutic Consequences at the “Front-End”: Using Social Science to Inform Legal Actors

Legal actors can seek to minimize the negative impact and increase the accuracy of incompetency determinations in several ways. To do this, legal actors must increase their knowledge about persons with mild cognitive impairment and must also develop a greater understanding of their own beliefs about this population. First, judges must realize that their status as authority figures may have strong effects on the individuals they deem incompetent, perhaps increasing

¹⁶³ *Id.* at 17–18.

¹⁶⁴ Hartley & MacLean, *supra* note 100, at 294.

¹⁶⁵ *Id.* at 287–88.

¹⁶⁶ For the purposes of this research, active coping was defined as “efforts aimed at gaining control over the stressful situation or over one’s emotions.” *Id.* at 286. Other methods of coping with stress that were assessed in this study were “distraction coping,” defined as “efforts aimed to distract from the stressful situation through positive thoughts and positive activities,” and “avoidant coping,” defined as “efforts aimed at avoiding or disengaging from the stressful situation or one’s emotional experience.” *Id.*

¹⁶⁷ *Id.* at 294.

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* text accompanying notes 33–57.

the tendency for the individuals to feel that they are completely incapable in the areas of life for which a judge appoints a guardian.¹⁷⁰ Second, while objectivity is a hallmark of most judicial decision-making, stereotypes about people with cognitive impairment may influence even judges. Because of this possibility, judges can benefit from specialized training and education about the unique needs and abilities of persons with mild cognitive impairment.¹⁷¹ In fact, a monitoring study conducted by the American Bar Association recommended that courts “designate certain judges to be responsible for guardianship hearings and review procedures.”¹⁷²

Just as drug-court judges become well versed on the topics of addiction and rehabilitation,¹⁷³ and mental-health-court judges become intimately familiar with mental disorders and treatment,¹⁷⁴ it is important for judges who take part in guardianship proceedings to familiarize themselves with the unique abilities of persons with mild cognitive impairment and with the psychological consequences that a judge’s rather routine decision-making can have on individuals subject to guardianship arrangements. With this knowledge, judges can transform their behaviors when dealing with this population.

In keeping with the drug-court model, judges presiding over guardianships should depart from the traditional adjudicative approach characterized by “disinterest, impartiality, passivity, and restraint,”¹⁷⁵ and instead should become proactive in their interactions with wards with mild cognitive impairment to ensure the least restrictive and most appropriate guardianship arrangement.¹⁷⁶ For instance, judges should make sincere efforts to understand the impact of an individual’s mild cognitive impairment on that individual’s actual abilities.¹⁷⁷ Judges should tailor their speech—its content, speed, and level of sophistication—to the needs of the individual and should attempt to clearly explain the reasoning behind any determinations to the individual, rather than solely to the lawyer or the

¹⁷⁰ Winick, *supra* note 13, at 31.

¹⁷¹ See *infra* text accompanying notes 187–93.

¹⁷² SALLY BALCH HURME, STEPS TO ENHANCE GUARDIANSHIP MONITORING 10–11 (1991).

¹⁷³ See NOLAN, *supra* note 37, at 135–38.

¹⁷⁴ See Kondo, *supra* note 50, at 292–93.

¹⁷⁵ NOLAN, *supra* note 37, at 92.

¹⁷⁶ *Id.* at 94. Nolan discusses how the “drug court judge deliberately departs from the kind of passive role Tocqueville saw as a defining quality of the American judiciary.” *Id.*

¹⁷⁷ Such efforts are consistent with a focus on a functional evaluation of an individual. See *supra* text accompanying notes 107–09.

guardian. The judge should also encourage the ward's active participation during the hearing.

All of these behaviors will likely reduce the intimidation or insecurity that a hearing and interaction with an authoritative judicial figure may engender in an individual subject to a guardianship proceeding. Further, such active participation by the judge may increase the individual's satisfaction with the overall result of the hearing.¹⁷⁸ Bruce Winick, a founder of the TJ movement, summarizes the empirical studies in this area in the following passage:

Litigants highly value the process or dignitary value of a hearing. People who feel they have been treated fairly at the hearing, with respect and dignity and in good faith, experience greater litigant satisfaction than those who feel treated unfairly, with disrespect, and in bad faith. People highly value "voice," the ability to tell their story, and "validation," the feeling that what they have had to say was taken seriously by the judge or other decision-maker. When people are treated these ways at a hearing, they are often satisfied with the result even if it is adverse to them, and comply more readily with the outcome of the hearing. Moreover, they experience the results of the proceeding as less coercive than when these conditions are violated, and even feel that they have voluntarily chosen the course that is judicially imposed. Such feelings of voluntariness rather than coercion tend to produce more effective behavior on their part.¹⁷⁹

Lawyers can also play a role in increasing the overall positive outcome of a guardianship proceeding. Research in the field of cognitive psychology suggests that lawyers who take an active approach in explaining elements and aspects of the legal process to their clients can reduce the stress experienced by the client.¹⁸⁰ The client's reduced stress may be attributed to having information that enables him or her to adjust expectations "in a realistic way and to prepare emotionally to meet the challenges ahead."¹⁸¹ Like judges, lawyers must adjust their language to meet the needs of a mildly cognitively impaired client. Also like judges, lawyers should assume a more active posture when dealing with a client with mild cognitive impairment; they should attempt to converse with their clients in a

¹⁷⁸ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (citing studies that found disputants' judgments about procedural justice affect perceptions of substantive justice as well as disputants' evaluations of authorities and institutions).

¹⁷⁹ Winick, *supra* note 152, at 320–21.

¹⁸⁰ See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 203 (1984).

¹⁸¹ Winick, *supra* note 152, at 313.

manner that demonstrates their sincere desire to attain the best outcome possible.

Another influential actor in this setting is the guardian ad litem (GAL). Many states provide for court appointment of an independent third party to investigate the circumstances and assess the needs of an alleged disabled person, to safeguard the procedural rights of an alleged disabled person, and to advocate on the person's behalf.¹⁸² The GAL is often a lawyer, but not always.¹⁸³ The GAL can play a vital role in assuring that the court understands the abilities and needs of the person with mild cognitive impairment.¹⁸⁴ The GAL is a uniquely situated actor, because of his or her extended or in-depth contact with the person subject to a potential guardianship.¹⁸⁵ The GAL is also more objective than a proposed guardian's attorney, because the proposed guardian—usually a parent—may be more likely to over-emphasize the limitations of the proposed ward.¹⁸⁶ Further, as an advocate, a GAL can play a crucial role in preventing “rubber-stamping” of guardianship applications and can urge the judge to undertake a more thorough inquiry into the needs and abilities of proposed wards. To effectuate this, a GAL should receive specialized training about the abilities and needs of persons with mild cognitive impairment. Also, as discussed below, a GAL must also acknowledge any beliefs or stereotypes about persons with cognitive impairment that are in conflict with his or her role as advocate.

Clearly, in order to create optimal outcomes for this population, legal actors must increase their knowledge and awareness about persons with mild cognitive impairment. Increasing awareness, however, does not end there. In fact, legal actors must make efforts to increase *self-awareness* about stereotypes they may hold concerning persons with mild cognitive impairment. Judges, lawyers, guardians, and GALs must acknowledge stereotypes they likely hold about persons with cognitive impairment, and they must not allow these stereotypes to color their perceptions of the abilities of the individual. By definition, a stereotype is “a generalized (sometimes accurate but often

¹⁸² SCOTT K. SUMMERS, GUARDIANSHIP & CONSERVATORSHIP: A HANDBOOK FOR LAWYERS 51–52 (1996).

¹⁸³ *Id.* at 51.

¹⁸⁴ *Id.* at 52 (“The involvement of a GAL . . . probably is the single best assurance that an alleged disabled person will be accorded full due process rights.”).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (suggesting that family members keep a “respectful distance” from the GAL and “cooperate fully with all requests for information” so as to maintain the objectivity of the GAL and the privacy of the conversations between the GAL and proposed ward).

overgeneralized) belief about a group of people.”¹⁸⁷ Research in the field of cognitive psychology has demonstrated that stereotyped beliefs are rooted in categorization and the need to simplify the world.¹⁸⁸

While categorization may aid information processing, it frequently also “biases our perceptions of diversity.”¹⁸⁹ This is particularly dangerous when legal actors, such as judges and lawyers, interact with persons with cognitive impairment. Research has shown that people tend to view themselves, and those in their groups (e.g., their racial group), as possessing more individuality and diversity than those in groups other than their own.¹⁹⁰ People also tend to overestimate the similarity of those in groups dissimilar to their own.¹⁹¹ Such research is informative in the legal setting because it is likely that many judges and lawyers consider themselves distinct from other segments of the population, due to their education level and the prestige associated with the legal profession. Assuming this to be true, judges and lawyers as a group may feel particularly different from those with cognitive impairments.¹⁹² Therefore, they may be more likely to view these persons as similar in abilities and capacity, despite differences in level of impairment.¹⁹³ Such stereotypes may result in an inappropriate assessment of incompetency and have the potential to affect the integrity of the overall guardianship arrangement.

The “front-end” of guardianship also involves the appointment of a guardian.¹⁹⁴ To follow a TJ model, the court must appoint a guardian based on an accurate and informed determination of incompetency while ensuring that the ward is agreeable to the choice of guardian. Ensuring the ward’s agreement with the choice of guardian is typically not an issue, as the law of most states presumes that the guardian will be a close family member. Despite this pre-

¹⁸⁷ MYERS, *supra* note 9, at 695.

¹⁸⁸ *Id.* at 697.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 697–98.

¹⁹¹ *Id.*

¹⁹² See generally JACQUES-PHILIPPE LEYENS ET AL., STEREOTYPES AND SOCIAL COGNITION 107 (1994) (discussing empirical support for the theory that “people hold a more complex representation of the ingroup than of the outgroup”).

¹⁹³ This conclusion is an application of research findings in the area of race and its effects on categorization and stereotyping. See Robert K. Bothwell et al., *Cross-racial Identification*, in PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 15, 19–25 (March 1989).

¹⁹⁴ Hurme & Wood, *supra* note 62, at 867. This Comment will not deal in great length with this aspect of the “front-end.”

sumption, a TJ perspective cautions against placing unquestioned faith in the presumed family guardian. As one author noted on the issue of elder autonomy, “[i]n . . . situations of shared authority between the family and the individual, especially in a home environment, the erosion of autonomy may be incremental rather than sudden, and the mundane nature of most decisions may camouflage this loss as it occurs. The loss of autonomy is real nonetheless”¹⁹⁵ This insight applies with equal force to guardianships involving persons with mild cognitive impairment, and it counsels in favor of enhanced accountability and monitoring—even when a guardian is the parent or other close relative of the ward.

B. The “Back-End”: Accountability and Monitoring

The “back-end” of guardianship arrangements involves guardian accountability and monitoring of guardianship arrangements.¹⁹⁶ According to two well-known guardianship scholars, “[t]he key to the quality of guardianship monitoring is the judge.”¹⁹⁷ They state that:

[T]he judge often has wide latitude in shaping court practices in guardian oversight. The judge may determine how frequently reports are filed in jurisdictions that allow discretion, what the reports should look like, what assistance guardians will have in preparation of the report, how the reports will be tracked and reviewed, whether investigators will follow up on “red flag” items, whether sanctions will be imposed, how the complaint process will be handled, and whether funds will be sought for resources monitoring.¹⁹⁸

Other commentators have likewise substantiated the importance of the role of the judge to the “back-end” of guardianship. One commentator writes that “[o]nly when judges become acculturated to the existing reforms, and only when they internalize the values embedded in those reforms, will guardianship truly change.”¹⁹⁹ Clearly, judges are crucially important figures at the “back end” of guardianship.

First, in order to improve judicial monitoring of the guardian to hold the guardian accountable for any abuses or other breaches in the guardian’s fiduciary duty to a ward, judges must educate them-

¹⁹⁵ Marshall B. Kapp, *Who’s the Parent Here? The Family’s Impact on the Autonomy of Older Persons*, 41 EMORY L.J. 773, 777 (1992).

¹⁹⁶ Hurme & Wood, *supra* note 62, at 867.

¹⁹⁷ *Id.* at 914.

¹⁹⁸ *Id.* at 914–15.

¹⁹⁹ Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL’Y REV. 347, 355 (1998).

selves about the importance of efforts to ensure ward safety and to prevent unnecessary infringements on autonomy. Judges must fully perceive the guardianship determination, and the appointment of a guardian, as only the first steps in a guardianship proceeding. The nature and quality of judicial involvement in drug and mental health courts is instructive on this point.²⁰⁰ Some drug-court judges have become involved in the lives of “clients” outside of the courtroom, contacting employers and becoming involved in community efforts.²⁰¹ Such behavior provides a positive message to guardians, wards, and the community at large.

Second, the designation of a specialized judge for guardianship hearings and review procedures is certainly beneficial because “of the specialized nature of cases involving incapacitated persons,” and the judge’s “need to be familiar with the complexities of case management and surrogate decision-making for individuals with complicated mental and medical problems.”²⁰²

Finally, guardian education and training and community and public awareness about guardianship arrangements can also help to ensure that guardianship arrangements provide optimal benefits to wards.²⁰³ Devising guardianship training and education requirements is difficult,²⁰⁴ and depends largely on the needs of each individual ward. However, judges should assume a leadership role and take it upon themselves to narrowly tailor statutory requirements regarding guardian accountability and monitoring to fit the needs of each individual.

Particularly in arrangements involving persons with mild cognitive impairments, judges should explore the possibility of modification orders in the event the scope of the existing guardianship arrangement is no longer appropriate.²⁰⁵ Frequently, modification orders are made to widen the scope of a guardian’s discretion and power over a ward, but judges should be cognizant of the possibility for contraction of guardian powers in cases involving persons with mild cognitive impairment. This is due to the fact that

²⁰⁰ See NOLAN, *supra* note 37, at 94–95.

²⁰¹ *Id.* at 95–97.

²⁰² Hurme & Wood, *supra* note 62, at 917.

²⁰³ *Id.* at 877, 918, 920.

²⁰⁴ *Id.* at 877.

²⁰⁵ See, e.g., N.Y. Surr. Ct. Proc. Act § 1755 (Consol. 2004). This statute provides for a modification order to modify the guardianship arrangement in the interest of protecting the mentally retarded person’s “financial situation and/or his or her personal interests.” *Id.*

persons with mild cognitive impairment may experience increases in adaptive functioning.²⁰⁶

According to the DSM-IV, “[a]daptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.”²⁰⁷ The DSM-IV further states that “[p]roblems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.”²⁰⁸ Adaptive functioning is conceptually indistinguishable from the notion of functionalism that is assessed in incompetency determinations.²⁰⁹ Therefore, judges should be aware of the potential for improvement in the ward’s abilities and the possibility of contracting the guardian’s power.

Community and public awareness efforts are also important in that they can foster social awareness about guardianship monitoring. As one commentator states: “if the community knows what guardians are supposed to do, guardians may be more likely to do it.”²¹⁰ Further, efforts to inform the community about guardianship arrangements may function to dispel stereotypes by promoting understanding about the capacities and needs of persons with cognitive impairment.

VI. COUNTERARGUMENTS

Proponents of the TJ movement study “the role of the law as a therapeutic agent.”²¹¹ A major criticism leveled against TJ is that it is inappropriate for legal actors to engage in “therapeutic” activity.²¹² Further, proponents of “therapeutic” processes and justice must address the obvious issues of cost and inefficiency.²¹³

²⁰⁶ DSM-IV, *supra* note 87, at 42. Adaptive functioning is a psychological term of art used in the DSM-IV to refer to “how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.” *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *supra* Part IV for a discussion of Article 81’s functional assessment.

²¹⁰ Hurme & Wood, *supra* note 62, at 920.

²¹¹ *Introduction to LAW IN A THERAPEUTIC KEY*, *supra* note 13, at xvii.

²¹² Hoffman, *supra* note 56, at 2072.

²¹³ See, e.g., Hurme and Wood, *supra* note 62, at 883 (discussing cost as a barrier to implementing guardianship reforms).

A major criticism of TJ principles involves the “therapeutic” practice of law by judges and other legal actors.²¹⁴ One critic, the Honorable Morris Hoffman, expresses concern that the “new therapeutic judges” take on the role of “amateur therapists.”²¹⁵ Another critic, Professor John Petrila, contends that “the assumption that lawyers and mental health professionals should act in concert to identify and promote therapeutic values as one of the core functions of the legal system” needs “critical examination.”²¹⁶ While the concerns of Judge Hoffman and Professor Petrila are understandable, a judge’s concern that an outcome that he or she devises be effective and appropriate is less akin to an attempt to be an “amateur therapist” and more indicative of an attempt to create a fair and effective remedy.

Further, the notion of therapeutic processes should not bring to mind clichéd visions of troubled patients lying on couches. Instead, one should recognize therapeutic processes as attempts to utilize advances in social science and law to create optimal outcomes.²¹⁷ Perhaps some of the doubts surrounding the TJ movement as a proper *legal* movement stem from an unwillingness to recognize that judges should incorporate aspects of social science into the practice of law. But judges do this in many areas of the law.²¹⁸ Or, perhaps the idea of “soft” social science used in conjunction with “hard” legal principles is disconcerting and considered dangerous to the proper administration of justice.²¹⁹

Judge Hoffman offered his criticisms in the context of the TJ movement’s relation to the drug-court movement.²²⁰ Judge Hoffman writes:

Drug courts are the most visible, but by no means the only, judicial expression of the therapeutic jurisprudence movement. The idea that judges should be in the business of treating the psyches of the people who appear before them is taking hold not only in

²¹⁴ Hoffman, *supra* note 56, at 2072.

²¹⁵ *Id.*

²¹⁶ John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 13, at 685, 696.

²¹⁷ *Introduction to LAW IN A THERAPEUTIC KEY*, *supra* note 13, at xvii (“[TJ] is an interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform.”).

²¹⁸ For perhaps the most well-known example of the use of social science research in legal proceedings, see *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954). In *Brown*, the Supreme Court relied upon research that found segregation had a destructive psychological impact on black children. *Id.* at 494–95.

²¹⁹ See, e.g., Hoffman, *supra* note 56, at 2063–65.

²²⁰ *Id.* at 2067.

drug courts but in a host of other criminal and even civil settings.²²¹

Judge Hoffman considers the idea of “therapeutic judges” to be dangerous for several reasons.²²² His primary criticism is that judges that employ principles of TJ are “amateur therapists but have the powers of real judges” and that these judges “act in concert with each other, their communities, prosecutors, defense lawyers, and the self-interested therapeutic cottage industry, contrary to the fundamental principle of judicial independence.”²²³ To the extent that Judge Hoffman’s opposition to the TJ movement and its embodiment in drug courts is related to his resistance to the disease model of addiction and his belief that drug courts undermine the retributive goals of the criminal justice system,²²⁴ it is inapposite to a critique of a therapeutic approach to guardianship proceedings and arrangements.

Judge Hoffman’s concern that “therapeutic” judges act as “amateur therapists” is somewhat overstated. While Judge Hoffman applies this argument primarily in the drug-court setting, he also expresses concern about the use of TJ principles in other settings, including civil settings.²²⁵ Judge Hoffman’s belief that judges will act as “amateur therapists” ignores the reality that judges that preside over mental health or guardianship cases will consult with and be advised by expert witnesses—such as psychiatrists and psychologists—and will form a judgment based on input from these specialists.²²⁶ Thus, these judges are not acting as would-be psychiatrists; rather they are participating in a multi-disciplinary approach to understanding complex issues. Further, model judges—be they in drug courts or in mental health courts, or presiding over guardianship proceedings and arrangements—will be intimately familiar with issues of addiction, mental illness, and the effects of cognitive impairment on behavior, respectively.²²⁷ Fears of judges acting beyond the bounds of their authority and competency are exaggerated because judicial discretion is appropriately constrained, and so-called judicial activism is nothing more than a willingness to address problems holistically.

²²¹ *Id.*

²²² *Id.* at 2072.

²²³ *Id.*

²²⁴ *Id.* at 2067–68, 2075–76.

²²⁵ Hoffman, *supra* note 56, at 2067.

²²⁶ See, e.g., Kondo, *supra* note 50, at 293.

²²⁷ *Id.* at 287 (discussing the unique qualifications necessary for the position of mental health court judge).

Professor Petrilá's criticisms of the TJ movement, as they apply to the applications of TJ to guardianship proceedings, include the following:

Significantly, *Essays* [a collection of essays authored by the founders of TJ which explore applications of TJ principles] fails to question *who decides* what represents a therapeutic outcome. Instead, *Essays* simply assumes that research scientists and lawyers will decide whether a particular legal rule or intervention has therapeutic value. People treated voluntarily or coercively by mental health professionals and subject to legal rules governing the conditions and terms of that treatment are largely ignored. As a result, people who can provide the best information about the therapeutic or antitherapeutic consequences of legal/therapeutic interventions are excluded from participating in the analysis of what is or is not in their interest. Therapeutic jurisprudence as it has been conceptualized to date is a conservative, arguably paternalistic, approach to mental disability law.²²⁸

The argument that TJ largely ignores those whom it is intended to help is inimical to the very nature of the movement. Principles of TJ have been applied to better understand addiction, mental illness, and mental capacity in order to best serve the interests of persons whose lives intersect with the legal system due to drugs, mental illness, or some type of incapacity. It is in this capacity that the TJ movement seeks to enhance therapeutic consequences and reduce anti-therapeutic consequences, all without "subordinating due process and other justice values."²²⁹

Within the guardianship setting, TJ principles encourage legal actors to recognize the importance of the participation of a mildly cognitively impaired ward in the guardianship arena. Further, empirical research suggests that active participation in legal proceedings increases satisfaction with outcomes.²³⁰ Certainly increased satisfaction is a "therapeutic outcome" that incorporates the experience of the person subject to legal processes. While not without force, Professor Petrilá's criticisms of the TJ movement are not persuasive in the guardianship context.

Other criticisms of the TJ movement involve time and cost considerations. Certainly, involving judges, lawyers, guardians, and wards to the extent suggested in this Comment will sacrifice efficiency in

²²⁸ Petrilá, *supra* note 216, at 688.

²²⁹ *Introduction to LAW IN A THERAPEUTIC KEY*, *supra* note 13, at xvii.

²³⁰ See generally LIND & TYLER, *supra* note 178.

guardianship proceedings. Further, training and education efforts for legal actors, guardians, and wards require time and money.²³¹ Some have suggested cutting costs through practical training solutions for new guardians using existing community resources.²³² These suggestions could apply with equal force to training for judges and lawyers.

Economic and efficiency arguments in the guardianship setting are powerful. However, the legal community must remain mindful of the very essence of guardianship as an institution that sacrifices individual autonomy. Such arrangements require careful scrutiny and an active legal system in order to ensure that they are appropriate and carefully tailored. Many persons with mild cognitive impairment need the assistance of a guardian; these people also need to retain autonomy and control in areas of their lives in which they are competent and capable. A justice system that is informed by principles of TJ will better serve this population.

VII. CONCLUSION

Guardianship arrangements involving persons with mild cognitive impairment present a unique opportunity in which the principles of TJ can be applied to improve the “front-end” and “back-end” of guardianship proceedings and arrangements.²³³ Persons with mild cognitive impairment are capable of so much, yet likely need assistance in some areas of their lives. The application of TJ principles in this context illuminates important areas of concern, such as appropriate assessment based on objective, functional methodologies.²³⁴ Further application of TJ principles in this setting can ultimately improve the quality of life for many persons in need of some form of guardianship arrangement by allowing for more control and participation in the guardianship process.²³⁵ The key to overcoming systemic discrimination and misunderstanding is to make legal actors, legislators, and the public see persons with mild cognitive impairment as more like them, and less like a distant “other.” A TJ approach, informed by social science, can help this process. Finally, approaching guardianship using a TJ lens need not raise concerns

²³¹ Hurme & Wood, *supra* note 62, at 883 (discussing examples of cost as a substantial barrier to training).

²³² *Id.* at 884 (citing the use of community resources, such as guardianship agencies and associations, as a way to reduce costs associated with training).

²³³ See *supra* Parts V.A–B.

²³⁴ See *supra* Part IV.

²³⁵ See *supra* Parts V.A–B.

about inappropriate judicial activism or the “unlicensed practice” of psychology by judicial actors,²³⁶ but, rather, it should be viewed as a comprehensive and integrative approach to guardianship arrangements involving a uniquely situated group of individuals.

²³⁶ See *supra* Part VI.