Bentham on Guardianship: A Special Relation For Protection And Representation

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Introduction

Students of guardianship taking their first look at Bentham's writings on the subject might well ask themselves whether these explain guardian-ward relations better than Blackstone's earlier exposition.[1] Bentham's well-known antipathy towards Blackstone may be part of the reason he felt it necessary to write on the same subject and without acknowledgement of Blackstone (or any other regarded authority on the subject). While no attempt is made at a point-by-point comparison between Bentham's views and Blackstone's it is contended that what Bentham had to say on the subject was of more importance.

Bentham's treatment of guardianship is brief compared with his approach to most other subjects but its succinctness is accompanied by clarity of exposition that helps in drawing out main themes and arguments. It was nevertheless necessary in writing this article to strike a balance between, on the one hand, commenting on matters that seem implicit in Bentham's account or which seemed logically to follow a particular statement as against, on the other hand, speculating about what Bentham would have said had he discussed the subject at greater length. It was, however, judged appropriate to conjecture at some points on the influence of Bentham's views on subsequent developments and contemporary issues.

A central proposition implicit in Bentham's account was that guardianship is beneficial to wards. We do not know whether 'benefit' carried an aspirational meaning or if Bentham was simply 'speaking as he found', i.e., of the situation as he appraised it. We do not have evidence of benefits that wards actually gained, i.e. collected data or factual accounts of actual persons' experience. Nor do we glean an idea of the time factor: was 'benefit' assumed to be a constant or was it a variable that might apply in different degrees and different stages of the relation? In the absence of

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[1] W. Blackstone, *Commentaries on the Laws of England*, 4 vols., Oxford, 1765-9, vol. 1, pp. 461-66.

evidence of these kinds, a different approach to evaluation is required. What is attempted here therefore is an appraisal of the integrity and intention behind Bentham's assertion of benefit. Did these assertions alongside his other ideas provide a firm foundation upon which beneficial outcomes could be predicted?

This presentation firstly brings together and summarises Bentham's main statements on guardianship that are contained in his *Writings on the Civil Code* and from *An Introduction to the Principles of Morals and Legislation*. Brief reference is also made to *Of Laws in General.* The article then proceeds to discuss the key issues and questions to which these statements give rise, setting the scene for a consideration of Bentham's major contribution to the subject: the special elements of the guardian-ward relation at the heart of the guardianship concept. The discussion of guardian-ward relations that follows considers key elements in the relation under four headings: *Trust and Protection*, *Agency and Representation*, *Power Dimensions* and *Fiduciary Dimensions*. No attempt is made to review the substantial bodies of literature on these subjects that have accumulated since Bentham's time. The task is confined to explaining their part in identifying the features that distinguish guardian-ward relations from others.

Bentham's main statements

Generally speaking, Bentham maintains, we are the best judges of our own best interests: 'For who should know so well as you do what it is that gives you pain or pleasure?'[2] Putative wards' lack of 'knowledge, inclination and physical power prevents these persons securing their own wellbeing, furthering their own best interests and achieving the happiness that others gain through their own efforts.[3] Wards are perceived as intellectually or motivationally 'deficient' through young age or mental disorder. These two conditions apply respectively:

1. Where a man's intellect is not yet arrived at that state which it is capable of directing his own inclination in the pursuit of happiness; this is the case of *infancy*.

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[2] *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart, Oxford, 1996 (*CW*), (henceforth *IPML* (*CW*)), p. 244.
[3] *Ibid.*, p. 244.

2. Where by some particular known or unknown circumstance his intellect has either never arrived at that state, or having arrived at it has fallen from it; which is the case of *insanity*.[4]

In describing guardianship as part of, or as an adjunct to, family relationships called 'a trust of a private nature'[5] or 'domestic magistracy'.[6] Bentham seemed to mainly have in mind younger wards 'living within the compass of the same family'.[7] From a wider purview, Bentham located guardian-ward relations in a class of superior-subordinate relations consisting of two categories that are distinguished by whether they benefit the superior or the subordinate. Guardian-ward relations benefit the ward, viz.: 'A guardian is one who is invested with power over another[...] called a ward; the power being exercised for the benefit of the ward'.[8] And further, 'If it be for the sake of the inferior that the power is established, then the superior is termed a *guardian*; and the inferior his *ward*'.[9]

The role of guardians is likened to that of trustees, persons entrusted to ensure that wards benefit by giving them the best chance of attaining 'the greatest quantity of happiness which his faculties, and the circumstances he is in, will admit of'.[10] This aim is realised by procurement;[11] through ensuring wards are protected;[12] and, implicitly, by representing their interests. The guardian's over-riding obligation is to further the interests of the ward in a way the ward would have done him/herself had he/she been able. A guardian's 'power [...] thereby coupled with a trust, may be termed a *fiduciary* one'.[13]

Exercising powers of control of the person of the ward may also entail control of the ward's property. Bentham defines such property as ' [...] things [i.e., objects, upon

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[4] Bentham's reference to 'insanity' is taken to include both 'learning disability' and 'mental illness'. The present writer's use of the term 'mental disorder' also applies both to learning disability and mental illness unless otherwise indicated.

[5] *Ibid*., p. 248.

[6] 'Principles of the Civil Code', in *The Works of Jeremy Bentham*, ed. J. Bowring, 11 vols., Edinburgh and London, 1843 (Henceforth Bowring), i. p. 348.

[7] *IPML* (*CW*), p. 244.

[8] *Ibid*., p. 244.

[9] *Ibid.*, p. 288

[10] *Ibid*., p. 246.

[11] *Ibid*., p. 247.

[12] Bowring, i. p. 347.

[13] *IPML* (*CW*), p. 238.

the use of which] a man's happiness depends[...]'[14] i.e. not *just* a collection of 'things' but what is personally important to the ward. Bentham is adamant that a guardian's remit does not extend to third parties or their property, viz.: ' [...] guardianship, being a trust of a private nature, does not, as such, confer upon the trustee any power [...] other than [towards] the beneficiary himself'.[15]

As to how long guardianship should last, the general principle Bentham conveyed was that guardianship would cease once a ward was 'exhibiting the quantity of intelligence which is sufficient for the purposes of self-government'.[16] Guardianships for mentally disordered wards should last until such a person 'be of sound mind and understanding'.[17] However, for youngsters Bentham said it was necessary to presume that after a certain period all these wards should be deemed to be independent, i.e. self-governing. As to where this line should be drawn, Bentham thought responsibility rested with the 'legislators to cut the gordian knot'[18] and determine that such a guardianship should cease when the ward 'arrives at full age'.[19] An alternative prescription Bentham put forward was that 'Provision may be made [for those] who never reach maturity, or reach it much later than others [...] by interdiction, which is only (sic) a prolongation of guardianship during a prolonged childhood'.[20]

Issues and questions raised

The issues and questions raised by Bentham's account discussed below are: how Bentham perceived the objective of guardianship; its legal and ethical basis; what process was involved and over what time-span; the characteristics of wards and how they were likely to benefit, including implications of the person and property distinction; and questions as to the identity and capabilities of guardians.

Bentham's view of guardianship seems to be that of an institution in which the relation between guardians and wards is prescribed and regulated, though the nature or adequacy of specific contemporaneous regulations is not evidenced. Bentham did not

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[14] *Ibid*., pp. 247-48.
[15] *Ibid*., p. 248.
[16] *Ibid*., p. 245.
[17] *Ibid*., p. 246.
[18] *Ibid*., p. 245
[19] The age of legal maturity in England was twenty-one, a figure Bentham endorsed in *Principles of the Civil Code*, Bowring, i. p. 348.
[20] *Ibid*., p. 348.

dwell on wider questions about guardianship's purpose, but we may confidently assume that he viewed guardianship no differently to other areas of public policy, namely that it should seek to increase the happiness of the populace, by reducing pain and increasing pleasure. To achieve this goal required that wards be afforded protection and representation, the overall task of guardians.

An area of uncertainty is whether Bentham saw guardianship as directed exclusively at furthering the interests of individuals, in this case guardians' wards, or whether he envisaged it dealing directly or indirectly with a problematic section of society as a step towards attaining greater overall community or national happiness. This, he may have argued, would be consequential upon having well ordered and regulated guardianship laws and acceptable ethical standards in place.

Contemporary discussions of guardianship usually proceed by reference to prevailing statutory frameworks and/or to specific statutes, or such references may be implicit. Bentham may well have discussed these had he offered a fuller account but it seems also have been the case that his idea of guardianship was much wider and more inclusive than that contained in the legislation. He was less concerned with legal definition than with ethical behaviour and relationships within and beyond the family. Bentham stressed the need to apply moral principles; ethical considerations should inform the law, taking precedence over legal detail and there should be clear-cut practical applications. Overall it could be said the Bentham's approach was what we might now term a social policy perspective on what people need and can realistically expect from others given normal ethical behaviour and the existing statutory framework.

Bentham's insistence that legal codes were enforced, and that remedies for breach and related criminal acts or omissions were in place, show his commitment to the place of the law in providing protection in its widest sense. We are left to wonder, however, how these requirements applied specifically to guardianship without cross-reference to the state of contemporary guardianship law or enforcement requirements. For example, was Bentham sufficiently confident in the effectiveness of the machinery of compliance such that situations of defaulting or exploitative guardians would not arise or could be effectively dealt with? The example quoted later (under *Trust and Protection)* of wards needing protection from

guardians suggests cause for concern in this respect.

Bentham identifies the power base of guardianship as belonging to a subcategory of 'power of imperation' called 'private dominion' power and described as: ' [...] the power which the master exercises over the will of his servant, the parent over that of his child, the guardian over that of his ward'.[21] Elsewhere, Bentham discusses 'relations of a legal kind which can be superinduced upon [...] natural relations'.[22] The legal aspect of domestic relations, he explains, implies imposition of obligations; and the enactment of legal obligations within the family requires enforceable powers and rights.[23] It was from this position that he approached the correlative connection between guardian and ward as combining fiduciary and power relations—discussed later under *Power Dimensions* and *Fiduciary Dimensions*.

To appreciate how Bentham envisaged individual guardianships progressing over time would have been made easier had he called for a general ruling as to how long guardianships were expected to last, such as the dictum that this was until the ward achieved independence. However, the different rule for youngsters (fixed closure point at age twenty-one) provided no means to insure these wards had progressed sufficiently towards independence by this time. Presumably Bentham saw interdiction proceedings (prolongation of guardianship where achieving independence is unlikely) as a way round this difficulty so as to provide for youngsters who were clearly failing to progress to that stage, thereby enabling guardians to continue their relationship with wards where necessary beyond age twenty-one.

The effect of adopting interdiction measures could have been to bring termination expectations in line with those applicable to mentally disordered wards, namely that guardianships last till no longer needed. This is now a widely accepted principle endorsed also on a general conceptual level. Hiz, for example, applies the dictum by analogy to educators and doctors as guardians vis- à-vis their pupils and patients (respectively), pointing out that responsibilities appropriately cease when their pupils successfully complete their studies and when their patients are fully recovered.[24]

Interdiction also raises questions about guardianships of indefinite duration as

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[21] *Of Laws in General*, ed. H. L. A. Hart, London, 1970 (*CW*), p. 138n.
[22] *IPML* (*CW*), p. 206.
[23] *Ibid*., pp. 236/7.
[24] H. Hiz, 'The Ethics of a Guardian and the Ethics of a Legislator', *The Philosophical Forum*, xxix. (1998).

might apply, for example, to persons with severe learning disability requiring long-term if not life-long support and care and where an objective of enabling the person to attain a degree of happiness independently is unrealistic. If interdiction measures could provide for a form of indefinite guardianship that ruled out or discounted any prospect or intention of conclusion the result would be more like a form of alternative parenting. The effect would be to render the basis of guardianship for youngsters indistinguishable to that of adoption under child law. It is ironic, therefore, that a form of 'special guardianship' has now been introduced to accommodate long-term (indefinite) care of youngsters short of full assumption of parental responsibility by adoptive parents.[25]

Turning to the question of which groups of people Bentham perceived guardianship as being intended for, we note that he identifies putative wards as youngsters and mentally disordered persons of limited intellectual capacity. Bentham was probably of the same opinion as most of his contemporaries at least in this respect in paying high regard for self-determination and personal autonomy. Therefore he would also have perceived the main way wards were 'deficient' was in having limited autonomy and therefore requiring another to decide and act on their behalf, hence the need for a guardian. To these limitations of wards Bentham added the inability to achieve the happiness that others achieve by their own efforts, suggesting that motivational and possibly health related problems could stand in their way as well as intellectual limitations.

'Happiness' in Bentham's terms means 'enjoyment of pleasures, security from pain' and this might well describe some expected direct or indirect gains from guardianship.[26] Being well protected and represented by guardians could be the formula that ensures such gains are realised and maintained. The expression 'knowledge, inclination and physical power', used by Bentham to describe qualities lacking in wards, also points towards important sources of happiness that could be encouraged or frustrated. The words themselves may also suggest a three-dimensional way of considering persons' wellbeing and it is notable that one of the most readily usable modes of modern analysis, that provided by May, similarly distinguishes between the person as an individual, the person as a social being and the

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[25] Sections 1 4A to 1 4G added to Children Act, 1989, by Section 115, *Adoption and Children Act*, 2002.
[26] *IPML* (*CW*), p. 74.

person as a physical body.[27] May's analysis also follows Bentham in helping to identify ways of achieving happiness as well as pinpointing obstacles that may stand in its way. Goodin takes May's approach a stage further in identifying the main impediment to achieving happiness as the vulnerability that arises from a person's limitations in one or more of these aspects of his/her life and dependence on another to compensate for these.[28] The fiduciary concept as articulated by Bentham helps to explain why a special relation is required to combat a person's vulnerability.

A notable effect of the way Bentham brings together youngsters and mentally disordered persons together as the group for whom guardianship was intended is that the 'deficiency' of underdeveloped or diminished intellect is a perceived as a common denominator. In so doing he effectively identifies a 'generic' identity of prospective wards and thereby made substantial progress over Blackstone's account that only considered the position of children. Even so, it is notable that Bentham pays less attention to the situation of mentally disordered and/or older persons than to youngsters. It is difficult, for instance, to think of the needs (let alone the happiness) of these persons without at the same time considering the role of institutional care. We do not know whether Bentham perceived such forms of care as alternatives to or as complementing guardianship, though we may presume that it was only the least disordered who remained at home subject to guardianship.

Following on from questions about the characteristics of wards it would be instructive to ask how putative wards were selected or whether there were recognised 'triggers' or 'starting points', i.e. particular situations or circumstances, that would lead to guardianship being initiated for these persons. It seems safe to assume, however, that Bentham understood that whatever process was in place required proper procedures and careful consideration because it was these procedures that provided necessary safeguards against blanket judgements inappropriately or hastily applied. Bentham would have been well aware that such judgements could contribute to the perpetuation of social ills such as when persons were deemed incapable of knowing their own best interests for the benefit of others, as in the case of forced child labour and in the unjustified compulsory incarceration of mentally ill people.

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[27] R. May, 'Contributions of Existential Psychotherapy' in *Existence: A New Dimension in Pschiatry and Psychology*, ed. R. May, E. Angel, H. F. Ellenberger, New York, 1958.
[28] R. E. Goodin, *Protecting the Vulnerable*, London, 1985.

As against the difficulty of determining whether wards benefited from guardianship in the way Bentham seemed to assume, some specific ways he expected wards to gain can be stated, namely in receiving protection of their persons and property and by representation of their interests. He also refers to procuration as an undefined benefit from guardianship that, we may surmise, covered the various kinds of practical help, including material gain, which guardians could secure for wards. As to protection of wards' property it appears that Bentham accepted that the person and property distinction had practical significance so that for the protection of children's inheritance, for example, there could even be circumstances requiring the appointment of two guardians, each representing two sets of interests – wards' persons, on the one hand, and their property, on the other.[29] We might wonder, however, whether Bentham would have approved of the almost complete separation of 'guardianship of the person' and 'guardianship of the estate/affairs/finances' into the distinct forms of guardianship that have since become commonplace.[30]

Bentham's exposition suggests that he was inclined to view person and property as 'two sides of a coin' in so far as their protection contributed to achieving the happiness of wards. This being so, Bentham may well have been critical of legal thinking that can appear impersonal and only concerned with questions of ownership and title. His references to *pretium affectionis* in several of his works suggests that he would have recognised how deeply people feel about their property, not necessarily connected with material value, and the degree of emotional attachment revealed when items are stolen or defiled during burglaries.

Moving on to discuss questions about the characteristics of guardians (other than parent guardians), we ask whether these were persons with particular skills or experience and what may have been their main tasks and functions.[31] It would seem that guardians' competence was presumed because these were persons ably fulfilling a number of other socially important roles (further discussed under *The Power*

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[29] Bowring, i. p. 347.

[30] The Law Commission's recommendation that guardian of the estate for children be abolished (*Guardianship and Custody,* Report No. 172, 1988, Section 2. 24) was not adopted at the passing of the Children Act, 1989, though its scope was effectively limited to a function of the Official Solicitor in certain narrowly defined circumstances (N.Lowe & G.Douglas, *Bromley's Family Law,* Oxford, 2007, p. 439.

[31] Questions that Bentham's account raises as to similarities and differences between guardian- ward and parent-offspring relations are not discussed in this paper but are considered in a further article in course of preparation.

Dimension). Whether some of their status and kudos was derived from proven abilities as guardians is a matter of conjecture. It might be assumed that major changes have occurred since Bentham's time by which the guardians' role would have become increasing professionalised. However, Hiz's contemporary discussion of the ethics of guardianship interestingly focuses not on professional guardians but on doctors and educators who he regards as good examples of persons who capably fulfil the guardian role.[32]

In considering how Bentham expected guardians to respond to wards' needs and difficulties this would presumably include taking remedial or ameliorative action that would hopefully improve wards' situations. At the very least, Bentham would have expected guardians to provide an influential and constructive role model to young wards, one which would encourage them to find their own ways of seeking greater happiness, while being ready to offer them guidance and, where necessary, authoritative direction. It is less easy to speculate as to how Bentham expected guardians to fulfil their responsibilities towards elderly and mentally disordered persons in an era in which institutional care played a major role.

It would be interesting to know whether Bentham envisaged guardians confronting wards' 'deficiencies' solely through attending to personal factors rather than addressing the social circumstances in which they lived. Guardians would probably experience considerable difficulty grappling with individual examples of poor housing, lack of employment or poverty and it seems that for the most part Bentham expected social problems to be addressed not through the one-to- one form of guardian-ward relation but through the operation of a National Charity Company.[33]

An issue that still remains unresolved is whether guardians ideally function in a free-standing capacity, thereby being fully accountable to wards or, as has become increasingly the case with guardians employed by social welfare agencies, guardians owing primary allegiance to others. It seems certain that Bentham would have favoured the free-standing position because the fiduciary nature of the relation he envisaged (discussed under *The Fiduciary Dimension)* suggests that accountability elsewhere would compromise guardians' integrity. Modern managerial assumptions about

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[32] Hiz, 'Ethics of a Guardian'.
[33] See M. Quinn, 'The Fallacy of Non-Interference: The Poor Panopticon and Equality of Opportunity', *Journal of Bentham Studies*, i (1997).

efficient performance convey the need for 'in-line' organisational accountability, but the notion that this ensures sufficiently high standards of guardians' performance at least towards elderly wards in care homes has been questioned.[34]

Essential elements of the guardian-ward relation

The above discussion, albeit speculative in some respects, has hopefully demonstrated that at the heart of Bentham's conception of guardianship was the relation of guardian and ward, i.e., two persons correlatively connected by their specific roles and statuses. His statements about the nature of the relation express a number of concepts—trust, power, fiduciary, procuration, interdiction – some of these in combination, and part of the task of the following analysis entails separating their meanings and relating them to other concepts that Bentham either did not discuss or which he gave less attention: protection, representation, agency, authority and empowerment.

There is no explicit distinction in Bentham's account between the protective and representational roles for guardians. We are therefore not sure whether he perceived guardian-ward relations as containing two distinct facets: *trustee-beneficiary relations* that afford protection and *agent- principal type relations* that provide personal representation. It is nevertheless argued that these concepts are implicit in his discussion of guardians' roles, the two functions being enjoined within guardianship by the fiduciary dimension. The two functions that Bentham effectively merged are discussed separately.

It is also argued that these functions together with their respective rationales provide a clearer and more precise description of guardians' responsibilities than those offered by Blackstone ('protection', 'maintenance' and 'education').[35] This was demonstrated by Buti who found that in order to complete Blackstone's list realistically he needed to add: 'discipline and punishment'; 'domicile, access and visitation'; and 'affection and emotional support'.[36] The following argues that all these responsibilities (with the exception of the questionably appropriate punitive aspect) are subsumed under protection and representation *provided these are fully pursued and*

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[34] L. A. Frolik, 'Elder Abuse and Guardians of Elderly Incompetents', *Journal of Elder Abuse & Neglect,* ii (1991), pp. 35-46.
[35] Blackstone, *Commentaries*, p. 461.
[36] A. D. Buti, *Separated,* Sydney, 2004.

undertaken within a fiduciary relation, the latter element being Bentham's main forte and the one most conspicuously absent from Blackstone's account.

Later commentators have sought to convey the dynamics of guardians' roles based on 'developmental' or 'therapeutic' models of guardianship.[37] For present purposes, these mainly serve to highlight that any statement that portrays a purely static view of guardians' functions and fails to stress that guardians have to adapt their roles to the changing needs and situations of wards needs to be challenged. This message is implicit in the following and is fully illustrated in the section on *Power Dimensions*.

Trust and protection

Protective functions seemingly stem from what Bentham describes as the trust basis for guardianship, i.e. guardians entrusted to protect their wards' person and property and being assured of actually gaining that protection. The idea that guardian-ward relations are akin to *trustee-beneficiary* relations does not mean that they depend on the formation of a trust in a technical (legal) sense. It was the ethical concept of trust— the idea of a trust as a form of bond or agreement between persons – that was almost certainly what Bentham and later commentators had in mind as a basis for guardian-ward relations. Hiz, an example of a contemporary observer, considers mutual trust between the parties as a quintessential guardianship attribute.[38]

Bentham talks more of wards' need for security than for protection *perse* in *IPML* but his discussion in the Civil Code is specific, commencing with the need to protect children.[39] Seemingly Bentham had some doubt as to how effective guardians could be as protectors of their wards given the social conditions of the time and at one point even suggested that wards might need protection from guardians. The simplest way to avoid guardians abusing their position by, for example, misappropriating a child's estate '[...]is to allow any person to act in legal matters as the friend of the infant against (sic) his guardians'.[40] It would be interesting to know whether Bentham considered guardians who abused their position in such ways would

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[37] L. A. Frolik, 'Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform', *Arizona Law Review,* xxiii (1981).
[38] Hiz, 'Ethics of a Guardian'.
[39] Bowring, i. p. 347.
[40] *Ibid*., p. 348.

automatically loose their 'superior' standing, but see discussion under *Power Dimensions* regarding Bentham's use of 'superior' and 'inferior' terminology.

Situations such as the one described above might suggest some scepticism on Bentham's part as to how much trust could realistically be vested in guardians but for the most part his account supports the view that trust relations between guardian and ward are the basis for ensuring that protective intentions translate into protective reality, both for the ward him/herself and for his/her property. How he perceived trust relations in general is shown in his definition of trusts:

> A trust is, where there is any particular act which one party, in the exercise of some *power,* or some *right,* which is conferred on him, is bound to perform for the benefit of another. Or, more fully, thus: A party is said to be invested with a trust, when being invested with a *power,* or with a *right*, there is a certain behaviour which, in the exercise of that power, or of that right, he is bound to maintain for the benefit of some other party. [41]

Bentham stresses that a trust is only appropriately so named if and when the person actually (i.e. demonstrably) receives or enjoys its benefit(s), and to mark this distinction he prefers the title 'beneficiendary' to the more conventional 'beneficiary'.[42] Perhaps this caveat contains the residue of any lingering scepticism that Bentham may have felt.

Bentham's discussion of the meaning of 'power' and 'right' in this context observes (not without misgivings about the terms themselves) 'that a power was a faculty, and that a right was a privilege'.[43] This is taken to mean that persons appointed as trustees are 'privileged' (i.e., gain kudos socially by being entrusted to fulfil this role) and that their 'faculty' was that they were authorised as legally and personally capable, i.e. 'accredited', to carry out such responsibilities as would fulfil the beneficiary's requirements and thereby comply with the terms of the trust.

Reference to trustees' powers would therefore seem to mean '*accreditation*

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[41] *IPML* (*CW*), pp. 205-7.
[42] *Ibid*., p. 208 n.
[43] *Ibid*., p. 207 n.

powers*',* i.e. powers better described as obligatory responsibilities. A key distinction is that such powers invested in trustees are not exercised within power relations *perse* but flow from being authorised to act, etc., without corresponding to or depending upon reciprocation from/by the other party. By contrast, reciprocation on the part of a ward, express or implied, would necessarily be the case with exercise of representational powers, as in the agency relation discussed later.

It is initially difficult to reconcile Bentham's view of trust law with its modern counterpart, much of which is subsumed into areas of business and financial management. While now mainly providing a legally secure means of safeguarding property in a person's estate in order for it to be made available to present or future beneficiaries, the relation of trustee-beneficiary remains the essential means by which this is assured and trust law provides important safeguards to maintain the integrity of trustees.

The understated but essential *protective* role of guardians as trustees stems from their formal responsibility for ensuring that sufficient safeguards are in place to stand the best chance of realising the trust's objectives; and, so far as provision within the trust allows, to ensure that beneficiaries actually gain and that the gain is in their own best interests. Conversely, any relation based on one party protecting another is only viable if the 'protectee' trusts the protector, allowing for the fact that younger or more mentally disordered wards may not be able to experience or express trust between themselves and others.

Bentham's perception of guardian-ward relations as a trust relation provides a link between the legal and social aspects of his thinking. Not only should the law of guardian and ward be based in part on trustee–beneficiary relations, the need for trust is upheld as the necessary basis of the relation in its ordinary ethical sense. The nub of the trust concept in both senses is the obligations and responsibilities of trustees to do whatever is necessary to fulfil the objectives and terms of the trust.

Agency and representation

Pitkin's review of various meanings of 'representation' includes' [...] the idea of taking care of or looking after the interests or welfare of another'.[44] In practice this

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[44] H.F. Pitkin, *The Concept of Representation*, Berkely, 1967, p. 141.

requires an arrangement or understanding between parties such that a relationship exists whereby one person's primary sets of interests, wishes/aspirations, intentions, life goals, etc., are 'taken on', in total or in part, i.e. by another. The rationale for the choice of guardians to fulfil this role would be that they were the persons most likely to be able to realise these goals and to do so better than wards could do alone.

Set against this position is Pitkin's earlier argument that guardians are no more the representatives of their wards than are headmasters of their pupils or parents of their children.[45] The critical difference here, however, is that headmasters and parents have interests of their own to represent; they have their own agendas that not only differ from, but could be in conflict with, those of their pupils/children. Guardians, on the other hand, following Bentham's line, have a fiduciary relation with their wards that places the needs/interests of the ward before those of the guardian, further discussed under *Fiduciary Dimensions* below.

There is no direct evidence that Bentham perceived guardians as representatives of their wards in this sense although, as his own analysis showed, their need for representation is self-evidently even greater than for those able to pursue their own interests. We may speculate that his thinking on the subject differed little (in this respect at least) from that of Hobbes who said that persons who were not mentally or otherwise capable could not themselves authorise another to represent their interests.[46] These included persons Bentham identified as candidates for guardianship.

We may further surmise that any suggestion that such needs could or should become rights enshrined within guardianship would have been resisted by Bentham, sceptical as he was of the value of furthering peoples' rights, at least when defined as natural entitlements. A connected consideration relates to his views on a different kind of representation, the franchise, which were basically that women, children and mentally disordered persons were not capable of voting with any degree of intelligence and should not be enfranchised.[47]

Set against these considerations is another side to Hobbes' argument, as

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[45] *Ibid*., p.30.

[46] Thomas Hobbes, *Leviathan*, London, 1914, p. 85.

[47] M. James, 'Bentham's Democratic Theory at the Time of the French Revolution', *Bentham Newsletter*, x (1986), p. 11 .See also *Constitutional Code* (*CW*), vol. 1, ed. F. Rosen and J. H. Burns, Oxford, 1983, Ch. V, § 1, p. 29.

articulated by Pitkin; that authorisation for other persons to represent people without capacity is possible provided it comes from 'outside', i.e., from a third party.[48] This source is what we would naturally identify as the bedrock of guardians' authority, i.e., the Sovereign.[49] It seems certain that Bentham would have viewed the Crown in this light as well as the one ultimately responsible for ensuring guardianship law was properly implemented, breaches dealt with, etc. Conceivably, Bentham wanted his straightforward and 'down to earth' account to be free of any esoteric rationale or philosophy, and might have perceived notions of *Parens Patria* and the Crown as 'guardian of guardians' in this light, i.e. as 'fictions' that might obscure rather than clarify guardians' roles.

Bentham would surely have approved of guardians acting for or making decisions on wards' behalf and in their interests, central features of the representational function. If he was reluctant to invoke the Royal Prerogative as ultimate authority he might have looked instead at agency law to authorise guardians to fulfil these roles. Agents, unlike trustees, have a representational role but their authority to fulfil this comes from their principals.[50] In the absence of capacity to give such authority, other legal means are needed and it is precisely this 'gap' in the law that guardianship could fill. A possible reason Bentham did not discuss agency law, its limitations and how guardianship law could overcome these is that agency law was at that time under-developed with principal-agent relations mainly associated with one particular and quite different set of relations, namely those of master and servant further discussed below.[51]

Another way in which guardianship law could have developed from Bentham's position regarding wards who by definition lacked capacity would be to give guardians powers to decide or act on wards' behalf without explicit endorsement when wards' present circumstances or previous wishes could reasonably be interpreted as implied agreement. This 'substituted judgement' basis upon which to safeguard wards' interests could be deemed an expression of the fiduciary relation.

It is not suggested here that Bentham envisaged developments that explicitly

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[48] Pitkin, *Representation,* p. 23.
[49] By 'Sovereign' in this context Bentham, a republican, would have meant whatever form of government pertains.
[50] *Ibid*., p. 130.
[51] O. W. Holmes, 'Agency' in *Collected Legal Papers*, New York, 1952, p. 50.

followed either of these paths. What is asserted is that his formulation paved the way for such developments and on this basis alone and we are justified in referring to this henceforth as the agency basis for guardian-ward relations.

Power dimensions

As indicated above, Bentham describes the legal basis of guardians' 'powers of control' as coming within the 'private dominion' subcategory of imperation powers. He then divided private dominion powers into two further classes – 'beneficiary' and 'fiduciary' powers. These Bentham illustrated by contrasting master-servant relations with guardian–ward relations. In master-servant relations, he identifies masters as the 'superior' party and as being the prime gainers from it; masters are said to exercise a *beneficiary power* over servants. In relations of guardian and ward, on the other hand, wards are the 'inferior' party but are presumed to be prime gainers from it. Guardians exercise a *fiduciary* power.

Bentham's use of terms 'superior' and 'inferior' might suggest that he considered guardianship to be an institution with a built-in status difference between guardians and wards. However, Bentham's contention was probably that these terms spelt out the critically important power difference between persons, albeit differences that may well have a social class basis (other than where guardian-ward relations were located within the same family). From this standpoint the power of 'superior' persons was likely to be derived from their elevated position in society from which they had acquired authority. Such persons were able to use power relations primarily to serve their own interests. Conversely, 'inferior' persons occupied lower social status, were relatively 'powerless', and so tended to be on 'the receiving end' of power relations. The point of departure for guardian-ward relations, is the reversal of the notion of 'benefit': guardians are relatively powerful compared with wards but are obligated to use their power 'over' wards not to serve their own interests but to further those of wards.

With these points in mind, Bentham's argument might be restated thus: the rationale (or 'purpose') behind master-servant relations is *primarily* for the gain of masters exercising power *beneficial to their own interests.* In guardian-ward relations, wards are the intended *primary benefit gainers*. The guardian's exercise of 'fiduciary'

power gives priority to serving the interests of the ward. However, we would surely now need to add a rider to this formulation, namely that the viability of both (if not all) sets of interpersonal relations depends in the long run on each party gaining some benefit. What guardians themselves would gain is discussed in the section on *Fiduciary Dimensions.*

Whilst Bentham would no doubt have emphasised that the consequential effect of relations is their key rationale, his stress on the notion of 'benefit' could realistically only have referred to purpose or intention since, as above indicated, there were no means available to know whether benefit was actually gained by wards. Warnock speaks approvingly of Bentham's 'celebrated "calculus" for measuring pleasures and pains' but it is doubtful whether this would help us judge (consequentially) whether the guardian-ward relation *per se* contributed beneficially in this sense.[52] Without documented accounts of experiences of wards and guardians any evidential base could only be hypothetical and is not further discussed.

The advantage of considering *purposeful* connections between powerless and powerful persons is that it enables us to speak of a power *relation* the purpose, objective or effect of which is realised because of the power difference between the parties. This also helps in envisaging a shifting 'balance of power' occurring in the relation over time. A problem with the way Bentham presents his account is that it conveys a static view of these relations in which guardians' exercise fiduciary power 'over' wards in a permanently benign manner. It seems inconceivable, however that he would not have accepted that passage of time alone can change the 'shape' of relations not least because guardians would exercising power in different ways.

It is not difficult to envisage scenarios to illustrate this point. A particular guardian-ward relation could start with a compulsory imposition but proceed towards a power-sharing state as and when the ward gains confidence in the guardian's best intentions and competence. A reverse pattern in the exercise of power could apply in the case of a ward whose mental state deteriorates to a point where he/she is unwilling to receive necessary help without the use of coercion.

The main way different types of power relations have been conceptualised is by distinguishing *Imposed Power* ('Power Over') and *Empowerment* ('Power To').[53]

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[52] M. Warnock, 'Introduction' to J.S. Mill, *Utilitarianism*, ed. M. Warnock, London, 1962, p. 19.
[53] S. Lucas, *Power*, London, 1974, pp. 28-31.

Although Bentham's formulation mainly conforms to the first of these, there seems little doubt that he would have recognised the need for guardians to empower their wards.

In power relations referred to here as *Imposed Power*, the more powerful person exercises dominance over the less powerful person. This involves not so much a question of 'who benefits?' from a relation of this kind but on whose terms the relation is conducted. It may nevertheless be the case that a more powerful person with benign motives imposes power in a way as to ensure that the less powerful person is the gainer. On the other hand, Bentham would have been well aware of examples of power used malevolently and of the evils brought about by abuse of power, as was the case with the slave trade, child labour, poor relief, etc. Likewise, he would surely have appreciated that malevolent power relations would discredit the more powerful whereas benign relations would afford kudos and social recognition.

At its extreme the more powerful person invokes compulsion and/or coercion, possibly legitimated by statutory authority. At the other end of the scale, the more powerful person may use assertive techniques selectively seeking to maintain the relation while exercising judicious control of the person. The authority that entitles the more powerful person to exercise this power may be self- assumed, effectively abrogated by the less powerful person, socially accepted or legally acquired.

Agency practice (discussed in detail under *Agency and Representation*) illustrates a particular kind of legally founded imposition in which the less powerful person authorises the other to exercise power(s) on his/her behalf – power(s) that he/she does not posses and/or cannot acquire and/or that *may be in conflict with the latter's apparent wishes*. Principals give agents authority to make such decisions or take such actions on their behalf by operation of agency law. They do so basically because they recognise that such agents 'know best' (or 'can-do better').

Modern guardianship under mental health legislation provides a fixed formula arguably based on an assumed need for three imposed powers over wards ('patients') namely, to determine their place of residence, their attendance (at specific places) and to ensure that guardians have access to them.[54] The flexibility

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[54] Section 7, Mental Health Act, 1983.

required to ensure that this serves wards' best interests and moves towards empowerment is considerable. Research has shown that this is only be achieved in practice by creative actions by guardian social workers.[55]

Turning to *Empowerment*, that might be described as a power relation in reverse, it could be said that this applies where a more powerful person shares or 'lends' his/her power to a less powerful other. The latter gains strength by having the other's power to support him/her and is enabled to become 'powerful enough' to proceed without the assistance of the other. The expression 'power exchange' has been coined to describe such circumstances.[56] Here the gainer is more clearly the less powerful person (e.g. where gain includes becoming 'more powerful') but the more powerful person may gain in a number of ways: his/her own satisfaction, social kudos or professional recognition.

Arguably guardians can only empower wards if they themselves are empowered by legitimate authority. The maxim that the legitimisation of power comes from authority might not seem prerequisite for empowerment in the same way as it is with imposed power. However, the difference is that the legitimisation of empowerment proceeds from a different underlying assumption namely, that a less powerful person only accepts the exercise of power by the other if the latter conveys credibility and capability. In other words, the former is perceived by the other as acting legitimately and as carrying authority, albeit of a personal kind.

Fiduciary dimensions

Contemporary uses of the word 'fiduciary' include adjectival descriptions of a wide range of terms, i.e. law, doctrine, obligations, duties, principles and power, as well as to describe a particular kind of relation between persons. This latter use of the term, placing it within a relational context, is the main focus of this discussion. Nevertheless it's meaning remains elusive and an assessment that it possessed 'a mystique only beginning to melt', would seem to have been optimistic.[57] 'A power [...] coupled with a trust [...] is a *fiduciary* one' is Bentham's sole reference to 'fiduciary' in the guardianship context**,** which seriously understates it as a central element in guardian-

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[55] B. E. Cox, *Research on Guardianship for Mentally Ill Peopl* e, London: Department of Health Social Services Inspectorate, 1994.
[56] P. M Blau, *Exchange and Power in Social Life* , Oxford, l986.
[57] J. R. M. Gautreau, 'Demystifying the Fiduciary Mystique', *Canadian Law Review*, lxviii, p. 1.

ward relations.[58] Had he thought it necessary to support his key statement by reference to the legal background to the fiduciary dimension this would no doubt have located it within the province of Chancery and Equity.

Two main questions about the meaning of 'fiduciary' have troubled commentators since Bentham: (1) what does the term mean as applied to interpersonal relations; and (2) are there specific kinds of relations that are fiduciary by definition (and if so, which) as opposed to a potentially limitless range of relations that may be or become fiduciary in certain circumstances? Fortunately, these questions can be addressed, separately and in turn, while shedding further light on Bentham's position.

Theories underpinning the nature of fiduciary relations mainly seek to explain the application of fiduciary law *per se* to business and commercial dealings. Few of these theories are of relevant application to guardianship (or other fiduciary relations) other than Reliance Theory, described as '[...] perhaps the most basic of all [...] and most commonly cited'.[59] In applying this theory, Shepherd states that 'a fiduciary relationship exists where one person reposes trust, confidence or reliance in another [...] to the knowledge of that other'[60] adding that this gives rise to a state of vulnerability, i.e. 'the relative vulnerability [present whenever] one party has dominance or influence over another party, which dominance is based upon a confidence reposed in him by that party'.[61]

Elsewhere, in place of 'dominance and influence' Sheppard comes closer to Bentham's position in saying that 'it is the power within the relationship which creates the vulnerability'[62] and that the fiduciary (the term used here as a noun) therefore has 'a duty to utilise that power in the best interest of the other'.[63] Interestingly, Goodin's thesis is that society's obligations to the socially vulnerable, i.e. persons 'vulnerable to avoidable harm', needs also to confront the vulnerability arising from dependence on more powerful others to reduce the impact of that harm.[64] From this standpoint, a more apt name for Reliance Theory would be Reliance-Dependence-Vulnerability Theory.

At first sight, Sheppard seems to undermine the credibility of reliance theory by

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[58] *IPML*, p. 238.
[59] J. C. Shepherd, *The Law of Fiduciaries*, Toronto, l981, p. 56.
[60] *Ibid.*, p. 56.
[61] *Ibid.*, p. 57.
[62] *Ibid.*, p. 85.
[63] *Ibid.*, p. 85.
[64] Goodin, *Protecting the Vulnerable*.

saying that it is derived from a principle' [...] taken out of thin air, an ethical or moral imperative [...] untestable within the confines of the legal system'.[65] However, Bentham may well have retorted that these moral and ethical perspectives are as valid as a purely legal approach. Moreover, Sheppard himself later reminds us' [...] not to lose sight of the moral foundation upon which many of our legal rules have been erected, including those in the area of fiduciaries.' [66]

On the second question posed above, Gautreau can be cited as typical of a modern commentator who argues that whether or when fiduciary obligations apply does not depend on the existence of identifiable classes of relationships.[67] Although solicitor-client, trustee-beneficiary, principal-agent and guardian-ward are all examples of generally agreed fiduciary relations, he maintains that 'It is the nature of the relationship [the particular undertakings between the parties] rather than the category of the actor involved that gives rise to the duty'.[68] The alternative view, and one that fits better with Bentham's guardianship, is that guardian-ward relations exemplify a class of relations that are fiduciary *by definition* (i.e. not dependent on characteristics of any given relation between the parties).

In fact we find that Bentham's actual description of obligations within guardianship is essentially consistent with a specifically identified fiduciary relation. Guardians serve the best interests of wards and are *obligated* to represent their wards' interests—not the possibly conflicting interests of others, i.e. of the guardians themselves or third parties. Being in a fiduciary relation with their wards means that they are 'duty bound' to put the interests of wards first. Therefore wards' trust, confidence and reliance on guardians are essential preconditions, together with the associated vulnerability of both kinds described above. The difficulty of squaring these principles with the basis upon which guardians operate, i.e. on a free-standing basis or within agencies, was discussed earlier in the context of how guardians are selected.

Such a stringent definition of fiduciary relations might suggest that guardians as fiduciaries were not expected to have interests of their own, but this does not follow from Bentham's exposition. Most obviously, guardians would have normal human

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[65] Shepherd, *Law of Fiduciaries*, p. 57.
[66] *Ibid*., p. 60.
[67] Gautreau, 'The Fiduciary Mystique', p. 1.
[68] *Ibid*., p. 5. Gautreau's article needs to be read in context, namely as a commentary on current trends, the general thrust of which is not here challenged.

interests possibly as parents (of their own offspring well as possibly of wards). And, as has been mentioned apropos trusts, guardians may attain the 'privilege' (kudos) that being a trustee affords. Their other legitimate interests would include ensuring the effectiveness and integrity of their role as guardians and maintaining the credibility of the institution, matters that will sooner or later further ward's interests.

Overall it can be said that guardian-ward relations defined as fiduciary highlight special requirements of personal care, and indicate the way responsibility of one person for a vulnerable other is exercised, a consideration notably absent from Blackstone's account. Taken together with 'a duty of care' (part of common law of tort rather than law of fiduciaries), these elements are judged to under-lie the primary care responsibility within guardian-ward relations.

Although power and fiduciary dimensions have been separately described it is obviously important that they combine together in practice. As a fiduciary relation, the impact of the power dimension means that guardians need to exercise imposed power 'over' their wards appropriately, i.e. to ensure the latter's protection and representation. By this measure, inappropriate use of power would include meeting the guardian's rather than the ward's needs, e.g. simply to make his/her task easier. Power exercised in the fiduciary relation substitutes equitably for that person's 'lack of power' and furthers that person's interests.

Bringing together the fiduciary and power dimensions within guardian-ward relations ensures that: (a) power relations are modified by fiduciary imperatives; and (b) that the fiduciary relation is supported by beneficial power(s). Seemingly it is this intermix that gives guardian-ward relations their distinct character.

Conclusions

Without due allowance for the limited scope of Bentham's exposition, students of guardianship could be justified in criticising the net result for being a-historical, non-empirical and lacking in vision. It is the case that the account did not: review guardianship's long and complex history; provide evidence of what was actually happening (the size of the issue or the need or the resources to meet it); or put forward recommendations or predictions as to necessary future needs or developments. On the other hand, it is also the case that there were additional reasons

for the absence of these considerations in Bentham's account and these are now briefly reviewed.

Whether or not Bentham intended his discussion to begin from a 'clean sheet' he demonstrated that starting afresh had substantial advantages: clearing the ground meant that he and his readers were not loaded with 'baggage' (precedent, status of previous commentators) thereby enabling the subject to be looked at afresh. In general, the value of a historical approach is to help explain the present and to intelligently predict the future. Arguably, Blackstone's concentration on archaic guardianship categories did not succeed in either of these objectives because his account effectively blurred the distinction between past and present, i.e. where 'the present' is described and reviewed in terms of prevailing laws, social and economic conditions. In this he was faced with the perennial problem shared with his contemporaries of how to provide a complete and realistic picture without available supporting evidence.

Bentham would not have been in a better position than Blackstone if he had sought to review the state of existing guardianship law or argue for the need for change because neither commentator could have accessed the facts of the situation. For instance, there was no centrally collected data on the working of the Tenures Abolition Act, 1660, (the formalisation of guardianship of children and adults), that could have been cited to indicate numbers of guardianships or proportions of different categories of wards.[69] Nor was there nationally collected information on local practice, such as the extent of use made of borough guardianships, i.e. guardianships framed around laws made by the boroughs themselves.[70]

Had Bentham written in depth on guardianship, and therefore, had he sought to present factual evidence for his views in the way he did on other subjects, a realistic assessment of the beneficial impact of guardianship could perhaps have been made. Of course a full treatment would have been more likely to convince his readers of the social value of guardian-ward relations, both as being of real beneficial value to wards and as benefiting society as a whole. Nevertheless, providing hard data alone would have been insufficient to support these contentions because deciding 'who benefits?' from any given arrangement or measure in any particular context

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[69] 12 Car. II. c.24.
[70] M. Bateson, *Borough Customs*, London, 1904.

depends on who makes the judgement and from which standpoint. Taking a different example, that of the slave trade, we could conclude that it was the slave owners and traders who enjoyed beneficial relations. Moreover, Bentham would have been first to appreciate how unsafe is to assume that simply because some more powerful others have legal duties or moral obligations to benefit the less powerful that this describes actual outcomes.

Overall, however, Bentham seems to have been less interested in guardianship law *per se* than whether it provided an ethical framework within and beyond the family nexus. This standpoint is judged to effectively circumscribe the nub of the issue so far as this article is concerned: the nature of guardian-ward relations beyond formal legal definition, though Bentham's location of his discussion within 'Division of Offences' (rather than 'Law of Persons', as had Blackstone) did not help to advance his argument. It is contended that notwithstanding the absence of empirical evidence there are other ways Bentham demonstrates the value of guardian-ward relations, and these are now briefly reviewed. Finally, some observations are offered on current developments that confirm their value.

Although Bentham's achievement has not been recognised his exposition reached the heart of the guardianship concept, namely the guardian-ward nexus as a distinct kind of fiduciary relationship. This demonstrated that combining the trust basis for protection and the agency basis for representation provided the best prospect for serving wards' best interests. He also paved the way for establishing a basic principle as to the time-span of guardianship, namely that guardianships should last till no longer required when earlier termination was inappropriate. Seemingly, Bentham left others to ponder on how these findings could be enshrined in future legal reform.

Similarly the importance of Bentham's major advance in providing the grounding for a generic criteria for guardianship (i.e., common to both youngsters and mentally disordered persons), has yet to be recognised. It is tempting to combine this with Goodin's vulnerability analysis in recognising that the essential common 'incapacitating' feature of some putative wards (irrespective of age) is their vulnerability to harm and to being dependent for their happiness on guardians. The 'three-dimensional' way of viewing wards' and their situations—suggested by

Bentham's terminology and developed conceptually by May—enables us to see them as individuals, as social beings and as physical persons.[71] Vulnerability within these areas calls both for protection and representation, hence Bentham's insistence on the fiduciary basis of guardian- ward relations.

Because the main focus in this paper has been on one-to-one relations, public policy issues *per se* have received less attention but Bentham would undoubtedly have been concerned that guardianship also serves the interests of communities and society as a whole. Arguably, prerequisite to this is maintaining the credibility of the institution as a necessary and ethical way to protect and represent the needs of socially vulnerable groups. A major contributor to this aim is the maintenance of the integrity of guardians, both in a legal and social sense. Bentham's exposition, including his reference to guardians who abuse their position, clearly pointed to the need for some kind of group identity, shared values, code of conduct and common skills among guardians. To support these proposals there should be added an efficient administrative system with accepted procedures for assessment and for initial agreement on 'terms of reference'.

The necessity of both the protective and representational needs of vulnerable groups have been better recognised since Bentham's time, and the growth of welfare provision and latterly of social services has transformed how these are provided. These objectives have been integrated into social policy agendas and contributed to comprehensive statutory frameworks. Whereas it could be said that guardianship has been absorbed into the legislative paradigm at the expense of attention to its essential relational core, many services now have an explicitly protective function and are sometime themselves viewed as a form of guardianship.[72]

The representational function has fared less well in this respect than protection. This is a particular area of current concern in residential care where prioritising a safe environment and providing overall protection can work against an individual's representational needs. Recent studies of elder abuse have found residents of care homes being physically restrained, not for their own sake but to

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[71] May, *Existential Psychotherapy*.
[72] T. Apolloni and T. P. Cooke, *A New Look at Guardianship*, Baltimore, 1984. Indicatively, the authors subtitled their work: 'Protective Services that Support Personalized Living'.

maintain a relatively tranquil and compliant regime.[73] To counter this trend it is being argued that the representational role needs reasserting more strongly, and that independent guardians need to have powers to intervene effectively on behalf of those unable to speak up for themselves.[74] These suggestions, taken together with Bentham's insights into the meaning of fiduciary relations, highlight the unresolved question, discussed above, as to whether guardians' full accountability to their wards is compatible with accountability to others in authority such as an employing agency.

Overall it is contended that because Bentham's 'relational' starting point was right, his formulation answers questions as to guardianship's purpose and function that are as relevant to-day as they were in Bentham's time, albeit in a very different social environment. Sufficient has hopefully been said to answer our original question positively: in the absence of empirical evidence that wards benefited from guardianship, it is maintained that Bentham's account did provide a firm foundation for believing that such benefit was being realised and/or that benefit would be realised if his important ethical and legal requirements as to the structure and function of guardian-ward relations were adhered to.

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[73] Commission for Social Care Inspection, *Rights, Risks and Restraints*, London, 2007.
[74] B. E. Cox, 'Combating Elder Abuse: Role of Guardians for Older People in Residential Care', *The Journal of Adult Protection*, x (2008).