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STATE CONSTITUTIONS AND STATUTES AS SOURCES OF RIGHTS FOR THE MENTALLY DISABLED: THE LAST FRONTIER?*

Michael L. Perlin**

I. INTRODUCTION

The evocation of a past, halcyon “golden age” is a popular and familiar concept, whether the subject matter is opera, rock ‘n’ roll, baseball or television drama. Nostalgic images are warmly recalled of prima donnas who could really sing, of guitarists who could really rock, of sluggers who could really hit and of dramatists who could really write. More cynical commentators have suggested, though, that some of these images are a bit distorted. Every generation, they suggest, has its own “golden age” (roughly akin to those years of one’s youth or adolescence when one discovers the subject matter in question). Having grown up in the New York metropolitan area in the early 1950’s, I am still convinced that that was the golden age of baseball (1951 [Willie Mays and Mickey Mantle arrive] to 1957 [the Giants and Dodgers depart for the West Coast], for purists), but I suppose I am willing—in the abstract, at least—to concede the commentators’ point.

On the other hand, if we look at the years 1972 to 1978 (which, not so coincidentally, cover my youthful years as a litigator), we may agree that these were, from the perspective of attorneys advocating on behalf of the mentally disabled, the “golden age” of federal litigation. Consider briefly the developments in the Supreme Court, the lower federal courts, and Congress during those years.

First, and perhaps most importantly, institutionally, the federal courts were undergoing significant change. The “hands off” doctrine1—

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which had, to a great extent, precluded relief in virtually all types of institutional reform cases—was being slowly abandoned.\textsuperscript{2} Simultaneously, the scope of the due process and equal protection clauses was being expanded in cases brought on behalf of a wide variety of minority groups\textsuperscript{3} and others,\textsuperscript{4} many of whom could broadly be characterized as coming within the protective confines of footnote 4 of \textit{United States v. Carolene Products Co.}\textsuperscript{5} Also, the scope of relief available under 42 U.S.C. section 1983\textsuperscript{6} expanded exponentially following the Supreme Court’s decision in \textit{Monroe v. Pape.}\textsuperscript{7} Further, a phenomenon becoming known as “public interest law”\textsuperscript{8} was taking root, through which it ap-

\textsuperscript{2} See, e.g., Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (there is “no curtain drawn between the Constitution and the prisons of this country”); see also Robbins & Buser, supra note 1, at 930 (federal intervention is a “last, but viable, resort” in prison conditions cases as a means of “charting the perimeters of a maturing society”).

\textsuperscript{3} The paradigmatic case is Brown v. Board of Educ., 347 U.S. 483 (1954).


\textsuperscript{5} United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); see also Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985); Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 Colum. L. Rev. 1093 (1982).


\textsuperscript{8} The seminal article is Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). See generally M. Meltsner & P. Schrag, Public Interest
peared inevitable that classically "hidden" and disenfranchised groups such as the mentally disabled9 would replicate the experiences of other similarly-situated groups, turning to the apparently friendly confines of the federal courts in an effort to seek vindication of fundamental constitutional and civil rights.10

In a wide variety of cases brought on behalf of the mentally ill and the mentally retarded, federal district courts and courts of appeals thus began to apply due process principles to such questions as substantive limitations on the civil commitment power,11 the applicability of the "least restrictive alternative" doctrine to both commitment and treatment matters,12 the right of involuntarily confined individuals to treat-


[Recent] development[s] of mental health rights law must be seen as a logical culmination of the expansion of such parallel fields as civil rights, consumer rights, criminal procedure, and inmates' rights: to a large extent, mental health law is at the crossroads of all of those paths, as an outgrowth of a process by which lawyers have become able to contribute to "public consciousness of inequities or shortcomings in the society" through "substantive concerns with issues of social policy."

Id. at 34 (footnotes omitted); see also id. at 41 nn.30A-30C. See generally Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635 (1982); Resnik, Managerial Judges, 96 HARV. L. REV. 376 (1982). But see Nagel, On Complaining About the Burger Court (Book Review), 84 COLUM. L. REV. 2068, 2081 (1984) (The Warren Court has been glorified and enshrined "because of a need for heroes," and "because of a need for deeper roots in a political community—for ties and loyalties that could reduce the need for moral simplicity in public affairs.").


ment, their right to refuse the imposition of certain medical treatments, and even the right to deinstitutionalization or community treatment.

The United States Supreme Court appeared to be signalling that it was comfortable with this trend. In his 1972 opinion for the Court in Jackson v. Indiana, Justice Blackmun applied the due process clause to


On the role of the judge in such litigation, see generally Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 VA. L. REV. 43 (1979). In Dent v. Duncan, Judge Rives wrote:

I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility . . . and thereby relieve the federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

360 F.2d 335, 337-38 (5th Cir. 1966) (Rives, J., concurring specially).


There have been 28 published opinions on various aspects of the Pennhurst case. For a complete list, see Halderman v. Pennhurst State School & Hosp., 610 F. Supp. 1221, 1222 (E.D. Pa. 1985).

the nature and duration of civil commitment and offered this now-famous "cue bid" to aspiring litigants representing mentally disabled individuals: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the commitment] power have not been more frequently litigated."18

Three years later, in O'Connor v. Donaldson,19 the Court, per Justice Stewart, recognized that certain nondangerous, mentally ill individuals have a "right to liberty" and added:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in custodial confinement. Assuming that the term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.20

It is no wonder that within days after the O'Connor decision was published, advocates for patients21 and prominent psychiatrists22 were predicting that thousands of long-term patients would be deinstitutionalized as a result of that opinion.23

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18. Id. at 737.
20. Id. at 575.
21. See, e.g., Grant, Donaldson, Dangerousness, and the Right to Treatment, 3 HASTINGS CONST. L.Q. 599, 608 n.45 (1976) (citing N.Y. Times, June 27, 1975, at 36, col. 3 (quoting Bruce Ennis, Kenneth Donaldson's counsel before the Supreme Court)).
22. See, e.g., Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 MICH. L. REV. 1, 143-44 (1984) (quoting a July 8, 1975, television interview with Dr. Alan Stone, Chairman for Judicial Action of the American Psychiatric Association); id. at 144 n.1044 (citing Opening the Asylums, TIME, July 7, 1975, at 44, regarding an estimate by American Psychiatric Association officials that 90% of compulsorily detained mental patients were not sufficiently dangerous to themselves or others to require hospitalization in light of the O'Connor standard).
23. These predictions initially appeared excessive. See, e.g., Comment, O'Connor v. Donaldson: The Death of the Quid Pro Quo Argument for a Right to Treatment?, 24 CLEV. ST. L. REV. 557, 571 (1975). A decade of experience has revealed, however, that to some extent the expected deinstitutionalization has occurred. In Virginia, for example, where the state's statutory scheme was rewritten "in partial anticipation" of O'Connor, the state institutional population was reduced from 17,000 to 10,000 within five years of the new law's enactment. Allerton, An Administrator Responds, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 17, 18 (1976).

On the multiple causes of deinstitutionalization, see generally Bassuk & Gerson, Deinstitutionalization and Mental Health Services, 238 SCI. AM. 46 (1978); Ewing, Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process, 31 STAN. L. REV. 679 (1979); Ferleger, Anti-Institutionalization and the Supreme Court, 14 RUTGERS L.J. 595 (1983); Mills & Cummins, Deinstitutionalization Revisited, 5 INT'L J.L. & PSYCHIATRY 271
Finally, Congress also appeared to recognize the plight of the disabled by enacting the Developmentally Disabled Assistance and Bill of Rights Act (DD),24 the Education of the Handicapped Act (EHA)25 and section 504 of the Rehabilitation Act of 1973.26 Congress stated that “[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities"27 and that treatment "should be provided in the setting that is least restrictive of the person's personal liberty."28 Congress prohibited discrimination against the handicapped in any program or activity receiving federal aid29 in order “to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . .”30

Speaking on the Senate floor in support of the DD bill, Senator Javits, one of its chief sponsors, spoke eloquently and persuasively on behalf of a far-reaching act, using language that appeared to reflect Congress' intent in enacting the law: "Congress should reaffirm its belief in equal rights for all citizens—including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded."31

28. Id. § 6009(2).
29. 29 U.S.C. § 794 (1982) provides that “[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.” Id.
31. 121 CONG. REC. 16,519 (1975). Quoting Thomas Wolfe, the late Senator Humphrey once said:

“To every man his chance; to every man, regardless of his birth, his shining, golden opportunity—to every man the right to live, to work, to be himself, and to become whatever thing his manhood and his vision can combine to make him—this, seeker, is the promise of America.”

Cook, The Provision of Health and Rehabilitation Services to Disabled Persons Under the Federal Rehabilitation Act, 12 CLEARINGHOUSE REV. 693 (1979) (quoting 118 CONG. REC. 525 (1972) (remarks of Sen. Humphrey)).

Speaking in support of § 504, Secretary of Health, Education and Welfare Joseph Califano was no less eloquent: “For decades, handicapped Americans have been oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by
In short, it appeared that this was truly the beginning of a "golden age," and that mental disability advocates would continue to focus—virtually to the exclusion of state courts—on the federal court as a preferred forum for litigation. Subsequent developments, however, revealed that early responses to what was perceived as the Supreme Court's encouragement of this sort of litigation were, to be conservative, somewhat exaggerated. Consider these occurrences in the past eight years.

demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens." DuBow, Competing Handicap Discrimination with Title V of the Rehabilitation Act of 1973: Employment and Other Rights, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1431, 1433 (1979) (quoting statement by Secretary Califano of Apr. 27, 1977); see also id. at 1438-39 (discussing regulatory history of § 504).

Similarly, the Senate Report which accompanied the Education of the Handicapped Act (EHA) articulated a clear statement of purpose:

This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.


32. Mental disability advocates, however, have not completely excluded seeking relief from state courts. See, e.g., State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) (extending procedural due process rights to insanity acquittees, and subsequently defining "dangerousness" for involuntary civil commitment purposes).

33. See Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1124 (1977) ("Even if state and federal forums were of equal technical competence, a series of psychological and attitudinal characteristics renders federal district judges more likely to enforce constitutional rights vigorously."). Neuborne also noted:

Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to ensure their ability to enforce the Constitution without fear of reprisal. State trial judges, on the other hand, generally are elected for a fixed term, rendering them vulnerable to majoritarian pressure when deciding constitutional cases.

Id. at 1127-28.
First, the Supreme Court has made it clear in cases arising from a variety of fact patterns that it is, at the least, unsympathetic, and at the worst, overtly hostile, to both the abstract notion of "public interest law" and to the use of the federal courts as vehicles for wide-ranging institutional reform. Writing for the majority in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., Justice Rehnquist left no doubts as to his views on this issue: "[Respondents'] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare."

On institutional reform in particular, the Supreme Court has rejected the notion that courts could assume that state legislatures and institutional officials "are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of [an institutional] system."

Most importantly, through a series of opinions beginning—not coincidentally for these purposes—with Pennhurst State School & Hospital v.

34. 454 U.S. 464 (1982).
35. Id. at 487 (footnote omitted). In United States v. Richardson, Justice Powell wrote: "[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens." 418 U.S. 166, 192 (1974) (Powell, J., concurring).
36. Rhodes v. Chapman, 452 U.S. 337, 352 (1981); see also Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); id. at 548 ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"). But see, Nagel, A Comment on the Burger Court and "Judicial Activism," 52 U. COLO. L. REV. 223, 226 (1981) (discussing response to Bell of the district court in Valentine v. Engelhardt, 474 F. Supp. 294, 301 (D.N.J. 1979)).

Throughout the early 1970's, many federal courts deciding penal and mental disability cases—as well as a wide variety of cases arising in other factual settings—used special masters and other alternative enforcement mechanisms to implement broad and far-reaching equitable decrees. Nathan, The Use of Masters in Institutional Reform Litigation, 10 U. TOL. L. REV. 419, 421-23 (1979); Reynolds, The Mechanics of Institutional Reform Litigation, 8 FORDHAM URB. L. J. 695 (1979-1980); Levine, The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered, 17 U.C. DAVIS L. REV. 753, 754-55 nn.4 & 6 (1984); Special Project, supra note 13, at 431. See generally FED. R. CIV. P. 53. These methods were especially appealing in cases posing "polycentric problem[s] that cannot easily be resolved through a traditional courtroom-bound adjudicative process" and involved a "multitude of choices affecting [social] resources." Hart v. Community School Bd., 383 F. Supp. 699, 766 (E.D.N.Y. 1974). To some extent, no doubt, this reflected the Supreme Court's attitude when it dealt with school desegregation cases, i.e., the "imaginative expansion of federal equity powers to deal with deprivations of constitutional..."
Halderman (Pennhurst II), 37 the Court has expanded the scope of the eleventh amendment. 38 This move has drastically curtailed federal suits against state officials in cases seeking relief under either pendent state jurisdiction 39 or federal statutes. 40

ds.") Robbins & Buser, supra note 1, at 897 (citing Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 28 (1971)).

For a sample of pertinent cases, see Brakel, Special Masters in Institutional Litigation, AM. B. FOUND. RES. J. 543, 544 n.4 (1979); Levine, supra, 760-61 nn.22-24. For a survey of the literature analyzing the use of masters in such cases, see Brakel, supra, at 546 n.14; Levine, supra, at 759 n.20. For a description of the elaborate review panel established to monitor compliance with the court's order in the Willowbrook case, see New York Ass'n for Retarded Children v. Carey, 596 F.2d 27, 32-34 (2d Cir. 1979). For a functional analysis of how monitoring decrees work, see McCormack & Mandel, How to Manage an Institution During Litigation, 9 MENTAL & PHYSICAL DISABILITY L. REP. 73 (1985). For excellent overviews of the historical authority for appointment of masters in institutional cases, see Hart, 383 F. Supp. at 764-66; Levine, supra.

The Supreme Court has in recent years expressed clear hostility to this sort of institutional reform effort. See, e.g., Brant, Pennhurst, Romeo, and Rogers: The Burger Court and Mental Health Law Reform Litigation, 4 J. LEGAL MED. 323, 348 (1983) (recent Supreme Court decisions reflect a "clear signal" that the Court does not want the federal courts overseeing the operation of facilities for the mentally disabled).


39. Pennhurst, 465 U.S. at 117-21; see also id. at 121 ("neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment").

The Pennhurst facility has been described within the past 15 years as a "Dachau, without ovens." Note, The "Right" to Habilitation: Pennhurst State School & Hospital v. Halderman and Youngberg v. Romeo, 14 CONN. L. REV. 557 (1982) (quoting L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION 17 (1973)).

I personally agree with the views expressed on this matter by Professors Rudenstine, Sherry and Chemerinsky: (1) the *Pennhurst II* majority wants to limit lower federal court power to reform state and local institutions on the basis of alleged *federal* law violations as well; (2) court reform of penal and mental institutions will be countenanced only in "extreme circumstances"; (3) the Justices' opposition to judicially-ordered social reform stems from a hostility to the litigants' underlying substantive claims; (4) the current Supreme Court is "deeply committed to protecting the states from intrusion by the federal judiciary"; (5) the Court's true agenda is to transform its role from the guardian of individual rights to that of "guardian of majority rule"; and, ultimately, (6) *Pennhurst II* threatens to "undermine the ability of the federal courts to remedy state and local government violations of the United States Constitution." Whether or not these scholars are correct is not crucial; the significance of the *Pennhurst II* line of cases lies in the undeniable fact that, at least until there is a significant restructuring of the Supreme Court, the terrain of federal courts will prove to be far more hostile to suits brought on behalf of the mentally disabled than it

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42. Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611 (1986).


44. Rudenstine II, *supra* note 41, at 83. His major source for this analysis, see *id.* at 83-84, is footnote 13 of *Pennhurst II*, which reads:

> We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of *federal law*, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Pennhurst II*, 465 U.S. at 104 n.13 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))) (emphasis added).


46. Rudenstine I, *supra* note 41, at 482. Professor Rudenstine sees this, however, as an "incomplete theory . . . because it accounts only for what Justices [ ] do not value, and leaves undefined the values they prize." *Id.* at 483.

47. Sherry, *supra* note 42, at 631.

48. *Id.* at 663.


50. The Court has, of course, shown a willingness to reverse itself fairly rapidly in other areas of constitutional law. For example, the Court, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985), recently overruled National League of
was a decade ago.\textsuperscript{51}

Second, on mental disability issues, the Supreme Court has expressed what can charitably be referred to as mixed signals. On commitment issues, while the Court mandated certain due process rights in cases involving prison-hospital transfers\textsuperscript{52} and “split the difference” on the question of the appropriate burden of proof,\textsuperscript{53} it rejected the argument that broad procedural due process protections apply to such diverse “special” populations as juveniles,\textsuperscript{54} insanity acquittees\textsuperscript{55} and sex offenders.\textsuperscript{56} In \textit{French v. Blackburn}\textsuperscript{57} the Court also summarily affirmed\textsuperscript{58} a district court decision which approved a set of commitment procedures that provided patients with significantly fewer due process protections than were countenanced by earlier cases following the rationale first articulated in 1972 in \textit{Lessard v. Schmidt}.\textsuperscript{59} In \textit{French}, questions concerning the need for a compulsory probable cause hearing,\textsuperscript{60} appropriate notice\textsuperscript{61} and a jury trial,\textsuperscript{62} as well as questions regarding the patient’s presence at a commitment hearing\textsuperscript{63} such as the applicability of the priv-

\textsuperscript{51} Cities v. Usery, 426 U.S. 833 (1976), substituting a more limited federalism inquiry where Congress acts pursuant to its power to regulate interstate commerce.

\textsuperscript{52} See generally Neuborne, \textit{supra} note 33.

\textsuperscript{53} Vitek v. Jones, 445 U.S. 480 (1980) (right to notice, hearing, confrontation, cross-examination, an independent decisionmaker, statement of reasons and “qualified and independent assistance”); \textit{see also id. at 497-500} (Powell, J., concurring).

\textsuperscript{54} Addington v. Texas, 441 U.S. 418 (1979).


\textsuperscript{57} Allen v. Illinois, 106 S. Ct. 2988 (1986).


\textsuperscript{59} The Supreme Court has made it clear that a summary affirmance, while serving as a ruling on the merits, Hicks v. Miranda, 422 U.S. 332, 343-45 (1975), has “considerably less precedential value than an opinion on the merits.” Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979); \textit{see also Edelman v. Jordan}, 415 U.S. 651, 671 (1974). Summary action on a case “represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not ... necessarily reflect our agreement with the opinion of the court whose judgment is appealed.” Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 474 (1979); \textit{see also Mandel v. Bradley}, 432 U.S. 173, 176 (1977) (“the rationale of the affirmance may not be gleaned solely from the opinion below”). This line of authority is generally traced to Fusari v. Steinberg, 419 U.S. 379, 390-91 (1975) (Burger, C.J., concurring). \textit{See generally Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda}, 76 \textit{COLUM. L. REV.} 508 (1976).

\textsuperscript{60} \textit{French}, 349 F. Supp. 1078.

\textsuperscript{64} \textit{French}, 428 F. Supp. at 1355-56.

\textsuperscript{65} \textit{Id.} at 1356-57.

\textsuperscript{66} \textit{Id.} at 1360-62.

\textsuperscript{67} \textit{Id.} at 1357-58.
lege against self-incrimination in commitment matters\(^6^4\) and the appropriate burden of proof were resolved against the disabled.\(^6^5\)

On substantive constitutional issues, the Court announced a right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint" for the mentally disabled\(^6^6\) and "assumed" that involuntarily confined patients retained some constitutionally-protected liberty interests which are "implicated by the involuntary administration of antipsychotic drugs."\(^6^7\) The Court, however, also clearly indicated that it would give extraordinary deference to the exercise of professional judgment in institutional cases\(^6^8\) especially where damages were sought.\(^6^9\) As the Court stated explicitly in *Youngberg v. Romeo*: "By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operation of the institutions should be minimized."\(^7^0\)

While reading the tea leaves of "vacate and remand in the light of" opinions can be foolhardy,\(^7^1\) the Court's decision to remand *Rennie v. Klein*\(^7^2\) in light of *Youngberg* rather than in light of *Mills v. Rogers*\(^7^3\) cannot be brushed off as unimportant. This decision reflected a clear statement on the Court's part that the *Youngberg* test should govern virtually all substantive institutional cases.\(^7^4\)

On the issue of the role of expert testimony in cases involving mentally disabled criminal defendants,\(^7^5\) the Court has remained overwhelm-

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64. *Id.* at 1358-59.
65. *Id.* at 1359-60.
68. *Youngberg*, 457 U.S. at 322; see also Alexander, *supra* note 1, at 963 (recent Supreme Court decisions "display a tolerance for and even a deference to the new prison administrators' values").
69. *Youngberg*, 457 U.S. at 323 (in damages action against professional in his individual capacity, professional will not be liable if unable to satisfy normal professional standards because of "budgetary constraints").
70. *Id.* at 322 (footnote omitted).
71. See Hellman, "Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice, 67 JUDICATURE 389, 390 (1984) (such decisions employ the "most puzzling mode of disposition in the Supreme Court's repertory").
73. 457 U.S. 291.
74. For a survey of cases, see Perlin, *Patients' Rights*, in 3 PSYCHIATRY 4, 18 nn.61-64 (1986).
75. Matters affecting mentally disabled criminal defendants are generally beyond the scope of this paper. See generally Perlin, *The Supreme Court, The Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling
ingly ambivalent, and seemingly, irreconcilably inconsistent. At the penalty phase of a capital punishment case, the Court, in *Barefoot v. Estelle*, allowed into evidence responses to hypotheticals on the future danger of defendant by experts who never examined the defendant. The Court blithely assured us that jurors can separate the "wheat from the chaff" in such testimony. Yet, the Court also held in *Ake v. Oklahoma* that an indigent defendant facing the death penalty has a right to expert psychiatric assistance where he makes an "ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense," in light of "the [extremely high] risk of an inaccurate resolution of sanity issues." 

Although there has been a profound split in the lower federal courts' interpretations of each of these signals by the Supreme Court, the fact is inescapable that the Court has not—either covertly or overtly—encouraged expansive decisionmaking in institutional cases brought on behalf of the mentally disabled.

Similarly, in construing federal statutes, the Court has given mostly crabbed readings of the laws in question. Justice Rehnquist, in...
Pennhurst I. brushed aside the Third Circuit’s careful analysis of the DD Act and rejected plaintiffs' arguments that broad relief could be structured under that law. The Court found that the legislation was little more than a federal-state grant funding mechanism and that nothing in the Act suggested that Congress had intended to require the states to “assume the high cost of providing ‘appropriate treatment’ in the ‘least restrictive environment’ to their mentally retarded citizens.” Academic commentary on this decision was almost entirely critical, reading the opinion as “eschew[ing]...logic,” “distort[ing] the major issue” in a “contorted framing” of the case, and as reflecting a “general hostility toward law reform efforts on the merits.”

While the Supreme Court’s decisions interpreting section 504 of the Rehabilitation Act and the Education of the Handicapped Act have been somewhat conflicting, it is also clear that these laws will not be con-
strued as broadly as its proponents had hoped.\footnote{94}

As a result of these developments, the notion of wide-ranging institutional and procedural reform in federal court cases involving the mentally disabled no longer appeared to be “an idea in good currency.” It appeared that the “pendulum” had shifted\footnote{95} and that, in cases where the


In Irving Independent School District v. Tatro, 468 U.S. 883 (1984), the Court held that clean intermittent catheterization is a “related service” required by the EHA. \textit{Id.} at 887-95; see also 20 U.S.C. § 1401(17) (1982). The provision of the EHA requiring services limited to those that “[m]ay be required to assist a handicapped child to benefit from special education” is discussed in Comment, supra, at 76. The author there stated: “Once again, the Court set forth a legally sound, theoretical standard, but failed to devise concrete, substantive guidelines to aid special educators in determining when a service does, in fact, benefit a child’s education.” \textit{Id.}


Among the most difficult questions still unresolved under both § 504 and the EHA are their applicability to persons with AIDS. See, e.g., Jones, \textit{The Education for All Handicapped Children Act: Coverage of Children with Acquired Immunity Deficiency Syndrome}, 15 J.L. & Educ. 195 (1986).

94. One of § 504’s co-sponsors, Senator Harrison Williams, had articulated its intent as “plac[ing] special emphasis on the target populations whose needs were not being met, and to grapple with problems, which while not related solely to rehabilitation, pose serious problems for handicapped individuals in becoming employed, staying employed, and generally supporting themselves within their communities.” 119 CONG. REC. 24,587-88 (1973); see also DuBow, supra note 34, at 1438 (“Section 504 is considered by handicapped people as the broadest protection of their rights”).

For the pertinent history of the EHA, reflecting similar views of sponsors and aspirations by advocates, see Comment, Beyond Conventional Education: A Definition of Education Under the Education For All Handicapped Children Act of 1975, 48 LAW & CONTEMP. PROBS. 63, 67-71 (1985). See also Yohalem, The Right to Education, in 2 LEGAL RIGHTS, at 1093, 1096 (1979) (right of handicapped children to special education now “firmly established” as result of EHA).

95. The use of the “pendulum” metaphor has grown exponentially in recent months. See,
Court was not overtly hostile, it merely chose to "sidestep" difficult decisions so as to avoid dealing with some of the issues raised by litigants. Thus, it was inevitable that advocates on behalf of this population would search for new bases for causes of action and new forums in which to bring such cases.

Two of the most important developments in this area have been the use of (1) state constitutions and (2) state statutes—commonly called "Patients' Bills of Rights"—as the source of such rights. While comparatively little academic and scholarly attention has been paid to this phenomenon (which is still sufficiently diffused such that it cannot accurately be called a "movement"), its importance will grow immeasurably in the next decade. Since it is not realistic to expect that the Rehnquist Court will be any more favorably disposed to the idea of expanding the rights of the institutionalized mentally disabled than the Burger Court,

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96. See, e.g., Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1230 n.7 (7th Cir. 1980) (Court "side-stepped" the issue of existence of private right of action under § 504 in Southeastern Community College v. Davis, 442 U.S. 397, 404-05 n.5 (1979)); see also Wexler, Seclusion and Restraint: Lessons from Law, Psychiatry, and Psychology, 5 INT'L J.L. & PSYCHIATRY 285, 290 (1982) (Court "skirted" question of right to refuse treatment in Mills); Note, O'Connor v. Donaldson: The Supreme Court Sidesteps the Right to Treatment, 13 CAL. W.L. REV. 168 (1976); Comment, supra note 23, at 564-65 (Court "sidestepped" constitutional right to treatment arguments in O'Connor). But see Darrone, 465 U.S. at 690 n.7 (existence of private cause of action under § 504 conceded by defendants).

97. See infra text accompanying notes 100-319.

98. See infra text accompanying notes 320-601.

This Article will omit, due to time and space limitations, discussion on such state statutes that parallel § 504 in barring employment discrimination. See, e.g., Note, From Wanderers to Workers: A Survey of Federal and State Employment Rights of the Mentally Ill, 45 LAW & CONTEMP. PROBS. 41 (Summer 1982). This Article also does not discuss state statutes that parallel the EHA in mandating special education services for handicapped children. See generally S. BRAKEL, J. PARRY & B. WEINER, THE MENTALLY DISABLED AND THE LAW 630-48 (1985).

99. Chief Justice Burger's well-documented interest in mental disability law has been characterized by a certain amount of ambivalence. See, e.g., Addington v. Texas, 441 U.S. 418 (1979) (establishing burden of "clear and convincing evidence" as standard of proof in involuntary civil commitment proceeding, rejecting both "preponderance" standard and "beyond a reasonable doubt" quantum); see also Burger, Psychiatrists, Lawyers and the Courts, 28 FED. PROBATION 3, 6 (June 1964); Delgado, "Concurrence" in Quotes: A Critical Assessment of
the use of state constitutions and state statutes in state courts may be the last frontier for the mentally disabled.

Chief Justice Burger's Objections to a Right to Treatment for the Involuntarily Confined Mentally Ill, 15 U.C. DAVIS L. REV. 527 (1982); Perlin, supra note 75.

Chief Justice Burger's concurring opinions in O'Connor and Youngberg underscore his antipathy to the declaration of a substantive constitutional right to treatment. O'Connor, 422 U.S. at 578 (Burger, C.J., concurring); Youngberg, 457 U.S. at 329 (Burger, C.J., concurring). His majority opinion in Parham has been criticized for ignoring "[t]he physical conditions, isolation and dangers of day-to-day life in institutions." Ferleger, Special Problems in the Commitment of Children, in 1 LEGAL RIGHTS, at 397, 404 (1979). Nonetheless, his O'Connor concurrence also helped firmly establish the application of procedural due process standards to the civil commitment process. See, e.g., In re S.L., 94 N.J. 128, 137, 462 A.2d 1252, 1256 (1983) (establishing placement review hearings for patients discharged pending placement); Perlin, "Discharged Pending Placement": The Due Process Rights of the Nondangerous Institutionalized Mentally Handicapped With "Nowhere to Go," Directions in Psychiatry (Watherleigh Co.) vol. 5, lesson 21 (1985). Because commitment "effects a great restraint on individual liberty, this power of the State is constitutionally bounded." O'Connor, 422 U.S. at 580 (Burger, C.J., concurring). Furthermore, Chief Justice Burger's majority opinion in Estelle v. Smith, 451 U.S. 454 (1981), established for the first time that admitting into evidence—at the penalty phase of a capital punishment trial—testimony of a "neutral" psychiatrist who had examined a defendant to determine his competency to stand trial violated the fifth and sixth amendments. Id. at 461-71. But see Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) (urging limitation on Court's decision to capital cases); see also supra text accompanying notes 82-84.

His preoccupations—perhaps a reflection of his lengthy battles with Judge Bazelon when they served on the District of Columbia Court of Appeals—also reflect his ambivalence about the role of psychiatry in the mental health process. See Perlin, supra note 75, at 168 & n.502; see also Addington, 441 U.S. at 429 (rejecting beyond a reasonable doubt standard, in part, because "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous"); O'Connor, 422 U.S. at 584 (Burger, C.J., concurring) ("There can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.' ") (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)). But see Delgado, supra, at 543-45 (as a result of subsequent and more contemporaneous medical developments, the former Chief Justice's uncertainty-of-diagnosis argument has "lost much of its original force").

On the other hand, Chief Justice Rehnquist's record reflects only hostility to cases brought on behalf of the mentally disabled, especially—but not exclusively—in the context of a criminal trial. In Estelle, he concurred on the grounds that defendant's counsel should have been notified of the psychiatric examination in question, adding that he was "not convinced" that any fifth amendment rights were implicated. 451 U.S. at 474-75 (Rehnquist, J., concurring). He dissented in Ake, suggesting that: (1) the Court's rule should be limited to capital cases, and (2) "the entitlement is to an independent psychiatric evaluation, not to a defense consultant." 470 U.S. at 87 (Rehnquist, J., dissenting).

Justice Rehnquist's opinion for the Court in Allen v. Illinois, 106 S. Ct. 2988 (1986), held that proceedings under Illinois' Sexually Dangerous Persons Act were not "criminal," thus making inapplicable the fifth amendment's privilege against self-incrimination, notwithstanding the fact that sex offenders were committed to maximum security institutions also housing convicts in need of psychiatric care. And, as indicated above, his opinion for the Court in Pennhurst I held that certain bill of rights sections of the Developmentally Disordered Assistance and Bill of Rights Act (DD Act) did not create any substantive rights to "appropriate
This paper will first examine the historical background of state constitutional developments (Part II A), and will then review the various methodologies employed in construing state constitutional provisions (Part IIB). Next, it will examine the expanding role of state constitutions as a specific source of rights for the mentally disabled (Part IIC).

It will then consider the traditional role of state statutes in governing treatment of the mentally disabled (Parts IIIA and B), examine the significance of the Wyatt v. Stickney case and the report of the President’s Commission on Mental Health in relation to subsequent statutory developments (Parts IIC and D), and will finally consider the expanding role of these statutes as a parallel source of rights of the same population (Parts IIE and F).

II. STATE CONSTITUTIONS

A. Historical Background

Although the emergence of state constitutional law as a scholarly topic worthy of serious scrutiny by judges, academics, and practitioners during the twentieth century has been the subject of much commentary, it was in the 1970s that state constitutional law became a recognized area of legal scholarship. The 1977-1978 term of the United States Supreme Court, for example, saw the issuance of two significant decisions that highlighted the role of state constitutions in protecting individual rights. In Estelle v. Williams, 429 U.S. 114 (1976), the Court held that a prisoner had a constitutional right to medical care, and in Board of Educ. v. Roth, 429 U.S. 553 (1977), the Court ruled that public high school students did not have an abnormally protected expectation of privacy in their school lockers.

In two cases, Chief Justice Burger joined separate opinions written by Justice Rehnquist. In In re Winfield, 421 U.S. 359 (1975), the majority ruled that the use of a criminal defendant’s post-arrest, post-Miranda warnings to prove his sanity violated due process. Id. at 366. Justice Rehnquist concurred, suggesting that a request for a lawyer “may be highly relevant where the plea is based on insanity.” Id. at 372 (Rehnquist, J., concurring). In Ford v. Wainwright, 477 U.S. 393 (1986), Justice Rehnquist dissented squarely, arguing that the eighth amendment does not create a substantive right not to be executed while insane. Id. at 407 (Rehnquist, J., dissenting).


tioners\textsuperscript{102} is a relatively recent phenomenon,\textsuperscript{103} California Supreme Court Justice Stanley Mosk\textsuperscript{104} has stressed that "[w]hen the Founding Fathers put this one nation together, they recognized the primacy of the states in protecting individual rights."\textsuperscript{105}

Before 1776,\textsuperscript{106} various colonies of the New World guaranteed their citizens freedom of religion,\textsuperscript{107} freedom of the press,\textsuperscript{108} freedom of

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Not all commentators have been so favorable. \textit{See, e.g.,} Maltz, \textit{The Dark Side of State Court Activism}, 63 Tex. L. Rev. 995 (1985).

102. \textit{See, e.g.,} \textit{RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW} (P. Bamberger ed. 1985) [hereinafter \textit{RECENT DEVELOPMENTS}].

103. Historians have traditionally studied the issues involved. \textit{See, e.g.,} F. Green, \textit{Constitutional Development in the South Atlantic States 1776-1860}, 52-56 (1930). The first major law review article on the topic, however, did not appear until 1951. \textit{See Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 Vand. L. Rev. 620 (1951).}

There was minimal academic interest in this topic in the 1960's. \textit{See, e.g.,} Force, \textit{State "Bills of Rights": A Case of Neglect and the Need for a Renaissance, 3 Val. U.L. Rev. 125 (1969); Graves, \textit{State Constitutional Law: A Twenty-five Year Summary, 8 WM. & MARY L. Rev. 1 (1966); see also Collins, supra note 101, at 4 n.11 (characterizing Paulsen's article as "far too often overlooked," and Force's as "valuable but forgotten"). But it was not until the early 1970's, perhaps not coincidentally, the time of the emergence of the Burger Court, that academic scholarship began to flourish. \textit{See, e.g.,} Howard, \textit{supra note 101, at 874-79; Ludlow, Recent Developments in the New Federalism, in \textit{RECENT DEVELOPMENTS}, supra note 102, at 405, 479-83 (listing articles); Linde, \textit{supra note 100, at 396 n.70 (same); Note, Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1328-29 n.20 (1982).}

For an early compilation of state constitutions, see W. Swindler, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (1973); F. Thorpe, \textit{THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA} (1909).

104. \textit{See Mosk I, supra note 100; Mosk II, supra note 100; see also Mosk, Contemporary Federalism, 9 FAC. L.J. 711 (1978) [hereinafter Mosk III].}

105. Mosk I, supra note 100, at 1082 (footnote omitted). Madison wrote:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. ... The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement, and prosperity of the state.


107. \textit{Charter of Rhode Island and Providence Plantations (1663), reprinted in SOURCES OF OUR LIBERTIES, supra note 106, at 169, 170.}

108. VA. CONST. § 12 (1776), \textit{reprinted in SOURCES OF OUR LIBERTIES, supra note 106, at 312.}
speech, and prohibited ex post facto laws and peacetime quartering of soldiers. For example, the North Carolina Declaration of Rights adopted in 1776 included

a compendium of most of the fundamental rights which had come to be recognized by American Constitution-makers: trial by jury, right to accusation and confrontation, privilege against self-incrimination, right against excessive bail or fines, cruel and unusual punishment, and general warrants, that not to be deprived of life, liberty, or property "but by the law of the land," freedom of the press, right to bear arms, freedom of conscience, and prohibition of ex post facto laws.

These provisions were an outgrowth of the colonists' pre-Revolutionary War distrust of Parliament, and served as "limitations imposed by the sovereign people on all branches of government, including the legislature." The "catalogue of civil liberties" in the pre-independence documents reflected "the beginning of the American constitutional doctrine of equality in fundamental law."

Significantly, during the months preceding American independence, the idea of preparing uniform state constitutions was considered and rejected. As a result, while many of the documents incorporated provi-

109. PA. CONST. art. XII (1776), reprinted in SOURCES OF OUR LIBERTIES, supra note 106, at 330.
110. DEL. DECLARATION OF RIGHTS § 11 (1776), reprinted in SOURCES OF OUR LIBERTIES, supra note 106, at 339.
111. Id. § 21.
112. 1 B. SCHWARTZ, supra note 106, at 286.
113. Note, supra note 103, at 1326.
114. Id. at 1326 (emphasis added).
115. Linde, supra note 100, at 381.
116. Williams, Equality in State Constitutional Law, in RECENT DEVELOPMENTS, supra note 102, at 71-72 (footnote omitted) [hereinafter Williams II]; see also Williams I, supra note 101, at 1195-1203. Professor Williams noted that:

As the colonies moved toward a revolutionary posture, equality became a key element of political rhetoric.

"Between 1763 and 1776 the political leadership in the colonies adopted the postulate of equality as part of its active vocabulary because it provided the most effective argument for justifying resistance to colonial rule."

Williams II, supra, at 72 (quoting John Adams); see also J. BAER, EQUALITY UNDER THE CONSTITUTION 38-56 (1983); Howard, "For the Common Benefit": Constitutional History in Virginia As A Casebook for the Modern Constitution-Maker, 54 VA. L. REV. 816, 823 (1968). The broad equality provisions in the Virginia Bill of Rights are owed "to the teachings of natural law, rather than to the dictates of the British Constitution." Howard, supra, at 823-24; see also VA. CONST. § 1 (1776), reprinted in SOURCES OF OUR LIBERTIES, supra note 106, at 311.

117. Linde, supra note 100, at 381. See generally F. GREEN, supra note 103, at 52-56.
sions such as those in the North Carolina enactment and Maryland's Declaration of Rights, the early state charters and constitutions were a remarkably diverse group of documents through which the colonists could "reject English political thought and . . . elaborate a new principle of political legitimacy."  

These state guarantees appeared so secure—and the powers of the prospective federal government so confined—"that a federal bill of rights was never seriously considered" at the 1787 Constitutional Convention. The federal Bill of Rights, eventually added "to allay fears that the new national government might use its power to curtail individual liberties," was thought unnecessary as applied to the states "where governments were trusted local authorities within the control of the citizenry."  

Thus, it was no surprise that the Supreme Court, in *Barron v. Baltimore*, held that the federal Bill of Rights did not apply to the states.

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118. See *supra* note 112.


120. Pollock II, *supra* note 100, at 978; *see also id.* at 979 (lauding system's "vibrant diversity"). According to Justice Pollock, Justice Brandeis' famous version of the "single courageous State . . . as a laboratory [which can] try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), stems from this historical diversity. Pollock II, *supra* note 100, at 978 n.8; *see also Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 *Tex. L. Rev.* 1141 (1985).

121. *Note, supra* note 103, at 1326.

122. *Id.* at 1327.

123. According to Professor Wood, James Madison introduced a federal bill of rights in the first Congress "primarily to quiet opponents of the federal Constitution." G. Wood, *The Creation of the American Republic 1776-1787*, at 542 (1969). It has been argued that the amendments eventually adopted in the Bill of Rights "represented a simplified list of state rights and did not claim to provide any greater or lesser degree of protection." *Note, supra* note 103, at 1327; *see Brennan, supra* note 100, at 501 ("Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal bill of rights previously had been protected in one or more state constitutions."). *See generally Brennan, The Bill of Rights and the States*, in *The Great Rights* 65 (E. Cahn ed. 1963).

124. Mosk I, *supra* note 100, at 1083 (emphasis added); *see also Linde, supra* note 100, at 381.

125. Mosk I, *supra* note 100, at 1083. *See generally C. Bloch, supra* note 105. Interestingly, the states that promulgated new constitutions after the enactment of the federal bill of rights often took their bills of rights from preexisting state constitutions rather than from the federal amendments. Linde, *supra* note 100, at 381; *see also Swindler, State Constitutional Law: Some Representative Decisions*, 9 *Wm. & Mary L. Rev.* 166, 173 (1967) ("Historically, new states in the westward movement of the nation borrowed in whole or in part from the constitutions of older states in preparing their first constitutions.").


127. *Id.* at 250-51.
As Chief Justice Marshall pointed out, the adoption of the fifth amendment "could never have occurred to any human being as a mode of doing that which might be effected by the state itself."128

From the time of Marbury v. Madison129 and other early decisions upholding the power of the Supreme Court,130 "there was a relentless tide of authority flowing from the states to the federal government."131 While the Bill of Rights was rarely litigated in the first half of the nineteenth century,132 ratification of the fourteenth amendment and the subsequent use of the incorporation doctrine to make selected Bill of Rights guarantees apply to the states133 "obliterated the functional independence of the original state and federal guarantees."134

This movement reached its zenith during the Warren Court years135 when, according to Professor Howard, it became "easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."136 As a result, and because of the states' "dismal record of

128. Id.; cf. Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that the fourteenth amendment incorporated first amendment rights as to the states); Stromberg v. California, 283 U.S. 359, 368 (1931) (applying Gitlow as reflecting incorporation doctrine).
129. 5 U.S. (1 Cranch) 137 (1803). It should be noted, however, that two decades before Marbury was decided, the Virginia Court of Appeals found that it had the power to declare a state law unconstitutional and that at least three state courts—in New Hampshire, North Carolina and Rhode Island—did so prior to the drafting of the federal Constitution. See Commonwealth v. Caton, 8 Va. 5, 8 (1782); Howard, supra note 101, at 877 n.20.
131. Mosk I, supra note 100, at 1084.
132. Note, supra note 103, at 1327.

On the other hand, Third Circuit Court of Appeals Judge John J. Gibbons has studied the period between 1790 and 1860 to review the then common practice of relegating the litigation of federal issues to state courts, and has concluded that this practice resulted in a "consistent failure of implementation of federal governmental policy." Gibbons, Federal Law and the State Courts: 1790-1860, 36 Rutgers L. Rev. 399, 402 (1984). According to Judge Gibbons, "[this] experience . . . teaches us that [dual sovereignty] will not work as a legal system unless the national government undertakes to have its own courts in place . . . providing prompt and effective enforcement or relief under the national laws." Id. at 452.
134. Note, supra note 103, at 1328.
135. According to Justice Brennan:

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law.

Brennan, supra note 100, at 493. See Ludlow, supra note 103, at 410-11, for a list of pertinent decisions.
136. Howard, supra note 101, at 878. According to Justice Brennan, "it was only natural that when during the 1960's our rights and liberties were in the process of becoming increas-
employing their state constitutions," the question was raised by respected commentators as to whether state bills of rights "still served a worthwhile purpose." 

Although the controversy rages as to whether or not the Burger Court has been a "revolutionary" one in its approach to constitutional litigation, there can be little disputing that the Supreme Court's last decade has been "marked most profoundly by a retrenchment of individual rights, particularly Fourth, Fifth and Sixth amendment federal constitutional guarantees to those accused of criminal offenses." 

As a result of this "retrenchment," litigants were soon urged to "employ their state constitutions to maintain decisional consistancy," a strategy which was paradoxically given support by other Burger Court

137. Mosk I, supra note 100, at 1084.
138. Brennan, supra note 100, at 495.

Professor Countryman answers his rhetorical question of whether "there is any real need for a Bill of Rights in a state constitution":

No state, even if it were otherwise willing to abdicate the function of protecting individual liberty entirely to the federal government, should today be willing to do so for at least three reasons: (1) Many of the Supreme Court's interpretations of federal constitutional guarantees applicable to the states are not clearly acceptable today, much less for the indefinite future. (2) Not all of the federal constitutional guarantees have been held applicable to the states. (3) Modern society is entitled to expect additional guarantees not to be found in the Constitution of the United States.

Countryman, supra note 133, at 456.

139. See THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983); Nichol, An Activism of Ambivalence, 98 HARV. L. REV. 315, 317 (1984) (Book Review) ("in short, the majority verdict is that the Burger Court is not so bad"); see also id. at 325 n.4 (discussing other reviews). For a collection of recent articles discussing the Court's record, see Goodwin, supra note 93, at 267 n.2. For a much earlier analysis, see Abraham, Of Myths, Motives, Motivations, and Morality: Some Observations on the Burger Court's Record on Civil Rights and Liberties, 52 NOTRE DAME L. REV. 77 (1976).


140. Greenhalgh, Independent and Adequate State Grounds: The Long and the Short of It, in RECENT DEVELOPMENTS, supra note 102, at 15, 17 [hereinafter Greenhalgh I]; see also Howard, supra note 101, at 874 (While the Burger Court has not been the "wrecking crew that some thought it would be," in many areas of the law "the difference between where we are today and where we were at the close of the Warren era is marked and inescapable.").

141. More neutrally, New Jersey Supreme Court Justice Stewart Pollock characterizes federal constitutional law as having "changed direction." Pollock II, supra note 100, at 979.

142. Mosk I, supra note 100, at 1088; see, e.g., Michigan v. Mosley, 423 U.S. 96, 111-21 (1975) (Brennan, J., dissenting) (reminding states that they could bestow on their citizens more rights than compelled by the federal Constitution); Brennan, supra note 100, at 502 ("[A]lthough in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.").
cases clarifying that a state was free, as a matter of its own law, to adopt “individual liberties more expansive than those conferred by the Federal Constitution.” Justice Brennan, for one, saw this strategy as a means of precluding Supreme Court review, as that Court’s jurisdiction was traditionally limited to the correction of errors related solely to questions of federal law. 145


145. See, e.g., Herb v. Pitcairn, 324 U.S. 117 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Brennan, supra note 100, at 501 n.80.

At the same time, commentators began to question the assumption—articulated by the Supreme Court in cases such as Stone v. Powell, 428 U.S. 465 (1976)—that state and federal courts were equally competent and functionally interchangeable forums for the enforcement of federal constitutional rights. Such an assumption of parity, Professor Neuborne charged, was a “dangerous myth,” providing a “pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.” Neuborne, supra note 33, at 1105-06. Professor Redish has echoed the same views:

It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law. Moreover, because federal judges are guaranteed the independence protections of Article III, while many state judges are forced to stand for election, we can generally be assured of a greater degree of independence of the federal judiciary from external political forces.


For a discussion of the theoretical impact of political concerns on judicial behavior, see Jacob, Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin, 1966 Wis. L. Rev. 801. It may not be coincidental that three of the four states where state judges are appointed with life tenure—Massachusetts, Rhode Island, New Hampshire and New Jersey—have been classified as states where courts have “a reputation for sympathetic consideration of civil liberties claims” and where state constitutions are relied upon “to extend protections for individual rights... broader than those accorded by the Burger Court.” Abrahamson, supra note 120, at 1181 n.162 (1985); see Tarr & Porter, Gender Equality and Judicial Federalism: The Role of State Appellate Courts, 9 HASTINGS CONST. L.Q. 919 (1982); Neuborne, supra note 33, at 1127 n.81; see also id. at 1116 n.45 (“While the evidence is far from conclusive, it is from among those appellate courts which closely approximate the independence enjoyed by the federal courts that one finds the state courts which have been most vigorous in protecting individual rights”). See generally S. ESCOVITZ, JUDICIAL SELECTION AND TENURE 17-42 (1975).

Professor Welsh has recently written that this “conventional portrait of state judges as
In *Michigan v. Long*, however, the Supreme Court announced that it will "merely assume that there are no [adequate and independent] grounds [so as to defeat federal jurisdiction] when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." As a result of *Long* and its progeny, a state court must make a "plain statement" that it cited to or discussed federal law for guidance only.

According to Professor Greenhalgh, the Court since *Long* has assumed a presumption of dependence on federal law in cases where state courts have protected the rights of their citizens under state law . . . [going] out of its way to find that rights granted under state constitutional provisions, which are certainly adequate to support state court judgments, have not been granted "independent" of an interpretation of federal law.

personally unsympathetic toward and institutionally incapable of vindicating individual rights no longer depicts current realities." Welsh, supra note 101, at 875.


With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement.


Concludes one student author: "The responsibility for the protection of individual rights is now primarily a function of the state courts and those who practice in them." Note, supra note 146, at 630.

149. *Long*, 463 U.S. at 1041. The New Hampshire Supreme Court has written: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." State v. Ball, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983). The New Jersey Supreme Court noted:

Consonant with the United States Supreme Court's decision in *Michigan v. Long*, we expressly observe that our decision today rests, in part, upon state constitutional grounds independent of federal law. The federal cases that we cite in support of our interpretation of the New Jersey Constitution "are being used only for the purpose of guidance, and do not themselves compel the result that [this Court] has reached."


Justice Pollock, who has subsequently characterized the adequate and independent state ground requirement as the "most critical question [facing the United States Supreme Court] in the near future," sees the lesson of the Long line of cases to be that "[s]tate court judges must become at least as familiar with their state constitution as they are with the federal constitution." Over a decade ago, Professor Howard concluded his exhaustive study with a parallel thought:

[T]he coming of the Burger Court offers an appropriate time for state courts to reflect on their ancient heritage as interpreters of their state charters of liberty and on the ever growing opportunities to look at those documents to vindicate the rights of the people of the several states. George Mason and the framers of Virginia's 1776 Declaration of Rights called for a "frequent recurrence to fundamental principles." It is in that spirit that successive generations of state judges breathe continued life into their states' constitutions.

B. State Constitutional Law Methodologies

Two questions must be considered in any case involving a state constitutional question: (1) Is the state constitutional question considered before, after, or simultaneously with the parallel federal constitutional question, and (2) How should a state judge textually approach a state constitutional question?

1. State and federal constitutional interplay

At least three separate modes of analyzing state constitutional claims have emerged. First, some courts employ a "dual reliance" system by which they find support for their decisions in both the state and the federal constitutions. While Washington Supreme Court Jus-

151. Pollock II, supra note 100, at 992.
152. Howard, supra note 101.
153. Id. at 943-44 (footnote omitted).
154. Pollock II, supra note 100, at 983-86; see also Pollock I, supra note 100, at 718-19.
155. See Deukmejian and Thompson, All Sail and No Anchor—Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975, 996-97 (1979).
tice Robert F. Utter has praised this approach as “benefit[ing] both the state and federal judiciaries,”\textsuperscript{157} \textit{Michigan v. Long}\textsuperscript{158} and its progeny\textsuperscript{159} seemingly call into question the future vitality of this doctrine.

Second, other courts employ the “primacy” approach, by which a court looks first to its own state constitution in matters involving fundamental liberties, and where federal constitutional issues are considered only if it is found that the infringement in question is permitted under the state constitution.\textsuperscript{160} According to Justice Pollock, this approach is “consistent with the proposition that state constitutions are the basic charters of individual liberties” and is consistent with “efficient judicial management.”\textsuperscript{161}

Third, under the “supplemental” or “interstitial” approach, a court looks first to the federal Constitution, and only consults the state constitution if the question is unclear under the federal Constitution or if the asserted violation of the litigant’s rights is valid under that Constitution.\textsuperscript{162} Justice Pollock views this approach as “particularly useful . . . in cases involving more than one set of fundamental rights.”\textsuperscript{163}

\textit{Badger}, 141 Vt. at 448-49, 450 A.2d at 347 (quoting State v. Brean, 136 Vt. 147, 151, 385 A.2d 1085, 1088 (1978) (citation omitted)).

157. Utter, \textit{supra} note 100, at 1047.
159. See \textit{supra} text accompanying notes 146-51.
161. Pollock II, \textit{supra} note 100, at 984.
163. Pollock II, \textit{supra} note 100, at 984; see, e.g., Green v. United States, 355 U.S. 184, 193 (1957) (finding it “intolerable” to force criminal defendant to abandon a fourth amendment right in order to assert an independent fifth amendment guarantee); Perlin, \textit{Another “Incredible Dilemma”?: Psychiatric Assistance and Self-Incrimination}, 1985-86 ABA PREVIEW OF UNITED STATES SUPREME COURT CASES, Mar. 14, 1987, No. 10, at 288; Westen, \textit{Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another}, 66 IOWA L. REV. 741 (1981). Justice Pollock concludes: “As a practical matter, it may be unimportant whether a court looks initially or secondarily to the state constitution as long as it knows what the state constitution means, understands what that constitution demands, and makes a plain statement that it is relying on the state constitution.” Pollock, \textit{supra} note 100, at 985. But see Schmid, 84 N.J. at 569, 575, 423 A.2d at 633, 636 (Pashman, J., concurring in part and dissenting in part) (criticizing majority for “gratuitously” deciding that criminal trespass conviction would be upheld under federal Constitution).
2. Textual analysis

Professor Howard has suggested that there are at least seven factors that a state court judge should consider in construing a question of state constitutional law. First, the textual language of the document itself may justify a broader reading of the state constitution than the United States Supreme Court has given to its federal counterpart. In some cases, a provision of the state constitution will contain "more sweeping" language than its federal counterpart; in others, the state constitution will explicitly provide specific rights in areas where there is no federal textual counterpart (e.g., education, environment and rights of the handicapped).

Second, even if the language is identical, legislative history, such as study commission reports and floor debates, may reveal an intention that will support reading a state provision differently than its federal counterpart. Even absent such interpretative tools, differing interpretations are possible; as the New Jersey Supreme Court has noted:

Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. . . . As Justice Mosk of the California Supreme Court has observed, "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first

164. Howard, supra note 101, at 935-41.
165. Id. at 935.
166. See, e.g., Schmid, 84 N.J. at 556-60, 423 A.2d at 626-28 (discussing New Jersey's freedom of speech provision).
167. See Galie, supra note 101, at 734-35.
168. See N.J. Const. art. VIII, § 4, ¶ 1.
169. See, e.g., Mont. Const. art. II, § 3. For a fascinating analysis of litigation under the Montana state constitution, see Collins, Reliance on State Constitutions—The Montana Disaster, 63 Tex. L. Rev. 1095 (1985).
170. See, e.g., Fla. Const. art. I, § 2; Mont. Const. art. XII, § 3(2). Constitutional provisions are collected in Meisel, The Rights of the Mentally Ill Under State Constitutions, 45 Law & Contemp. Probs., at 7, 23 n.91 (Summer 1982).

This expanded specific articulation of rights is not always seen as entirely salutary: "Other rights range from the radical, like New Hampshire's recognition of a constitutional right to revolution, see N.H. Const. pt. I, art. 10, to the ridiculous, like California's constitutional guarantee of a right to fish, see Cal. Const. art. I, § 25." Galie, supra note 101, at 734 n.26.
171. Howard, supra note 101, at 936.
state constitutions, rather than the reverse."\textsuperscript{172}

Third, a state's history and traditions should be considered, in an effort to determine if the state constitutional provision was meant to reflect a "sense of local uniqueness."\textsuperscript{173} Fourth, "[s]tate courts should consider the nature of the subject matter in litigation and the interests affected by the local political process."\textsuperscript{174} As Professor Sager has pointed out:

It is not an accident that judges in New Jersey should have a distinct read on the application of principles of social justice to problems of municipal land use, [or] that judges in a large and diverse state like California should be moved first to curb inequities in the financing of public education . . . .\textsuperscript{175}

Fifth, state courts may consider whether the United States Supreme Court has demonstrated a "hands-off" attitude towards a particular clas-

\textsuperscript{172} Schmid, 84 N.J. at 557 n.8, 423 A.2d at 626 n.8 (quoting People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975)).

\textsuperscript{173} Howard, supra note 101, at 936-37. The most famous case in this line interpreted the Alaska state constitutional section guaranteeing a right of privacy, see ALASKA CONST. art. I, § 22, in light of the "character of life in Alaska," to give Alaskan citizens the right to possess and use marijuana in their own homes unless the state could show a substantial state interest in prohibiting such use. Ravin v. State, 537 P.2d 494, 502-04 (Alaska 1975). The court stressed:

Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

\textit{Id.} at 504. Ravin is discussed in Howard, supra note 101, at 932-33. For other like examples, see, e.g., State v. Sklar, 317 A.2d 160 (Me. 1974) (jury trial for minor criminal offenses); \textit{In re} Advisory Opinion to the Senate, 108 R.I. 628, 278 A.2d 852 (1971) (jury of twelve); State ex rel. Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890) (church/state separation); Howard, supra note 101, at 903-04.

\textsuperscript{174} Howard, supra note 101, at 937.

\textsuperscript{175} Sager, \textit{Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law}, 63 Tex. L. Rev. 959, 975 (1985). Judge Pollock suggests:

[State courts are a more appropriate forum than federal courts for defining a municipality's power to zone and its responsibility to provide a realistic opportunity for low and moderate income housing. State courts provide a preferred forum not because state judges are more sensitive to fundamental rights than are federal judges, but because state courts are not obligated to a national constituency in the same way as are federal courts. Furthermore, state courts can respond more readily to local conditions. As difficult as it may be to develop constitutional principles to govern the exercise of zoning power in a given state, how much more difficult it would be to define and enforce a single set of constitutional obligations to govern an entire nation.]

Pollock I, supra note 100, at 717. \textit{But see} Simon, \textit{Independent But Inadequate: State Constitutions and Protections of Freedom of Expression}, 33 U. Kan. L. Rev. 305-06 (1985) ("Unfortunately, in some ways, the movement toward the 'rebirth' of state constitutions has become a juggernaut and poses the same dangers as any movement with no destination." (footnotes omitted)); Maltz, supra note 101 (criticizing the state-by-state development of free expression law).
sification of problems, as with substantive due process involving economic regulation. Sixth, because state constitutions are amended "to reflect changing values" more easily and frequently than their federal counterpart, it can be argued that the state documents respond more contemporarily to "the felt needs of each generation" and thus should be read in this context.

Finally, the "honored" tradition of the individual "courageous" state as the "laboratory" for "novel social and economic experiments" can be seen as a clarion cry for "innovation and diversity among state courts," notwithstanding the ambiguous relationship between Justice Brandeis' "laboratory" vision and the Burger Court's embrace of a "new federalism" in the aftermath of Younger v. Harris and its progeny.

In addition to Professor Howard's arguments, other commentators have suggested one final justification for independent state constitutional analysis: the increasingly fractious and diffuse decision-making process of the Burger Court. Oregon Supreme Court Justice Hans A. Linde has noted pointedly: "A lot of Supreme Court decisions are no longer persuasive, but filled with fuzzy, soft terminology which has no cutting edge.... When the Court's doctrinal cogency and coherency begins to fall apart, we have state courts saying, in effect, 'We don't have to do it".

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176. Howard, supra note 101, at 938.
177. This area has been, in the words of Professor Galie, "well analyzed" by the commentators. Galie, supra note 101, at 774; see also id. n.276 (collecting authorities). For a full recent analysis of this area, see Malina, Substantive Due Process—State Constitutional Protection in the Economic Area, in RECENT DEVELOPMENTS, supra note 102, at 101.
178. Howard, supra note 101, at 939.
179. See, e.g., Adrian, Trends in State Constitutions, 5 HARV. J. ON LEGIS. 311, 313-20 (1968); Graves, supra note 103.
181. Id. at 940.
182. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also supra note 21.
183. Howard, supra note 101, at 940.
184. See Welsh, supra note 101, at 875 ("The [United States Supreme] Court's insensitive approach to the demands of independent constitutional interpretation has resulted in the exercise of federal judicial review in a manner that thwarts the very innovative forces that the Black/Brandeis conception endeavors to protect.").
185. See Wright, supra note 100, at 182-83.
188. See generally Linde, supra note 100.
that way.’”\textsuperscript{189}

In short, there can no longer be any doubt as to the importance of state constitutional doctrine in any question involving state regulation of civil liberties. It can only be expected that litigants representing the mentally disabled will turn more and more to state constitutional provisions in the future.\textsuperscript{190}

C. Rights Under State Constitutions

Four years ago, Professor Alan Meisel characterized state constitutions as a “virtually untapped source of rights” and perhaps “the most promising source of rights” for the mentally disabled in this decade.\textsuperscript{191} He surveyed then recent United States Supreme Court case law, including \textit{O'Connor v. Donaldson},\textsuperscript{192} \textit{Parham v. J.R.},\textsuperscript{193} \textit{Addington v. Texas},\textsuperscript{194} \textit{Youngberg v. Romeo}\textsuperscript{195} and \textit{Mills v. Rogers}.\textsuperscript{196} Professor Meisel concluded that, as that Court could not “be relied upon to break new constitutional ground in securing rights to psychiatric patients on the civil side of the mental health system,”\textsuperscript{197} the only “reliable sanctuary from Supreme Court review lies in the state courts’ ability to decide cases exclusively on the basis of state law.”\textsuperscript{198}

While Professor Meisel was able to find only a scattering of such cases\textsuperscript{199} (some of which were ambiguous as to the source of declared rights),\textsuperscript{200} he characterized state constitutional law as “a much overlooked source of substantive rights for persons in the mental health system,”\textsuperscript{201} and underscored that lawyers representing such persons “plainly have a duty to raise state law claims” in addition to federal


\textsuperscript{190}. See infra notes 191-206 and accompanying text.

\textsuperscript{191}. Meisel, supra note 170, at 9.


\textsuperscript{193}. 442 U.S. 584 (1979). See generally supra text accompanying note 50.

\textsuperscript{194}. 441 U.S. 418 (1979). See generally supra text accompanying note 49.


\textsuperscript{197}. Meisel, supra note 170, at 15.

\textsuperscript{198}. Id. at 16; see also Landmark, supra note 93, at 149 (Because the Supreme Court’s decision in \textit{Board of Education v. Rowley}, 458 U.S. 176 (1982), “may discourage plaintiffs from pursuing their federal rights concerning education for handicapped children, [it is suggested] that plaintiffs turn to state law to ensure an adequate education for handicapped children.”).

\textsuperscript{199}. Meisel noted the significant methodological research difficulties in searching for and identifying all such cases. Meisel, supra note 170, at 24 n.94.

\textsuperscript{200}. See, e.g., id. at 12 n.31 (discussing New Jersey cases).

\textsuperscript{201}. Id. at 39-40.
Although there has been no subsequent explosion of either state constitutional litigation or academic commentary in the intervening four years, a modest body of law has developed, especially in the area of the right to refuse treatment. Given the general scholarly and judicial impetus towards further state constitutional law developments, and given the Supreme Court’s recent hostility towards institutional reform litigation, it seems likely that there will be further growth in this area.

1. Procedural rights in the civil commitment process

Several courts have considered the applicability of state constitutional provisions to the involuntary civil commitment process. In one of the earliest and broadest readings of any such state constitutional provision, the West Virginia Supreme Court of Appeals declared significant portions of that state’s involuntary civil commitment statutes unconstitutional. The West Virginia court held that the statutes failed to provide both substantive due process limitations on the commitment power and procedural due process protections including the right to be present at the commitment hearing, the right to meaningful confrontation and cross-examination, and the right to a full transcript to guarantee meaningful judicial review. To support its holdings, the court relied on both state and federal constitutional due process provisions, which it characterized as “the most advanced mechanisms for fairness which juridical science can create.”

The Connecticut Supreme Court has read that state’s constitution to mandate that involuntarily confined individuals receive periodic and continuing judicial reviews of the propriety of their commitment. In the

202. Id. at 40.
203. The only survey done since Meisel’s is Schwartz, State Constitutional Due Process Rights?, in RECENT DEVELOPMENTS, supra note 102, at 181, 196-201.
204. See infra notes 233-95 and accompanying text.
205. See supra notes 154-90 and accompanying text.
207. The decision by the West Virginia Supreme Judicial Court in State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974), was issued at the height of what I refer to as the “golden age of federal litigation” on behalf of the mentally disabled.
210. Id. at 441-47, 202 S.E.2d at 125-28.
211. Id. at 435, 202 S.E.2d at 122 (citing U.S. CONST. amend. V, and W. VA. CONST. art. III, § 10 (1872)).
212. Id. at 426, 202 S.E.2d at 117.
subsequent words of the New Jersey Supreme Court, the Connecticut court “eloquently stated” the “compelling reasons” in support of its position: 214

Freedom from involuntary confinement for those who have committed no crime is the natural state of individuals in this country. The burden must be placed on the state to prove the necessity of stripping the citizen of one of his most fundamental rights, and the risk of error must rest on the state. 215

Similarly, the New York Court of Appeals relied on both state and federal constitutional provisions in ruling that basic procedural due process protections applied to the civil commitment process, 216 and that such commitment must be “therapeutic, not punitive.” 217

Elsewhere, the Kentucky Court of Appeals interpreted its state constitutional provision guaranteeing the right to confrontation in criminal prosecutions 218 to apply equally to civil commitment hearings (there denominated “lunacy inquests”), 219 noting simply that the right was “also guaranteed by the Sixth Amendment.” 220

On the question of the right of a person facing civil commitment to a jury trial, courts have split in their interpretations of state constitutional provisions. The West Virginia Supreme Court of Appeals, after carefully examining the historical development of both the state constitution and the right to a trial by jury, 221 refused to read that state’s constitutional due process provision 222 to so guarantee that right. 223

on the due process guarantees of both the state constitution, Conn. Const. art. 1, § 8, and on such constitutional decisions of the United States Supreme Court, as O’Connor v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972).


217. Id. at 166, 305 N.E.2d at 903, 350 N.Y.S.2d at 892. The court relied on the New York state constitution which provides in pertinent part: “The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine.” N.Y. Const. art. XVII, § 4.


220. Id. at 683.


223. Markey, 264 S.E.2d at 443. The court stressed that if the framers of the West Virginia Constitution had intended for the due process provision to provide for jury trials in all cases, there would have been no need for two other state constitutional provisions that mandated jury trials in "suits at common law" or in cases involving “crimes and misdemeanors.” Id. at 441; see also W. Va. Const. art III, §§ 13, 14.
On the other hand, the Wisconsin Supreme Court found there was no justification under state or federal equal protection grounds\textsuperscript{224} in denying a jury trial under a subsequently repealed sex offender recommitment statute\textsuperscript{225} when such a trial was guaranteed by statute to persons facing involuntary civil commitment.\textsuperscript{226} And the California Supreme Court held that a person in peril of being declared "gravely disabled" pursuant to state law was entitled to a unanimous jury verdict in any such adjudication under the equal protection provisions of both the state and federal constitutions.\textsuperscript{227}

In other cases, courts have relied on state constitutional provisions as a source of rights in construing other procedural aspects of the commitment process. The New Hampshire Supreme Court concluded that because of the "grievous loss" attendant upon an erroneous commitment decision, the state constitution\textsuperscript{228} mandated a burden of beyond a reasonable doubt at an involuntary commitment hearing,\textsuperscript{229} both as to determinations of mental illness and potential dangerousness.\textsuperscript{230} The California Supreme Court applied state constitutional law in holding that a statutory scheme permitting the indefinite placement in a state hospital of nonprotesting developmentally disabled adults violated both the equal protection and due process provisions of both the state and federal constitutions.\textsuperscript{231} The court concluded:

\textsuperscript{224} State \textit{ex rel.} Farrell v. Stovall, 59 Wis. 2d 148, 158-62, 207 N.W.2d 809, 813-15 (1973). The court noted that "[t]he United States and Wisconsin Constitutions are similar with respect to the due process and equal protection clauses." \textit{Id.} at 158 n.20, 207 N.W.2d at 813 n.20.

\textsuperscript{225} For the chronology of the statute involved, see State \textit{v.} Combined Community Servs. Bd., 122 Wis. 2d 65, 87 n.12, 362 N.W.2d 104, 115 n.12 (1985).

\textsuperscript{226} Farrell, 59 Wis. 2d at 168-69, 207 N.W.2d at 815-19; see also Community Servs. Bd., 122 Wis. 2d at 87-90, 362 N.W.2d at 114-16 (state and federal constitutions similar due process and equal protection provisions (citing State \textit{ex rel.} Farrell v. Stovall, 59 Wis. 2d 148, 158 n.20, 207 N.W.2d 809, 813 n.20)).

\textsuperscript{227} Conservatorship of Roulet, 23 Cal. 3d 219, 231, 590 P.2d 1, 8, 152 Cal. Rptr. 425, 432 (1979).

\textsuperscript{228} See N.H. \textit{CONST.} pt. 1, art. 15.


\textsuperscript{230} \textit{Id.} at 935, 380 A.2d at 677-78. Subsequently, that court relied on the state constitution to strike down a state statute which had created an irrebuttable presumption of dangerousness in cases involving recommitment of persons initially committed following a finding of not guilty by reason of insanity. See State \textit{v.} Robb, 125 N.H. 581, 585-89, 484 A.2d 1130, 1132-35 (1984).

\textsuperscript{231} \textit{In re} Hop, 29 Cal. 3d 82, 94, 623 P.2d 282, 288-89, 171 Cal. Rptr. 721, 727-28 (1983). The court stressed that state law providing that developmentally disabled persons "have the same legal rights and responsibilities guaranteed all other individuals by the Federal Constitution and laws and the Constitution and laws of the State of California" is "but a legislative reaffirmation of a firmly rooted and independent constitutional principle which assures that persons will not be deprived of due process or equal protection of the law on the basis of developmental disability alone." \textit{Id.} at 89, 623 P.2d at 286, 171 Cal. Rptr. at 725 (quoting
Neither the benevolent intent of the Legislature, nor of those involved in the care of the developmentally disabled, nor the force of the legislative directive mandating the least restrictive placements for the developmentally disabled ... renders constitutional the legislative scheme which denies them the procedural safeguards of a hearing which is uniformly extended to other potential wards.232

2. The right to refuse treatment

While most of the case law233 and scholarly and academic attention234 paid to the scope of the right to refuse treatment has focused on the application of the federal Constitution,235 several courts have found a state constitutional right to refuse treatment.236 Most recently, the New York Court of Appeals has issued what appears to be the broadest right to refuse treatment opinion yet decided by an appellate court, and the broadest opinion decided by any court on the topic since the Third Circuit's remand opinion in Rennie v. Klein.237 In Rivers v. Katz,238 New

CAL. WELF. & INST. CODE § 4502 (West 1984)). The court cited prior cases decided under the California Constitution, holding that "'personal liberty is a fundamental interest, second only to life itself.' " Id. (quoting People v. Olivas, 17 Cal. 3d 236, 251, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976)).

232. Id. at 93, 623 P.2d at 289, 171 Cal. Rptr. at 728 (citation omitted).


236. See infra text accompanying notes 238-95. This material is adapted, in large part, from Perlin, supra note 72.

237. 720 F.2d 266 (3d Cir. 1983).

York's highest state court ordered, in most cases, a judicial "determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's parens patriae power." The Rivers court based its decision solely upon state constitutional and common law grounds, involving (1) a broader class of drugs than any prior opinion, and (2) a regulatory scheme already approved in large part on federal constitutional grounds by the second circuit.

Rivers was a consolidated action brought on behalf of three involuntarily committed patients at Harlem Valley Psychiatric Center, who attempted to refuse the administration of certain antipsychotic

239. Where a patient presents a danger to self or others or engages in dangerous or potentially destructive conduct within the institution, the state may be warranted, in the exercise of its police power, in administering antipsychotic medication over the patient's objections. The most obvious example of this is an emergency situation, such as when there is imminent danger to a patient or others in the immediate vicinity.

240. Rivers appears to be the first case involving a patient complaining about the administration of lithium. Id. at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77; cf. Mills, 457 U.S. at 293 n.1 (adopting classification used by First Circuit in Rogers); Rennie, 653 F.2d at 839 n.2 ("drugs such as lithium are not considered here"); Rogers, 634 F.2d at 653 n.1 (case exclusively concerned with antipsychotic drugs such as Thorazine, Mellaril, Prolixin, and Haldol; drugs such as lithium not covered); Price v. Sheppard, 307 Minn. 250, 262-63, 239 N.W.2d 905, 913 (1976) (While procedural due process hearing required prior to the imposition of electroshock therapy or other "more intrusive forms of treatment," such procedures "[c]ertainly [are] not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient.").


242. The trial court's denial of class certification was affirmed "since application of the principles of stare decisis will adequately protect subsequent litigants." Rivers, 67 N.Y.2d at 499, 495 N.E.2d at 345, 504 N.Y.S.2d at 82.


244. Harlem Valley Psychiatric Center is a New York state mental hospital. Rivers, 67 N.Y.2d at 490, 495 N.E.2d at 339, 504 N.Y.S.2d at 76.

245. Each patient unsuccessfully invoked the state's administrative procedures governing refusal of medication by state hospital patients. Id. at 490-91, 495 N.E.2d at 339-40, 504 N.Y.S.2d at 76-77. Under state regulations, before such treatment is ordered over a patient's objection, the decision to medicate must be reviewed by "the head of the service." 14 N.Y. COMP. CODES R. & REGS. tit. 14, § 27.8(c) (1986). Aggrieved patients then have a right to a counseled appeal before the facility director. Id. § 27.8(d), (e)(1). That decision may then be appealed to the regional director of the state department of mental hygiene. Id. § 27.8(e)(3).
medications. In each instance, after the court overrode the patients’ objections and the medications were involuntarily administered, the patients filed declaratory judgment actions against the state commissioner of mental hygiene and hospital officials “to enjoin the nonconsensual administration of antipsychotic drugs and to obtain a declaration of their common-law and constitutional right to refuse medication.”

Reversing the trial court’s dismissal, the court of appeals held that the due process clause of the state constitution affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication, and that “neither mental illness nor institutionalization per se can stand as a justification for overriding an individual’s fundamental right to refuse antipsychotic medication on either police power or parens patriae grounds.”

First, the court restated the “firmly established” and “faithfully adhered to” common-law principles that “every individual ‘of adult

248. Plaintiff Rivers was medicated with Prolixin Hydrochloride, Prolixin Decanoate, and Mellaril. Rivers, 67 N.Y.2d at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77. Plaintiff Zatz was medicated with Navene and lithium, and plaintiff Grassi was medicated with Prolixin Hydrochloride. Id. at 492, 495 N.E.2d at 340, 504 N.Y.S.2d at 77. The court discussed both the usefulness and the side effects of antipsychotic drugs. Id. at 490 n.1, 495 N.E.2d at 339 n.1, 504 N.Y.S.2d at 76 n.1. The administration of lithium—a drug first administered in 1949 and given to ameliorate manic episodes in patients with manic-depressive illness—was not specifically challenged in any of the cases cited by the court. See Cade, Lithium Salts in the Treatment of Psychotic Excitement, 36 MED. J. AUST. 349 (1949); Fieve, Lithium Therapy, in 2 FREEDMAN, KAPLAN & SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II 1982 (2d ed. 1975).

249. Plaintiffs Rivers and Zatz filed one action, while plaintiff Grassi filed a separate action. Rivers, 67 N.Y.2d at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77.

250. Id. The trial court had dismissed plaintiffs’ complaints, on the theory that “the involuntary retention orders necessarily determined that these patients were so impaired by their mental illness that they were unable to competently make a choice in respect to their treatment,” id., and the Appellate Division affirmed for the reasons stated by the trial court in Rivers v. Katz, 112 A.D.2d 926, 491 N.Y.S.2d 1011 (1985), rev’d, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).


252. Rivers, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

253. Id. at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

254. Id. at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court added that these principles were also recognized by the state legislature. Id. (citing N.Y. PUB. HEALTH LAW
years and sound mind has a right to determine what shall be done with his own body,” and to control the course of his medical treatment. In the case of competent patients, this “fundamental” right, which is co-extensive with the patient’s liberty interest protected by the state constitution’s due process clause, must be honored “even though the recommended treatment may be beneficial or even necessary to preserve the patient’s life.”

The court specifically rejected defendants’ argument that involuntarily committed mental patients were “presumptively incompetent” to exercise this right because involuntary commitment included an implicit determination “that the patient’s illness has so impaired his judgment as to render him incapable of making decisions regarding treatment and care.” Without more, neither the fact of mental illness nor the fact of commitment “constitutes a sufficient basis to conclude that [such pa-

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256. Rivers, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court cited Schloendorff, 211 N.Y. at 129-30, 105 N.E. at 93 (except in the case of an emergency, every patient has a common right to determine what should be done with his own body) and In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858 (1981) (“right to die” case, holding that, where, prior to becoming incompetent, an elderly patient had consistently expressed his desire not to have his life prolonged by medical means if there was no hope for recovery, it was proper for the court to approve discontinuance of a respirator on which he was being maintained in a permanent vegetative state).


258. Rivers, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (citing In re Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 73, 438 N.Y.S.2d 266, 273 (1981)). The court added: In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires . . . . This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness.

Id.

259. Id.
[Patients] lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being.\(^{260}\)

On the other hand, the court recognized that the right to reject antipsychotic medication was not absolute, and that, under certain circumstances, it might have to yield to compelling state interests.\(^{261}\) in an “emergency situation” where the patient was an “imminent danger to [another] patient or others in the immediate vicinity,”\(^{262}\) or, under the state’s *parens patriae* power where an individual is “incapable of making a competent decision concerning treatment on his own . . . [and] lacks

\(^{260}\) Id. at 494, 495 N.E.2d at 341-42, 504 N.Y.S.2d at 78-79; see also Rennie, 653 F.2d at 846 n.12 (“It is simply not true that all persons involuntarily committed are always incapable of making a rational decision on treatment. . . . Psychiatric literature indicates that many forms of mental illness have a highly specific impact on the victims, leaving decision-making capacity and reasoning ability largely unimpaired.”); *Rogers*, 634 F.2d at 658-59.

The court in *Rivers* added that it was “well-accepted” that mental illness “often strikes only limited areas of functioning, leaving other areas unimpaired,” and, as a result, “many mentally ill persons retain the capacity to function in a competent manner.” *67 N.Y.2d* at 494, 495 N.E.2d at 342-43, 504 N.Y.S.2d at 79.

In fact, the court stressed, the “nearly unanimous modern trend” in the courts and among both medical and legal commentators is to recognize “that there is no significant relationship between the need for hospitalization of mentally ill patients and their ability to make treatment decisions.” *Id.* at 494 & nn. 4-5, 495 N.E.2d at 342 & nn. 4-5, 504 N.Y.S.2d at 79 & nn. 4-5.

It concluded on this point by quoting Professor Brooks: “‘[T]here is ample evidence that many patients, despite their mental illness are capable of making rational and knowledgeable decisions about medications. The fact that a mental patient may disagree with the psychiatrist’s judgment about the benefit of medication outweighing the cost does not make the patient’s decision incompetent.’” *Id.* at 495, 495 N.E.2d at 342, 504 N.Y.S.2d at 79 (quoting Brooks, *Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 191 (1980)).

\(^{261}\) *Rivers*, 67 N.Y.2d at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 79.

\(^{262}\) *Id.* Under state regulations, facilities may treat objecting patients “where the treatment appears necessary to avoid serious harm to life or limb of the patients themselves or others.” *N.Y. COMP. CODES R. & REGS.* tit. 14, § 27.8(b)(1) (1986); see also *id.* § 27.8(b)(3).

This exception, the court explained, was premised on the state’s police power. *Rivers*, 67 N.Y.2d at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80. It noted, however, that no such claim was advanced by defendants in the case before it. *Id.* In a footnote, the court explained what this exception does not include:

Any implication that State interests unrelated to the patient’s well-being or those around him can outweigh his fundamental autonomy interest is rejected. Thus, the State’s interest in providing a therapeutic environment, in preserving the time and resources of the hospital staff, in increasing the process of deinstitutionalization and in maintaining the ethical integrity of the medical profession, while important, cannot outweigh the fundamental individual rights here asserted. It is the needs and desires of the individual, not the requirements of the institution, that are paramount.

*Id.* at 495 n.6, 495 N.E.2d at 343 n.6, 504 N.Y.S.2d at 80 n.6. In Youngberg v. Romeo, 457 U.S. 307, 324 (1982), the Court stated that “in deciding this case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate.” *Id.* at 324 (emphasis added).
the capacity to decide for himself whether he should take the drugs.

The court reasoned that prior judicial determination in the latter group of cases should be in the nature of a de novo hearing, following exhaustion of the state's administrative review procedures. At this hearing, the state bears the burden of demonstrating, by clear and convincing evidence, the patient's incapacity to make a treatment decision. If the court determines that the patient has the capability of making his own treatment decision, the state is precluded from administering such drugs. On the other hand, if the court determines the patient lacks such capacity

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 adverse side effects associated with the treatment and any less intrusive alternative treatments. The State would bear the burden to establish by clear

263. Rivers, 67 N.Y.2d at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80 (quoting Rogers v. Okin, 634 F.2d 651, 657 (1st Cir. 1980)).

This determination, the court underscored, "is uniquely a judicial, not a medical function." Due process thus requires that "a court balance the individual's liberty interest against the State's asserted compelling need on the facts of each case to determine whether such medication may be forcibly administered." Id. at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81 (emphasis added); cf. State v. Fields, 77 N.J. 282, 308, 390 A.2d 574, 587 (1978) ("The final decision on the need for and appropriate extent of restrictions on the committee's liberty is for the court, not the psychiatrists.") (emphasis in original).


265. Id. (citing N.Y. JUD. LAW § 35(1)(a) (McKinney 1983)) (counsel may be assigned in civil commitment proceedings if the court is satisfied the individual is financially unable to obtain counsel).

266. Id.; see also Addington v. Texas, 441 U.S. 418, 424 (1979) (intermediate burden of proof constitutionally mandated at civil commitment hearings used where "interests at stake . . . are deemed to be more substantial than mere loss of money").

267. Rivers, 67 N.Y.2d at 97, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

268. Id. The court listed eight factors that might be considered in evaluating an individual's capability to consent to or refuse treatment:

(1) the person's knowledge that he has a choice to make; (2) the patient's ability to understand the available options, their advantages and disadvantages; (3) the patient's cognitive capacity to consider the relevant factors; (4) the absence of any interfering pathologic perception or belief, such as a delusion concerning the decision; (5) the absence of any interfering emotional state, such as severe manic depression, euphoria or emotional disability; (6) the absence of any interfering pathologic motivational pressure; (7) the absence of any interfering pathologic relationship, such as the conviction of helpless dependency on another person; (8) an awareness of how others view the decision, the general social attitude toward the choices and an understanding of his reason for deviating from that attitude if he does.

Id. at n.7 (citing Michels, Competence to Refuse Treatment, in Refusing Treatment in Mental Health Institutions 115, 117-18 (Douden & Swazey 1979)).
and convincing evidence that the proposed treatment meets these criteria.\(^{269}\)

The court concluded that the state administrative review procedures failed to meet state constitutional muster.\(^{270}\) The regulations were deficient in that they did not articulate "the standards to be followed or criteria to be considered at each stage of the administrative process" in such matters as the patient's need for a particular drug, whether the drug is the "least intrusive, whether it is capable of producing the least serious side effects, and the proper length of its use."\(^{271}\)

Finally, the court ruled that state law mandating that hospital professional staff act "within the scope of professional license"\(^{272}\) applied to the administrative process. It further held that such "medical determinations as to the need to administer antipsychotic drugs must honor the patient's due process rights and be made in accordance with accepted professional judgment, practice and standards."\(^{273}\)

\textit{Rivers} is an important case for six reasons. First, on the merits, there is virtually nothing in the opinion acknowledging the split\(^{274}\) in the way courts have construed the right to refuse treatment following the Supreme Court's decision in \textit{Mills v. Rogers}\(^{275}\) and the Third Circuit's \textit{Rennie v. Klein} remand decision.\(^{276}\) While there is a "but see" citation to \textit{Stensvad v. Reivitz}\(^{277}\) on the question of the relationship between institu-

\begin{footnotesize}
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\item \(^{269}\) Id. at 497-98, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.
\item \(^{270}\) Id. at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.
\item \(^{271}\) Id. The court noted that:
  
  "The absence of any standard for determining the permissible duration of forced medication [was] particularly disturbing. Manifestly, when the medication is necessitated by the patient's dangerousness, a circumstance that would implicate the State's police power interest, it may well be that the need would continue only for so long as the dangerous condition exists. The determination would not necessarily imply incapacity and thus would not provide a justifiable basis for the exercise of the State's \textit{parens patriae} authority to override the patient's objection or to continue the medication for a protracted period. When the medication is determined to be necessary in order to care for a patient who is unable to care for himself because of mental illness, the State's \textit{parens patriae} power would be implicated, which, as we have said, may only be employed when it has been determined that the patient is unable to make a treatment decision."

\begin{footnotesize}
\item Id. at 498, 495 N.E.2d at 344-45, 504 N.Y.S.2d at 81-82.
\item \(^{272}\) Id., 495 N.E.2d at 345, 504 N.Y.S.2d at 82 (quoting N.Y. MENTAL HYG. LAW § 33.03(b)(3) (McKinney 1978)). Under this section of the mental health law, "in order to assure protection of patients in their care and treatment [there must be an] order of a staff member operating within the scope of a professional license for any treatment or therapy based on appropriate examination." N.Y. MENTAL HYG. LAW § 33.03(b)(3).
\item \(^{273}\) Rivers, 67 N.Y.2d at 498-99, 495 N.E.2d at 345, 504 N.Y.S.2d at 82.
\item \(^{274}\) See generally Perlin, supra note 72.
\item \(^{275}\) 457 U.S. 291; see also Perlin, supra note 74, at 7-8, 19-20 nn.126-34.
\item \(^{276}\) Rennie, 720 F.2d 266; see also Perlin, supra note 72.
\item \(^{277}\) 601 F. Supp. 128 (W.D. Wis. 1985); see also Perlin, supra note 72.
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tionalization and treatment decision-making capacity, a reading of Rivers alone would give little indication of the range of developments in the right to refuse treatment since 1982.

Second, Rivers makes no mention of Project Release v. Prevost, a Second Circuit Court of Appeals opinion which upheld on federal constitutional grounds the regulation struck down on state constitutional grounds by the Rivers court. The absence of any mention of Project Release is thus particularly stark. Third, the expansion of the class of drugs covered by the opinion to include lithium is a significant quantitative and qualitative increase in the universe of drugging decisions in which constitutional due process decisions are now implicated.

Fourth, the use in Rivers of a pre-administration judicial hearing—like that ordered by the Massachusetts Supreme Judicial Court in the Rogers remand—is a ringing endorsement of the judicial model in an area where it appears likely that the United States Supreme Court would accept a more informal, medically-focused model so as to adequately satisfy the demands of the due process clause of the federal Constitution.

278. Rivers, 67 N.Y.2d at 494 n.4, 495 N.E.2d at 342 n.4, 504 N.Y.S.2d at 79 n.4.
280. 722 F.2d 960 (2d Cir. 1983).
281. Id. at 980-81.
283. There are important clinical side effect issues raised by the use of lithium. See, e.g., Bar, Nathan, Brenner & Horowitz, Nonspecific Stomatitis Due to Lithium Therapy, 142 AM. J. PSYCHIATRY 1126 (1985) (letter to the editor); Cohen & Cohen, Lithium Carbonate, Haloperidol, and Irreversible Brain Damage, 230 J. AM. MED. A. 1283 (1974); Crews & Carpenter, Lithium-Induced Aggravation of Tardive Dyskinesia, 134 AM. J. PSYCHIATRY 933 (1977); Kane, Extrapyramidal Side Effects with Lithium Treatment, 155 AM. J. PSYCHIATRY 851 (1978); Mann, Greenstein & Eilers, Early Onset of Severe Dyskinesia Following Lithium-Haloperidol Treatment, 140 AM. J. PSYCHIATRY 1385 (1983) (letter to the editor); Reisberg & Gershon, Side Effects Associated with Lithium Therapy, 36 ARCHIVES GEN. PSYCHIATRY 879 (1979); Shukla, Lithium-Carbamazepine Neurotoxicity and Risk Factors, 141 AM. J. PSYCHIATRY 1604 (1984); Shukla & Mukherjee, Lichen Simplex Chronicus During Lithium Treatment, 141 AM. J. PSYCHIATRY 909 (1984); Spring & Frankel, New Data on Lithium and Haloperidol Incompatibility, 138 AM. J. PSYCHIATRY 818 (1981); Zorumski & Bakris, Choreoathetosis Associated with Lithium: Case Report and Literature Review, 140 AM. J. PSYCHIATRY 1621 (1983). However, none of these is mentioned in the course of Rivers. The decision's "side effects footnote" cites solely to articles and cases discussing the narrower class of drugs before the court in Rennie and Rogers. Rivers, 67 N.Y.2d at 490 n.1, 495 N.E.2d at 339 n.1, 504 N.Y.S.2d at 76 n.1; cf. Mills, 457 U.S. at 293 n.1.
285. See, e.g., Younghberg, 457 U.S. at 322-23 ("[T]here certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions [about internal operations of state mental institutions]."); Roth, The Right to Refuse Psychiatric Treatment: Law and Medicine at the Interface, 35 EMORY L.J. 139, 157 (1986) ("[W]hile
Fifth, Rivers' paraphrase of the "professional judgment" language used by the United States Supreme Court in Youngberg to support its holding that, in the administrative process, "medical determinations as to the need to administer antipsychotic drugs must honor the patient's due process rights," is more than mildly ironic. The Youngberg language is now generally used to countenance more informal procedures and as a standard under which "the judgment of medical authorities should determine the most efficacious treatment modality that will satisfy the treatment needs of the patient." It is not ordinarily used as justification for a due process model which is in some ways stricter than the trial court's original remedy in Rennie.

Sixth, the decision's sole reliance on state constitutional law may be its most important legacy. Given the shift in attitude in the United
States Supreme Court on cases involving institutional reform and its concomitant emphasis on professional deference,291 and the general renaissance of state constitutional law as a source of rights in matters involving civil liberties,292 the broad articulation of a state constitutional right in Rivers may reasonably be expected to have an impact both beyond the geographic borders of New York and beyond the subject-matter confines of the question of the right of the institutionalized mentally disabled to refuse treatment.

Although several other state cases have used state constitutions as the source of finding similar rights,293 none appears to have the potential scope and impact of Rivers.294 While it is far too early to speculate as to Rivers' ultimate impact, it should be self-evident that it is available as a model to high courts of other states, if they wish to "sidestep"295 the Supreme Court's decisions in Mills and Youngberg and the Third Circuit's cutbacks in its Rennie remand decision.

3. Right to treatment

Surprisingly, there has been virtually no caselaw on the question of a state constitutional right to treatment on behalf of mentally disabled persons.296 While ambiguities in decisions by the highest appellate courts in both New Jersey297 and New York298 may be so interpreted, there have

291. See supra text accompanying notes 69-99.
292. See supra notes 154-90 and accompanying text.
293. A right to refuse treatment has been found under the New Hampshire state constitution in Opinion of the Justices, 123 N.H. 554, 465 A.2d 484 (1983). There, in one of the broadest readings, the New Hampshire Supreme Court looked specifically at the state constitutional provision granting "mentally ill persons, like all other individuals, . . . certain fundamental liberty interests" in finding that patients have "a right to be free from unjustified intrusion upon their personal security," which includes a qualified right to refuse treatment as "a liberty interest which is protected by our State Constitution." Id. at 559-60, 465 A.2d at 488-89; see also Large v. Superior Court, 148 Ariz. 229, 714 P.2d 399 (1986) (right to refuse treatment for mentally ill convicts); Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (right to refuse treatment for incurably ill non-psychiatric patients who seek the discontinuation of artificial life support systems).
294. It is ironic that, while Rivers declared a broad right to refuse treatment on state constitutional law grounds (ignoring the contrary federal constitutional decision of Project Release), the Rennie trial court originally rejected defendants' abstention argument, in part, because a New Jersey state trial court had previously approved—on state law grounds—of the involuntary administration of psychotropic drugs to resisting patients. See Rennie, 462 F. Supp. at 1142; In re Hospitalization of B., 156 N.J. Super. 231, 383 A.2d 760 (Law Div. 1977).
295. See generally supra note 96. See also Brant, The Hostility of the Burger Court to Mental Health Law Reform Litigation, 11 BULL. AM. ACADEMY PSYCHIATRY & L. 77, 83 (1983); Kemna, supra note 234, at 132.
298. See, e.g., Lavette M. v. Corporation Counsel, 35 N.Y.2d 136, 143, 316 N.E.2d 314,
been no cases holding squarely that there is such a state constitutional right.

4. Rights involving sterilization

Several courts have weighed state constitutional provisions along with their federal counterparts in cases involving petitions for involuntary sterilization of minors or incompetent persons, and have found both the right to be sterilized and the right to autonomy in sterilization decision-making to be protected by such provisions.

The New Jersey Supreme Court, for instance, first recognized that, although a right to sterilization had not received express constitutional protection from the United States Supreme Court, several lower courts had found such a right, and that, drawing on its historic decision in *In re Quinlan*, the right to be sterilized was included in the privacy rights afforded by the federal Constitution. Beyond this basis, however, the


299. See, e.g., *In re K.K.B.*, 609 P.2d 747, 749 (Okla. 1980) (footnote omitted) (“Other courts have consistently held a patient in a mental hospital has a constitutional right to meaningful treatment. We adopt this view and hold it is the law in the State of Oklahoma.”). There is, however, no citation to the Oklahoma state constitution, and the cases cited in the omitted footnote are all federal constitutional decisions. See id. at n.6.

In Chill v. Mississippi Hospital Reimbursement Commission, 429 So. 2d 574, 580 (Miss. 1983), while holding that the state could properly charge a patient for the reasonable costs of his care, maintenance and treatment, the Mississippi Supreme Court noted that the state constitution vested in the legislature the duty to provide the mentally ill with care and treatment. Id. at 579 (citing Miss. CONST. art. IV, § 86). *Chill* is discussed infra at text accompanying notes 490-93.

300. In addition to the cases discussed infra text accompanying notes 301-12, see Eberhardy v. Circuit Court, 102 Wis. 2d 539, 548-51, 307 N.W.2d 881, 885-87 (1981) (discussing circuit court's state constitutional right to rule on petition by guardian seeking to have adult mentally retarded daughter sterilized). The Alaska Supreme Court has held that a trial court of general jurisdiction had, pursuant to the state constitution, broad *parens patriae* power over incompetents, enabling it to act upon a petition seeking sterilization filed by guardian of noninstitutionalized, adult mentally disabled woman afflicted with Down's Syndrome. K.C.M. v. Alaska, 627 P.2d 607, 609-12 (Alaska 1981) (citing Superintendent of Belchertown State School v. Saitkiewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976)).


304. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663 (right to privacy found in state constitution); see N.J. CONST. art. 1, ¶ 1.

305. *Grady*, 85 N.J. at 249, 426 A.2d at 474. The application in the *Grady* case was brought
New Jersey Supreme Court specifically found that the right was also protected by the state constitution, and that "the governmental intrusion into privacy rights may require more persuasive showing of a public interest under our State Constitution than under the federal Constitution."  

The California Supreme Court—in addition to finding that state legislation which absolutely forbade sterilization of persons under conservatorship deprived developmentally disabled persons of their privacy rights under the state and federal constitutions—also found that the right of a woman "to choose whether or not to bear a child and thus to control her social role and personal destiny" was a fundamental right under the same state constitutional provision, which could be restricted only by a compelling state interest.

5. Other issues involving the mentally disabled

In addition, other courts have invoked state constitutional provisions in cases involving the scope of testimonial privilege which can be invoked by a psychotherapist, a court's authority to order a state by the parents of a noninstitutionalized 19-year old daughter similarly afflicted with Down's Syndrome. Id. at 246-47, 707 P.2d at 771-72.

306. Id. at 249, 426 A.2d at 474 (citing N.J. Const. art. I, ¶ 1).

307. Id.; see also In re Moe, 385 Mass. 555, 563-64, 432 N.E.2d 712, 719 (1982) (United States Supreme Court has "implicitly recognized that the right of a person to be sterilized is a fundamental right"; court also relies on other cases to support "right of person to be free from nonconsensual invasion of bodily integrity").


309. The Valerie N. case was brought by parents who were co-conservators of their adult developmentally disabled daughter who, like the subjects of the petition in Grady and K.C.M., was affiliated with Down's Syndrome. Valerie N., 40 Cal. 3d at 148, 707 P.2d at 762, 219 Cal. Rptr. at 389-90.


311. Id. at 163, 707 P.2d at 774, 219 Cal. Rptr. at 401.

312. Id.; see Cal. Const. art. I, § 1.


314. See, e.g., In re B., 482 Pa. 471, 484, 394 A.2d 419, 425 (1978) (patient's right to prevent psychiatrist from disclosing certain information obtained in the context of the psychotherapist-patient relationship based on state constitutional right to privacy). This opinion was characterized by petitioner's counsel as "very confused." Meisel, supra note 170, at 39 n.168; see McKirdy v. Superior Court, 138 Cal. App. 3d 12, 23, 188 Cal. Rptr. 143, 150-51 (1982) (psychotherapy patient's "proper and substantial" interest in privacy of communications with therapist protected in part by state constitutional provision guaranteeing right to privacy outweighed by state's need to investigate alleged fraud in therapist's billing practices); see also
mental health department to pay the cost of care for a mentally disabled child at a private psychiatric hospital,\textsuperscript{315} limitations on the use of a group home by the mentally retarded,\textsuperscript{316} the scope of remedy available to a litigant alleging false imprisonment and false arrest in an involuntary civil commitment proceeding,\textsuperscript{317} and the legality of a reimbursement scheme by which certain relatives of institutionalized mentally disabled persons were billed for the costs of their institutionalization.\textsuperscript{318}

\textbf{D. Conclusion}

Thus, while the use of state constitutions as a source of rights for mentally disabled individuals is a comparatively recent development,\textsuperscript{319} and while caselaw is still somewhat limited, decisions such as Rivers v. Katz make it likely that, as the Supreme Court continues to be unreceptive to far-reaching and innovative claims brought on behalf of such per-


\textsuperscript{315} See In re Hamil, 69 Ohio St. 2d 97, 99, 431 N.E.2d 317, 318-19 (1982) (court lacked such authority; state constitutional provision imposed duty solely on state to provide for the handicapped in public facilities).

\textsuperscript{316} See, e.g., State ex rel. Thelen v. City of Missoula, 168 Mont. 375, 380-81, 543 P.2d 173, 176-78 (1975) (statutes providing for community residential facilities for developmentally disabled persons in all residential zones constitutional). The court in Thelen relied on a state constitutional section providing that the legislature "shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society." Mont. Const. art. XII, § 3(3); see also Crane Neck Ass'n v. New York City/Long Island County Servs. Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, cert. denied, 469 U.S. 804 (1984).


\textsuperscript{318} Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), vacated and remanded, 380 U.S. 194, on remand, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

The Supreme Court remanded the initial Kirchner opinion because that opinion lacked clarity as to whether it struck down the statutory provision on the basis of the state or federal constitution. 380 U.S. at 196-97. On remand, the California Supreme Court noted that, while it had understood that the fourteenth amendment and parallel state constitutional sections provided "generally equivalent but independent protections," it had premised its decision on "our construction and application of California law, regardless of whether there is or is not compulsion to the same end by the federal Constitution." 62 Cal. 2d at 588, 400 P.2d at 322, 43 Cal. Rptr. at 330.

\textsuperscript{319} But see supra text accompanying notes 208-13.
sons, the use of state constitutions as a source of rights will increase significantly in the coming years.

III. STATE STATUTES

A. Introduction

In addition to state constitutional provisions, state statutory provisions are being turned to more frequently as sources of rights for the mentally disabled. While a small body of literature has developed with regard to the use of state constitutions generally, the law reviews have been nearly silent on the equally important question of the applicability and utility of state statutory bills of rights to the pertinent substantive and procedural issues.

B. Historical Background

Although several states enacted modest statutes protecting the substantive rights of the institutionalized mentally disabled as early as the 1930's and 1940's, it was not until the publication of the Council on State Government's national report and the issuance of the National Institute of Mental Health's Draft Act Governing Hospitalization of the Mentally Ill (Draft Act) in the early 1950's that state legislatures be-

320. See, e.g., Meisel, supra note 170; Schwartz, supra note 203.
322. In Massachusetts, statutory enactments providing the institutionalized mentally disabled with limited rights to visitation by counsel and correspondence with institutional officials date to the 19th century. See MASS. GEN. L. ch. 195, § 4 (1879) (visitation); MASS. GEN. L. ch. 363, §§ 1-2 (1874) (correspondence). These sections remained virtually unchanged—see, e.g., MASS. ANN. LAWS, ch. 123, §§ 97-98 (Law. Co-op 1949); MASS. GEN. LAWS ANN. ch. 123, §§ 97-98 (West 1969)—until the 1970 recodification of the Massachusetts mental health code. MASS. GEN. LAWS ANN. ch. 123, § 23 (West 1986); see also ILL. ANN. STAT. ch. 91 1/4, §§ 9-14 (Smith-Hurd 1951) (providing for institutional investigation if patient is being “cruelly, negligently or improperly treated”) (repealed); MICH. COMP. LAWS § 330.62 (1948) (right of state hospital commissioner to promulgate rules and regulations so that hospital patients receive “proper care, attention and treatment”); VT. STAT. ANN. tit. 18, § 7711 (1968) (attorney visitation).
323. COUNCIL OF STATE GOVERNMENTS, THE MENTAL HEALTH PROGRAMS OF THE FORTY-EIGHT STATES (1950) [hereinafter CSG].
324. NATIONAL INSTITUTE OF MENTAL HEALTH, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (1952) [hereinafter DRAFT ACT]. For commentaries discuss-
gan to consider—for the first time—the implications of the notion that individuals’ civil rights could not be abrogated simply because of institutionalization.325

Although the suggestion that patients could retain “all their personal rights” was still labeled as “foolhardy,”326 there was at least some sense327 that a “practical ideal for the care and treatment of mental patients”328 would include the right to “humane care and treatment”329 and, subject to certain significant limitations,330 the right to “exercise all civil rights.”331 Under the Draft Act, patients were also to be entitled332 “to communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital”333 and to “receive visitors.”334 The commentary to the Draft Act noted that these sections were stated “as broadly as it is possible to do so consistently with the orderly execution of the hospital.”335

The commentary to the Draft Act noted that these sections were stated “as broadly as it is possible to do so consistently with the orderly execution of the hospital.”335

See generally DRAFT ACT, supra note 324. In summarizing the developments in this area in the American Bar Foundation’s Report on the Rights of the Mentally Ill, Lindman and McIntyre reflected significant ambiguity:

The extent to which restrictions should be placed on the rights and freedoms of mental patients, whether voluntary or involuntary, poses a real dilemma. Some restrictions are, no doubt, necessary to further the patient’s treatment and welfare. The doctors in charge are in the best position to make this determination. As statutory law now stands, generally speaking, hospital authorities have broad discretion in dealing with the rights of patients but lack official criteria to guide them. The majority of the states are without statutory provisions guaranteeing protection of patients’ rights in the area of correspondence and visitation, mechanical restraints, major medical treatment, [and] employment . . . . This is an undesirable state of affairs from every point of view.

Lindman, supra note 325, at 155.

328. See DRAFT ACT, supra note 324, § 19 comment.

329. Id. § 19.

330. The exercise of civil rights was to be subject to “the general rules and regulations of the hospital” and “the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose restrictions.” Id. § 21(a)(3).

331. Id. These civil rights were to include “the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote unless [the patient had] been adjudicated incompetent and not restored to legal capacity.” Id. This right, according to the Act’s commentary, “follows naturally from the fact that, under the theory of the Act, a determination that hospitalization is justified is entirely different and separate from an adjudication of incompetency.” Id. § 21(a)(3) comment.

332. See supra note 330 for applicable limitations.

333. DRAFT ACT, supra note 324, § 21(a)(1).

334. Id. § 21(a)(2).

335. Id. § 21(a) comment.
In addition, the Draft Act and the State Government Council report also suggested regulation of the imposition of mechanical restraints on the institutionalized and the compulsory "employment" of patients without compensation. Contemporaneous studies prepared by the Group for the Advancement of Psychiatry recommended safeguards against the indiscriminate use of such intrusive interventions as psychosurgery and electroshock treatment.

In response to these initiatives and to other governmental, professional and blue-ribbon studies questioning patient treatment at large public institutions, states began to enact laws providing some "baseline" protections in the areas discussed. By 1958, nine states adopted the Draft Act's language as to the exercise of civil rights, communication and visitation, and eight provided patients with the right to unrestricted correspondence with attorneys.

Although commentators were especially critical of the overuse and misuse of mechanical restraints, as of 1961, only a dozen states attempted to provide any sort of regulation of the practice. At the same time, it did not appear as if any state law adequately protected patients against exploitation and abuse in the area of forced labor. Finally, only six states made any provision for the regulation of major medical treatment, and, of these, only the Kansas law could be construed—by the most expansive and charitable reading—to be protective of patients' rights.

336. CSG, supra note 323, at 12, 192-94; Draft Act, supra note 324, § 20.
337. CSG, supra note 323, at 187.
338. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, RESEARCH ON PREFRONTAL LOBOTOMY (1948).
339. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SHOCK THERAPY (1947).
341. See supra text accompanying notes 331-33.
342. Lindman, supra note 325, at 145 n.23. The states were Idaho, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Texas and Utah. See id. at 158-59 table V-A. In addition, 11 other states adopted some sort of statute governing visitation alone. Id. at 145, 158-59 table V-A.
343. Id. at 143 nn.11-12. While Colorado, Illinois, Kentucky, Louisiana, Pennsylvania, Texas and Wisconsin enacted statutes, New York promulgated its policy in an administrative regulation, apparently in response to earlier litigation. See id. at 143 (discussing Hoff v. State, 279 N.Y. 490, 18 N.E.2d 671 (1939), and People ex rel. Jacobs v. Worthing, 167 Misc. 702, 4 N.Y.S.2d 630 (Sup. Ct. 1938)).
344. Id. at 146; see also id. at 163 table V-B (Georgia, Idaho, Kansas, Kentucky, Massachusetts, Missouri, New Mexico, North Dakota, Oklahoma, Pennsylvania, Texas and Utah).
345. See id. at 151-52. Although several states governed nontherapeutic labor by patients, none provided appropriate statutory safeguards. See, e.g., id. at 151 nn.79-80.
346. Id. at 165 table V-C (Illinois, Kansas, Minnesota, Ohio, Oklahoma and Vermont).
In short, prior to the "due process revolution," few states regulated the substantive treatment of the institutionalized mentally disabled. It was not until the district court's decision in Wyatt v. Stickney that state legislatures began to respond seriously to the issues raised and articulated in the State Government report and the Draft Act.

C. Impact of Wyatt

There can be no doubt concerning the significance of Wyatt v. Stickney as an "influential force" in the shaping of modern state-level patients' bills of rights and bills of rights on behalf of the developmentally disabled. The elaborate standards crafted in Wyatt-ranging from the global to the ultra-specific, and covering virtually every phase of institutional patient life—served as the role model for many of the approximately fifteen states that either adopted new legislation or expanded existing statutes in the immediate aftermath of Wyatt.

These statutes—to either a greater or lesser degree—began to

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348. While exempting public hospital employees from liability to patients for any physical or mental injury caused by the use of shock treatment, the statute premised immunity on the proviso that "approved and accepted methods and techniques of administering such 'shock' treatment are [to be] used." Id.

349. See supra note 10.


351. Id.

352. See The Wyatt Standards: An Influential Force in State and Federal Rules, 28 Hosp. & COMMUNITY PSYCHIATRY 374 (1977) [hereinafter Influential Force]. According to Louis Kopolow, M.D., coordinator of patients' rights and advocacy programs for the National Institute of Mental Health, however, Wyatt served more as a " 'moralizing force' " than as a "specific cause" of the new legislation. Id.


354. See, e.g., Perlin, supra note 74, at 2.

355. See Influential Force, supra note 352. States which enacted such legislation between the issuance of the Wyatt orders in 1972 and the promulgation of the report of the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health in 1978, included Alabama, Alaska, California, Florida, Hawaii, Iowa, Kansas, Michigan, Nebraska, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota and Wisconsin. Id. See generally Survey I, supra note 321.


357. Several patients' bills of rights were enacted between the time of the Wyatt decision and the publication of the report of the Task Force on Legal and Ethical Issues of the Presi-
track\textsuperscript{358} Wyatt and guarantee\textsuperscript{359} patients the right to "appropriate treatment and services,"\textsuperscript{360} to an individualized treatment plan\textsuperscript{361} which is to be periodically reviewed,\textsuperscript{362} to an aftercare plan,\textsuperscript{363} to a humane treatment plan, or to a facility that is otherwise available by common law or statute." N.J. STAT. ANN. §§ 30:4-24.1 to 24.2h (1978); N.Y. MENTAL HYG. LAW §§ 33.01 to .17 (McKinney 1978 & Supp. 1986); OR. REV. STAT. ANN. §§ 370.41 to 370.55 (1986); SD. Codified Laws Ann. §§ 27A-12-1 to -33 (1984); Vt. STAT. ANN. tit. 18, §§ 7701-7711 (Supp. 1986); WASH. REV. CODE ANN. §§ 71.05.360 to .370 (1975); W. VA. CODE § 27-5-9 (1980); WIS. STAT. ANN. § 51.61 (West Supp. 1986).


358. By 1982, virtually all states had some sort of patients' rights legislation in place, but in many cases actual protection was little more than "nominal." Survey I, supra note 321, at 179.

359. For a listing of various enforcement mechanisms, see *State Survey*, supra note 356. In New Jersey, for instance, any individual subject to institutionalization in a facility for the mentally disabled shall be "entitled to enforce any of the rights [enumerated in the Patients' Bill of Rights, N.J. STAT. ANN. §§ 30-4-24.1 to 24.2] by civil action or other remedies otherwise available by common law or statute." N.J. STAT. ANN. § 30-4-24.2h.


361. See, e.g., DEL. CODE ANN. tit. 16, § 5161(2)(e).


363. See, e.g., MONT. CODE ANN. § 53-21-162(3).
ment environment,\textsuperscript{364} and to privacy\textsuperscript{365} and safety.\textsuperscript{366} Similarly, other statutory provisions mandated a right to refuse treatment\textsuperscript{367} and to such communications rights\textsuperscript{368} as the right to converse privately,\textsuperscript{369} to have visitors,\textsuperscript{370} and to communicate by telephone\textsuperscript{371} and mail.\textsuperscript{372}

In addition, certain jurisdictions provided patients with the right to an explanation regarding their treatment,\textsuperscript{373} and with certain rights regarding the records of their institutionalization and notice of their substantive treatment rights while hospitalized: confidentiality of records,\textsuperscript{374} access to one's own records\textsuperscript{375} (both before and after discharge),\textsuperscript{376} and information as to one's rights (both orally\textsuperscript{377} and through posted notices).\textsuperscript{378}

Also, statutes were amended and rewritten to provide patients with a mechanism through which they could assert grievances\textsuperscript{379} through some sort of administrative structure\textsuperscript{380} and with access by a legal representative\textsuperscript{381} or to a patient advocate.\textsuperscript{382} Other laws specified that there could be no reprisals against patients for asserting their rights,\textsuperscript{383} and that patients were entitled to a whole range of civil rights while institutionalized,\textsuperscript{384} including the right to free practice of religion,\textsuperscript{385} to be com-

\textsuperscript{364} See, e.g., N.M. STAT. ANN. § 43-1-6(D) (1978).
\textsuperscript{365} See, e.g., OHIO REV. CODE ANN. § 5122.29(G) (Anderson 1981).
\textsuperscript{366} See, e.g., MO. ANN. STAT. § 630.110.1(3) (Vernon Supp. 1986).
\textsuperscript{367} See, e.g., KAN. STAT. ANN. § 59-2929(a)(6), (b). An earlier statutory survey on this specific right can be found in Plotkin, \textit{supra} note 234, at 504-25.
\textsuperscript{368} See generally, Perlin, \textit{Other Rights of Residents in Institutions}, in 2 LEGAL RIGHTS, \textit{supra} note 31, at 1009.
\textsuperscript{369} See, e.g., LA. REV. STAT. ANN. § 28:171(c) (West 1978).
\textsuperscript{370} See, e.g., ILL. ANN. STAT. ch. 91 1/2, ¶ 2-103.
\textsuperscript{371} See, e.g., IOWA CODE ANN. § 229.23(3) (West 1985) (as amended).
\textsuperscript{372} See, e.g., OKLA. STAT. ANN. tit. 43A, § 93.
\textsuperscript{373} See, e.g., CAL. WELF. & INST. CODE § 5326.2 (West 1984).
\textsuperscript{374} See, e.g., FLA. STAT. ANN. § 394.459(9).
\textsuperscript{375} See, e.g., COLO. REV. STAT. § 27-10-120(1)(b) (1982).
\textsuperscript{376} See, e.g., OHIO REV. CODE ANN. § 5122.31 (Anderson 1981).
\textsuperscript{377} See, e.g., TENN. CODE ANN. § 33-3-111 (Supp. 1986).
\textsuperscript{378} See, e.g., UTAH CODE ANN. § 64-7-48(5) (1986).
\textsuperscript{379} See \textit{supra} note 358.
\textsuperscript{380} See, e.g., WIS. STAT. ANN. § 51.61(5)(a).
\textsuperscript{381} See, e.g., MO. ANN. STAT. § 630.110(3) (Vernon Supp. 1986).
\textsuperscript{382} See, e.g., S.C. CODE ANN. § 44-23-1030. This statute, and others like it, see \textit{Survey I}, \textit{supra} note 321, at 194-96, provide only that a patient has a right to communicate with "his counsel." See, e.g., S.C. CODE ANN. §§ 43-33-310 to -400 (establishing the South Carolina Protection and Advocacy System for the Handicapped, Inc.); \textit{id.} § 43-33-350(1) (system shall protect and advocate for the rights of developmentally disabled persons by "pursuing legal . . . remedies to insure the protection of the rights of such persons").
\textsuperscript{384} See, e.g., N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1978).
\textsuperscript{385} See, e.g., OR. REV. STAT. § 426.385(1)(d).
pensated for work done, to not be barred from registering to vote because of institutional status, to physical exercise and outdoor recreation, to a nourishing diet, and to reasonable visitation from members of the opposite sex.

It must be stressed that these statutes were neither all-encompassing nor uniform. As recently as 1982, only five states were found to be in substantial compliance with the bills of rights recommendations of the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health. Also, the assumption made by several senators during the debate on the federal Mental Health Systems Act—that thirty-five states had adequately comprehensive bills of rights protections—was flatly erroneous. On the other hand, while this figure was clearly "inflated," the statutes referred to reveal that—to some extent, at least—state legislatures were beginning to respond to the moral imperative of cases such as Wyatt.

D. Impact of the President's Commission's Report

When the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health submitted its final report in 1978, it stressed the importance of state-level patients' bills of rights as a major tool "to help to ensure 'equal access to justice' for mentally handicapped persons." Invoking Judge Frank Johnson's "seminal" decision in Wyatt v. Stickney, it lauded those states which had at that time codified "the outlines of a constitutional right to protection of bodily integrity

387. See, e.g., N.J. STAT. ANN. § 30-4-24.29(a).
389. See, e.g., MO. ANN. STAT. § 630.115.1(13).
391. See generally supra note 321.
392. 42 U.S.C. § 9501 (1983); see infra notes 397-422 and accompanying text.
393. Survey I, supra note 321, at 178.
394. Id. at 179-80.
395. Id. at 180.
396. See id. at 185-201.
from unwanted State intrusion."  

The need for such legislation, the Task Force noted, "should be self-evident": "The extent of discrimination against mentally handicapped persons needs no lengthy recitation. The pattern of abuse, disenfranchisement, and disregard eloquently underscores the need for vigorous, enforceable, prophylactic legislation in each of the States." Such legislation would not "consign[] the mentally handicapped to second-class citizen status," but would acknowledge the fact that "such persons have been perceived and treated as second-class citizens—or worse—by much of society."  

The Task Force considered the array of pre-existing state statutes, and recommended that each state adopt legislation which would include at least seven basic components:

(a) A statement that all mentally handicapped persons are entitled to the specified rights;
(b) A statement that rights cannot be abridged solely because of a person's handicap or because s/he is being treated (whether voluntarily or involuntarily);
(c) A declaration of the right to treatment, the right to refuse treatment and the regulation of treatment, the right to privacy and dignity, the right to a humane physical and psychological environment and the right to the least restrictive alternative setting for treatment;
(d) A statement of other, enumerated fundamental rights which may not be abridged or limited;
(e) A statement of other, specified rights which may be altered or limited only under specific, limited circumstances;
(f) An enforcement provision; and
(g) A statement that handicapped persons retain the right to enforce their rights through habeas corpus and all other common law or statutory remedies.

The President's Commission generally endorsed its Task Panel's

399. Mental Health and Human Rights, supra note 397, at 133-34 (quoting, in part, Developments—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1345 (1974)).
400. Mental Health and Human Rights, supra note 397, at 134.
401. Mental Health and Human Rights, supra note 397, at 134.
402. Mental Health and Human Rights, supra note 397, at 134; see also Wald, Basic Personal & Civil Rights, in The Mentally Retarded Citizen and the Law 3, 18 (M. Kirndred ed. 1976) (handicapped person perceived as "someone to whom attention need not be paid.").
403. See, e.g., Mental Health and Human Rights, supra note 397, at 134 n.197.
404. Mental Health and Human Rights, supra note 397, at 134.
suggestions stating that, as there were "strong legal, ethical, and social policy reasons for adopting the principles of a right to receive treatment, a right to receive treatment in the least restrictive setting, and a right to refuse treatment," it recommended that "[e]ach State review its mental health laws and revise them, if necessary, to ensure that they provide for" such rights, along with "a right to due process when community placement is being considered."

"To articulate these... rights," the Commission recommended that "[e]ach State have a 'Bill of Rights' for all mentally disabled persons, wherever they reside." It added that such a bill should include the same seven components that the Task Force had listed earlier.

The bill that was ultimately enacted by Congress—the Mental Health Systems Act of 1980 (MHSA)—included a bill of rights that was merely a recommendation rather than an enforceable enactment of rights. A survey done soon after enactment showed that, contrary to Congress' belief that at least thirty-five states already had enacted comprehensive protective statutes, only five states had actually complied with as many as half of the Act's recommendations, while just twenty-two substantially complied with one-third. Significantly, the greatest degree of compliance was found in areas not directly related to treatment, e.g., visitation (forty-two states) and confidentiality of records (forty-six states), while the right to a humane treatment environment and the least restrictive alternative for treatment each were clearly stipu-

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405. 1 President's Commission on Mental Health, Report to the President 43 (1978).
406. Id. at 44. The Commission added one caveat. In recommending the inclusion of a statutory section providing for a right to refuse treatment, it added language specifying that states pay "careful attention to the circumstances and procedures under which the right may be qualified." Id.
407. Id.
408. Id.
409. Id. at 72 n.45.
411. See 42 U.S.C. § 9501 which provides:
   It is the sense of the Congress that each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision should take into account the recommendations of the President's Commission on Mental Health and: [42 U.S.C. § 9501(1)-(4)(c)].
412. See generally, Survey I, supra note 321, at 178; see also Survey II, supra note 321.
413. Survey I, supra note 321, at 178; see Survey II, supra note 321, at 153 n.4 (citing remarks by Senators Morgan, Hatch, Danforth, Javits and Roth).
414. Id.
415. Id.
lated in only nineteen states.\footnote{416} 

In the five years after the MHSA was passed, thirteen states made at least some substantive amendments to their patients' rights acts so as to provide some of the protections recommended in the federal act.\footnote{417} Of these states, only one, Hawaii, made such changes which provided patients with "virtually all the rights recommended in the MHSA."\footnote{418} Interestingly, of all the states where changes were made, only in Hawaii did officials indicate that the passage of the MHSA substantially influenced the new laws.\footnote{419} According to that state's Mental Health Association, the legislative revision was based "entirely" on the MHSA, which served as a "catalyst" to initiate statutory review.\footnote{420} 

Notwithstanding this lack of direct causation, the commentators who have studied this issue most closely have concluded that MHSA's Bill of Rights was nevertheless important "as a step in legitimatizing the very idea of rights for those who receive mental health services."\footnote{421} They note that the Act's content "may have had influence on practice, legal advice, regulations or court decisions, even if it was not incorporated in state statutes."\footnote{422}

\footnote{416} Id. 
\footnote{417} Survey II, supra note 321, at 147. In at least one state (Illinois), statutory review was abandoned because of the advisory-only language in the Mental Health Systems Act (MHSA). Id. 
\footnote{418} Id.; see also id. at 151 (discussing post-1980 changes in the state laws of Hawaii, Kentucky, Maryland and Mississippi, the only states felt to have made "extensive changes" in the interim five years). 
\footnote{419} Id. at 147. Officials in at least four states—Alabama, Louisiana, Massachusetts and Utah—indicated that court decisions were the key factor spurring legislative change. Id. 
\footnote{420} Id. (emphasis in original). 
\footnote{421} Id. at 153. For a more pessimistic reading, see Federal Bill of Rights Has Little Impact on the States, 36 Hosp. & COMMUNITY PSYCHIATRY 1008 (1985). 
\footnote{422} Survey II, supra note 321, at 153. The Act itself has not been cited extensively. See Foy v. Greenblott, 141 Cal. App. 3d 1, 10 n.2, 190 Cal. Rptr. 84, 90 n.2 (1983) ("Congress has also declared that all state mental health programs should provide treatment in the least restrictive environment" (citing 42 U.S.C. § 9501(1)(A),(F),(G),(J))); Rennie v. Klein, 653 F.2d 836, 852 n.17 (3d Cir. 1981) (en banc), vacated, 458 U.S. 1119 (1982) (comparing § 9501 to New Jersey's Administrative Bulletin 78-3, and concluding that New Jersey has "anticipated and accommodated virtually all of the concerns expressed in the [MHSA]"). 

In their comprehensive analysis of the creation of the MHSA, Professors Levine and Lyon-Levine conclude:

If the states do not guarantee the rights specified in the MHSA, as Congress has said it expects, we can see what will happen when the political pendulum predictably swings back some day to a more activist Congress. The MHSA rights, along with those of Pennhurst, will no doubt return to the Congressional agenda for effective enforcement. . . . 

In order for rights protection to remain a strong contender, its proponents must learn the lessons of this history. If they do, rights protection for consumers of mental health services—bills of rights and advocacy—is no dead horse.

Levine & Lyon-Levine, supra note 321, at 58.
E. Substantive Patients' Rights Under State Statutes

Litigation\(^{423}\) under state-level patients' bills of rights\(^{424}\) has focused predominantly on the same substantive rights which have been at the center of the major constitutional litigation which has developed over the past decade: the right to treatment, the right to refuse treatment, institutional rights and the right to deinstitutionalization and/or community services.

Although some courts\(^{425}\) have appeared reluctant to construe such statutes more expansively than the United States Supreme Court has read the Constitution in such cases as *Youngberg v. Romeo*\(^{426}\) and *Mills v. Rogers*,\(^{427}\) others have explicitly articulated a broader reading of state law.\(^{428}\) While no clear trends emerge from these conflicting modes of interpretation, it is clear that, in some states at least, the Supreme Court's modest statements of the breadth of the right to treatment\(^{429}\) and the right to refuse treatment\(^{430}\) will not bar innovative and wide-ranging state statutory decisions.

1. The right to treatment

a. before *Youngberg*

Prior to the Supreme Court's decision in *Youngberg*, several courts read relevant state statutes to create enforceable rights to treatment and to provide habilitation for the institutionalized mentally disabled.\(^{431}\)

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\(^{423}\) Courts in nearly every state have, of course, construed their commitment laws to determine the appropriate procedural and substantive due process safeguards applicable in the civil commitment process. These issues are generally beyond the scope of this Article. *See e.g.*, *In re Hop*, 29 Cal. 3d 82, 623 P.2d 282, 171 Cal. Rptr. 721 (1981) (applying right to jury trial, proof beyond a reasonable doubt standard and appointment of counsel to case of developmentally disabled person institutionalized at state hospital); North Dakota State Hosp. v. Palmer, 363 N.W.2d 401 (N.D. 1985) (determining adequacy of outpatient treatment); *cf.* Association of Bds. of Visitors v. Prevost, 98 A.D.2d 260, 471 N.Y.S.2d 342 (App. Div. 1983) (Boards of Visitors of state facilities for the mentally disabled lacked, under state law, standing to sue to compel state watchdog agency to provide counsel to investigate complaints of patient abuse at state hospital).

\(^{424}\) *See supra* notes 320-422 and accompanying text.


\(^{427}\) 457 U.S. 291 (1982).

\(^{428}\) *See infra* notes 473-585 and accompanying text.

\(^{429}\) *See Perlin, supra* note 74, at 5.

\(^{430}\) *See id.* at 6-7.

Thus, in *E.H. v. Matin*, the West Virginia Supreme Court of Appeals interpreted that state's bill of rights as the legislature's "acknowledgment of its concern for both humane conditions of custody and effective therapeutic treatment" in "conformity with the highest possible standards of moral rectitude"; in enforcing this right, the court was not being asked to "impose a new constitutional standard upon a reluctant and unwilling state [but] rather, . . . only to order the executive branch to fulfill its obligation under clear and unambiguous statutory provisions."

The legislature, the court reasoned, could not have passed the pertinent provisions of the mental health code "for any reason other than to establish rights in mental patients" and a corresponding duty upon the state. If patients could not seek enforcement of these rights in the courts, "both right and duty evaporate in any meaningful sense and the entire Code provision becomes either a joke or an exercise in irony." The court could not "infer that either was the intent of our Legislature."
Against this backdrop, the court enumerated its specific holdings:

1. [The state statutory provision] creates specific enforceable rights in the entire inmate population of the State's mental hospitals. 2. [The state statutory provision] requires a system of custody and treatment which will reflect the competent application of current, available scientific knowledge. Where there is a good faith difference of opinion among equally competent professional experts concerning appropriate methods of treatment and custody, such differences should be resolved by the director of the . . . Department of Health and not by the courts. 3. It is the obligation of the State to provide the resources necessary to accord inmates of mental institutions the rights which the State has granted them under [the state statute].

The case had been brought as a mandamus action pursuant to the state supreme court's powers of original jurisdiction. The E.H. court transferred the action to a county circuit court for purposes of developing an appropriate remedy.

Similarly, in Chasse v. Banas, the New Hampshire Supreme Court viewed the state legislature's enactment of a patient's bill of rights as having created a right for involuntarily committed patients "and concomitantly impose[d] a duty upon employees of the State hospital to provide adequate and humane treatment." By enacting the law,

439. Id. at 259-60, 284 S.E.2d at 238. On the question of the financial implications of its decision, the court responded that the "definitive answer" was provided in Wyatt v. Aderholt:

"It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. And it is the essence of our holding that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone."

E.H., 168 W. Va. at 260 n.2, 284 S.E.2d at 238 n.2 (quoting Wyatt v. Aderholt, 503 F.2d 1305, 1314-15 (5th Cir. 1974)). Although the E.H. court did not reach the issue of whether an involuntarily confined patient had a right to treatment, it noted that "a growing number of courts have . . . recognized such a right." Id.


441. E.H., 168 W. Va. at 259, 284 S.E.2d at 238. The court additionally ordered that defendants submit a plan to the circuit court through which the statutory rights in question "will be accorded to every patient in mental health institutions maintained by the State of West Virginia." Id. at 261, 284 S.E.2d at 239.


444. Chasse, 119 N.H. at 96, 399 A.2d at 610. "The existence of a statutory right implies
the court reasoned, "the legislature had done more than enunciate general objectives and goals" in "recogniz[ing] civil rights of the mentally disabled who are confined in State institutions." If a patient were denied the right to legal action to enforce the created rights, "the legislature's guarantee of adequate treatment [would] be an empty promise."

Elsewhere, in *Rone v. Fireman*, a federal district court declined to apply federal constitutional standards in an institutional conditions case, finding that an Ohio state statute created judicially enforceable rights against which the record would be measured. The court found that the state law set forth "detailed and extensive treatment requirements," and that its role was to "further define and determine adequate treatment by interpreting the applicable [state] statute."

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the existence of all necessary and appropriate remedies." *Id.* (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969)).

444. *Id.* at 96, 399 A.2d at 610.


448. *Ohio Rev. Code Ann.* § 5122.27 (Baldwin 1971). In pertinent part, the statute in question reads:

The head of the hospital . . . shall assure that all patients . . . shall:

- . . .
- *(B)* Have a written treatment plan consistent with the evaluation, diagnosis, prognosis, and goals . . . ;
- *(C)* Receive treatment consistent with the treatment plan. The department of mental health shall set standards for treatment provided to such patients, consistent wherever possible with standards set by the joint commission on accreditation of hospitals;
- *(D)* Receive periodic reevaluations of the treatment plan by the professional staff of the hospital at intervals not to exceed ninety days;
- *(E)* Be provided with adequate medical treatment for physical disease or injury;
- *(F)* Receive humane care and treatment, including without limitation, the following:

  - *(3)* A humane psychological and physical environment within the hospital facilities . . .

*Id.*


451. *Id.* at 120.

452. *Id.*
The court then analyzed "seven basic treatment rights" contained in the state law, and found, *inter alia*, that the defendants had failed to develop adequate and individualized treatment programs. The court determined that in one specific hospital unit, the defendants failed to maintain a "humane and therapeutic environment," and that the hospital staff was not "sufficiently qualified nor provided sufficient training and education to provide minimally adequate humane care and treatment." To remedy these violations, the court entered a broad remedial order "to assure all patients at [the state hospital] the treatment required by the law of Ohio."

Finally, in *New Jersey Association for Retarded Citizens, Inc. v. New Jersey Department of Human Services*, the New Jersey Supreme Court broadly interpreted a state statute providing the right of habilitation to developmentally disabled persons. The court ruled that the state was required to provide *each* resident of a state school for the retarded with "specialized" and "comprehensive . . . services," including "treatment, education, training, rehabilitation, care and protection" in order to "alleviate the residents' disabilities and promote their social, personal, physical and economic habilitation." The court specifically rejected defendants' argument that the law merely obligated them to make certain services generally available at a facility "without imposing a duty on them to provide each individual resident with these services." The court responded:

We conclude that the Legislature did not merely intend these services to be generally available at the facility. The import of these statutes is clear. [The state school] does not have

453. *Id.* at 121 (footnote omitted).
454. *Id.*
455. *Id.*
456. *Id.* at 122.
457. *Id.* at 123.
458. *Id.* at 133. *See generally id.* at 133-35.
460. *Id.* at 247-50, 445 A.2d at 710-12; *see also* N.J. STAT. ANN. 30:6D-1 to -12 (West 1981 & Supp. 1986).
462. N.J. STAT. ANN. § 30:4-165.1.
463. N.J. STAT. ANN. § 30:4-165.2 (2).

The court noted that, due to the presence of adequate state statutory grounds, it was not necessary to reach plaintiffs' federal statutory or constitutional claims. *Id.* at 244 n.5, 445 A.2d at 708 n.5.
465. *Id.* at 247, 445 A.2d at 710.
the freedom to choose which of its residents will receive services and which will not. Every individual at [the state school] is entitled to these special services not only because it is morally right and just, although it is both those things. They are entitled to them because it is the law.\textsuperscript{466}

On the other hand, in at least two cases, state statutory grants have been construed narrowly. In \textit{United States v. Ecker},\textsuperscript{467} the Court of Appeals for the District of Columbia interpreted the District's local law\textsuperscript{468} to allow a facility to withhold certain forms of treatment if its benefits are outweighed by the potential harm to others.\textsuperscript{469} A Pennsylvania district court, in \textit{Santori v. Fong},\textsuperscript{470} read that state's pertinent statutes\textsuperscript{471} as "a mere statement of policy, [which,] without more, will not rise to the level of a constitutionally protected interest in property or liberty, because neither an affirmative duty nor a specific right is created."\textsuperscript{472}

\textit{b. since Youngberg}\n
In \textit{Youngberg}, the Supreme Court found that involuntarily confined mentally retarded persons were entitled under the fourteenth amendment’s liberty clause to such “minimally adequate or reasonable training to ensure safety and freedom from undue restraint.”\textsuperscript{473} In balancing liberty interests against relevant state interests, courts must determine

\textsuperscript{466} Id. at 249, 445 A.2d at 711. An Indiana court found a right to treatment under the federal DD Act. The court cited the counterpart state statute and noted that “both our federal and state legislatures have entrusted our courts with the responsibility of enforcing the rights of the developmentally disabled by requiring a judicial determination of whether a statutory minimum level of treatment is being afforded.” \textit{In re Ackerman}, 409 N.E.2d 1211, 1221-22 (Ind. Ct. App. 1980); \textit{cf} \textit{Halderman v. Pennhurst State School & Hosp.}, 451 U.S. 1 (1981). \textit{See supra} text accompanying notes 87-92 for a discussion of this case.


\textsuperscript{469} \textit{Ecker}, 543 F.2d at 199-200; \textit{see also} \textit{Bowman v. Wilson}, 672 F.2d 1145, 1155 n.21 (3d Cir. 1982) (construing District of Columbia law).

\textsuperscript{470} 484 F. Supp. 1029 (E.D. Pa. 1980).

\textsuperscript{471} \textit{See PA. STAT. ANN. tit. 50, §§ 7101-7116} (Purdon Supp. 1986). Under the Pennsylvania statute, “[i]t is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, . . . and in every case, the least restrictions consistent with adequate treatment shall be employed.” \textit{Id.} § 7102. The statute defines adequate treatment as “a course of treatment designed and administered to alleviate a person’s pain and distress and to maximize the probability of his recovery from mental illness.” \textit{Id.} § 7104.


\textsuperscript{473} 457 U.S. at 319.
whether professional judgment has been exercised. Professional’s decision in such cases is “presumptively valid,” and “liability may be imposed only when the decision . . . is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”

While the question has been raised concerning the continued constitutional vitality of Wyatt after Youngberg, commentators apparently have not extensively considered Youngberg’s impact on the construction of state statutory rights. A review of several pertinent cases reveals that most courts have continued to read relevant state statutes broadly even in the aftermath of Youngberg.

474. Id. at 321.
475. Id. at 323. “Professional” is defined at id. n.30.
476. Id. at 323.
480. See cases discussed supra text accompanying note 479 and infra text accompanying notes 478-504; see also Marshall v. Kort, 690 P.2d 219, 221 (Colo. 1984) (habeas corpus petitioner, committed following finding of not guilty by reason of insanity, entitled to determination of legality of confinement, at which he can raise question of “remedy that addresses appropriate treatment short of immediate release”); cf. In re D.J.M., 158 N.J. Super. 497, 500-02, 386 A.2d 870, 871-73 (1978) (although there is “no dispute” as to existence of statutory right to treatment, question of quality of medical care generally not cognizable at “routine review” of civil commitment; if patient wishes to raise treatment questions, counsel must give prior notice to court and opposing counsel, and, if funding is involved, to the appropriate public official charged with overseeing such funding); Bezio v. New York State Office of Mental Retardation and Developmental Disabilities, 95 A.D.2d 135, 466 N.Y.S.2d 804 (App. Div. 1983) (statute directing state-created patient advocacy service to review suitability of mentally retarded residents remaining in voluntary institutional status does not provide opportunity for resident to challenge appropriateness of treatment; such challenge must be raised in collateral civil proceeding); Ford v. Civil Serv. Employees Ass’n, 94 A.D.2d 262, 265, 464 N.Y.S.2d 481, 483 (App. Div. 1983) (in investigation of allegations that employee of state hospital sexually abused patient, the State’s duty extends beyond basic rights secured by the United States Constitution).
Thus, where a district court\(^{481}\) had ordered\(^{482}\) the preparation of a program by which the institutional population of a state school for the developmentally disabled would be reduced by 200 residents,\(^{483}\) state officials sought to have the injunction vacated on the grounds that \textit{Youngberg} was limited by its own terms to the involuntarily committed.\(^{484}\) These officials argued that since a significant number of the residents in the case before the court were voluntary admittees, they "[did] not enjoy similar constitutional protection[s]."\(^{485}\)

The Eighth Circuit, in \textit{Association for Retarded Citizens v. Olson}, rejected this argument on the basis of North Dakota state law which "grants a right to treatment to all developmentally disabled persons."\(^{486}\) The \textit{Olson} court concluded that "because state law accords a panoply of rights to handicapped individuals and makes no distinction between the voluntarily and involuntarily committed, the State's contention that it has no duty to provide appropriate treatment, services and habilitation to involuntarily committed individuals in the least restrictive setting is with-

\(^{481}\) Association for Retarded Citizens v. Olson, 561 F. Supp. 473 (D.N.D. 1982), \textit{aff'd in part, modified and remanded on other grounds}, 713 F.2d 1384 (8th Cir. 1983).

\(^{482}\) Association for Retarded Citizens v. Olson, 713 F.2d 1384, 1387 (8th Cir. 1983). The district court also ordered state defendants (1) to either place eligible plaintiffs in licensed or accredited aftercare facilities or to create community-based residential services meeting certain professional standards so that the population at a state school for the mentally retarded would be reduced to 450 over a five year period, and (2) to comply with all regulations promulgated pursuant to Title XIX of the Social Security Act at all facilities in which deinstitutionalized plaintiffs reside or will reside in the future. Id. at 1388-89.

\(^{483}\) \textit{Id.} at 1391-92.

\(^{484}\) \textit{Youngberg}, 457 U.S. at 309.

\(^{485}\) \textit{Olson}, 713 F.2d at 1392.

\(^{486}\) \textit{Olson}, 713 F.2d 1393 (emphasis in original); see N.D. CENT. CODE § 25-01.2-02 (Supp. 1981) ("All persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities . . . [which] shall be provided in the least restrictive [alternative],"); see also N.D. CENT. CODE §§ 25-01.2-01(1), -01(3), -03 to -13. Cf. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1245-46 (2d Cir. 1984). \textit{Society for Good Will} is construed in \textit{Armstead}, 629 F. Supp. at 276, and \textit{Kolpak}, 619 F. Supp. at 378.
Elsewhere, in a case arising from an involuntary civil commitment appeal, the Vermont Supreme Court ordered a remand so that the trial court could consider plaintiff's argument that he was not receiving adequate and appropriate treatment. It squarely rejected the state's argument that the Youngberg standards control:

The issue, however, is not whether the constitutional minimum has been met, but whether the statutory mandate of "treatment which is adequate and appropriate to [the person's] condition" has been met. This mandate may require something more than the "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests" which the Fourteenth Amendment requires.

In *Chill v. Mississippi Hospital Reimbursement Commission*, a case focusing on the state's right to demand reimbursement from a patient's estate for that individual's care and maintenance at a state hospital, the Mississippi Supreme Court looked carefully at the recent
“explosion of litigation”491 regarding the substantive and procedural rights of the mentally disabled. The court noted that such rights “find their content” in two sources: (1) the “federal constitutional minimum,” and (2) “higher or broader state created rights.”492 The court concluded that Mississippi’s civil commitment law has “without doubt . . . vested rights in the mentally ill substantially in excess of those minimum protections required by the federal constitution.”493

_Foy v. Greenblott_494 presented a unique damages action. An incompetent patient and her infant son sued the facility in which she was institutionalized and her institutional doctors on a “wrongful birth” theory. The plaintiff argued that her son’s birth was due to defendants’ negligence in failing to supervise her and/or to provide her with appropriate birth control devices or counseling in light of their awareness of her medical history of “irresponsible sexual behavior toward [others].”495 As part of her position, she asserted that “under no circumstances should a woman adjudicated as incompetent be permitted to bear a child.”496

In rejecting this aspect of her claim,497 the court noted that, under state statute, institutionalized mental patients enjoy “the same legal rights and responsibilities guaranteed all other persons’ except those specifically denied her by law,”498 including the “fundamental” right to “freedom from unwarranted governmental intrusion and to choose whether to bear children.”499 In response to plaintiff’s suggestion that she be subject to “extra supervision” so as to insure that she does not conceive,500 the court relied on the state patients’ bill of rights as entitling every institutionalized person to “individualized treatment under the ‘least restrictive’ conditions feasible,” so that “the institution should minimize interference with a patient’s individual autonomy, including her

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491. _Id._ at 582.
492. _Id._
493. _Id._
494. 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983).
495. _Id._ at 5, 190 Cal. Rptr. at 87.
496. _Id._ at 9, 190 Cal. Rptr. at 89-90.
497. The court of appeal allowed plaintiff to proceed only under the theory that defendants’ failure to make contraceptive counseling and medication available to her was “possibly actionable.” _Id._ at 13, 190 Cal. Rptr. at 92. Associate Justice Poche, in his concurring opinion, characterized plaintiffs' complaint as “an unfortunate, classic example of mushball pleading” and a “creature of obfuscation.” _Id._ at 16, 190 Cal. Rptr. at 94.
498. _Id._ at 9, 190 Cal. Rptr. at 90 (quoting CAL. WELF. & INST. CODE §§ 5325.1, 5325, 5327 (West 1984)). The court stated that “[t]he courts and legislatures do not subscribe to [plaintiffs'] theory of eugenics.” _Id._
499. _Id._ (quoting Maxon v. Superior Court, 135 Cal. App. 3d 626, 632, 185 Cal. Rptr. 516, 520 (1982)).
500. _Id._ at 10, 190 Cal. Rptr. at 90.
personal 'privacy' and 'social interaction.' \textsuperscript{501} Effective hospital policing of all patients "would not only deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents."\textsuperscript{502}

In a footnote, the court noted that numerous other courts had found a federal constitutional right to the least restrictive conditions of institutional treatment,\textsuperscript{503} but claimed that the Supreme Court had declined to rule on the question, citing Youngberg \textit{v. Romeo}.\textsuperscript{504} The \textit{Foy} court appeared to interpret,\textsuperscript{505} however, the "reasonably non-restrictive confinement conditions" constitutionally mandated by Youngberg\textsuperscript{506} to include "suitable opportunities for the patient's interaction with members of the opposite sex" as among the "minimum constitutional standards for adequate treatment."\textsuperscript{507}

On the other hand, in a suit brought to enjoin the implementation of a plan to close a state residential facility for the mentally retarded, the Illinois Supreme Court, in \textit{Dixon Association for Retarded Citizens v. Thompson},\textsuperscript{508} disposed of the issue by simply finding that "the statutory rights granted [to institutionalized developmentally disabled persons] under the [state] Code\textsuperscript{509} are more expansive than and include the constitutional rights of the [facility] residents,"\textsuperscript{510} citing Youngberg.\textsuperscript{511} After reading \textit{in pari materia} three statutory sections of the state bill of rights

\textsuperscript{501} Id. (quoting, CAL. WELF. & INST. CODE §§ 5325.1(a), (b), (g), 5358(a), (c) (West 1984)).
\textsuperscript{502} Id. at 10, 190 Cal. Rptr. at 91.
\textsuperscript{503} Id. at 10 n.2, 190 Cal. Rptr. at 90-91 n.2 (citing Wyatt \textit{v. Stickney}, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd sub. nom. Wyatt \textit{v. Aderholt}, 503 F.2d 1305 (5th Cir. 1974)).
\textsuperscript{504} Id. (citing Youngberg \textit{v. Romeo}, 457 U.S. 307, 324 (1982)).
\textsuperscript{505} The footnote in which this issue is discussed is ambiguous. It notes that the Supreme Court has not ruled on the right to treatment in the least restrictive alternative, that it has mandated "reasonably non-restrictive confinement conditions" (citing Youngberg), and that "one such least restrictive treatment case" provides, as a minimum constitutional standard for treatment, opportunities for social interactions with the opposite sex. \textit{Id.}
\textsuperscript{507} \textit{Foy}, 141 Cal. App. 3d at 10 n.2, 190 Cal Rptr. at 91 n.2 (citing Wyatt \textit{v. Stickney}, 344 F. Supp. 373, 379-81 (1972)).
\textsuperscript{508} 91 Ill. 2d 518, 522, 440 N.E.2d 117, 119 (1982).
\textsuperscript{509} See ILL. REV. STAT. ch. 91 1/2, § 2-100 (1985 Supp.) ("No recipient of services shall be deprived of any rights, benefits or privileges guaranteed by law, the Constitution of the State of Illinois, or the Constitution of the United States solely on account of the receipt of such services.").
\textsuperscript{510} \textit{Dixon}, 91 Ill. 2d at 523, 440 N.E.2d at 119 (citing Youngberg \textit{v. Romeo}, 457 U.S. 307 (1982)).
\textsuperscript{511} \textit{Id.}
for institutionalized persons, the court concluded that, under the code, "adequate and humane care and service would seem to include the care or service encompassed within the definition of 'habilitation.' " For such care or services to be "adequate," they would also have to conform to another Code provision that no service recipient may be denied any rights guaranteed by the state or federal constitution. The court then turned to Youngberg and determined that the rights declared there by the Supreme Court "essentially overlap the rights conferred by [state law]." On the merits of the case, the court found that, before the facility in question had been ordered to be closed, there was "detailed, considered planning," and that the relocation program in question was designed by professionals who "had exercised their professional judgment." Although certain other professionals disagreed with the decisions made, the court declined to interfere because the program ultimately designed was not "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person[s] responsible actually did not base the decision' on their professional judgment." Thus, with the exception of Dixon, the Illinois case, most state courts have been willing to interpret state patients' rights laws expansively in light of (or, perhaps, in spite of) the Supreme Court's cautionary language as to professional deference and institutional decisionmaking in Youngberg.

512. See ILL. REV. STAT. ch. 91 1/2, ¶ 2-102(a) (1985); id. ch. 91 1/2, ¶¶ 1-111, 1-115 (1981). These statutes are discussed in Dixon, 91 Ill. 2d at 529, 440 N.E.2d at 122-23.
513. Dixon, 91 Ill. 2d at 529, 440 N.E.2d at 123. "Habilitation" is defined in the statute as including, but not being limited to "diagnosis, evaluation, medical services, residential care, day care, special living arrangements, training, education, sheltered employment, protective services, counseling and other services provided to developmentally disabled persons by developmental disabilities facilities." ILL. REV. STAT. ch. 91 1/2, ¶ 1-111.
514. Dixon, 91 Ill. 2d at 529-30, 440 N.E.2d at 123 (citing ILL. REV. STAT. ch. 91 1/2, ¶ 2-100).
515. Id. at 530, 440 N.E.2d at 123 (citing ILL. REV. STAT. ch. 91 1/2, ¶ 2-102(a) (1981)). Under that section: "A recipient of services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan, which shall be formulated and periodically reviewed with the participation of the recipient to the extent feasible . . . ." ILL. REV. STAT. ch. 91 1/2, ¶ 2-102(a).
516. Dixon, 91 Ill. 2d at 534, 440 N.E.2d at 125.
517. Id. at 535, 440 N.E.2d at 125.
2. The right to refuse treatment

   a. introduction

As of 1978, one of the most influential law review articles on the right to refuse treatment\(^{519}\) characterized then-existing state regulatory legislation as "a patchwork of inconsistencies and omissions that offers committed persons little real protection from coerced treatment."\(^{520}\) At least thirteen states at that time, including the District of Columbia, had no requirement of any sort mandating informed consent prior to the imposition of psychiatric treatment.\(^{521}\) Several of the states that regulated the subject matter limited the scope of statutory protections to interventions that were not "standard psychiatric treatment"\(^{522}\) or to "intrusive,"\(^{523}\) "hazardous,"\(^{524}\) or "unnecessary"\(^{525}\) treatment. In most cases, substituted consent of a close relative could be sought to override a patient's desire to refuse,\(^{526}\) and the statutory provisions offered "few concrete protections for the involuntarily committed mental patient."\(^{527}\)

On the specific issue of drug treatment, several states did provide that patients could not be administered "unnecessary or excessive"\(^{528}\) or "experimental"\(^{529}\) medication, and, in at least three jurisdictions, voluntary patients had an absolute right to refuse medication.\(^{530}\) In other


\(^{520}\) Plotkin, supra note 234, at 498.

\(^{521}\) Id. at 498 n.229. See generally id. at 504 app.

\(^{522}\) See, e.g., GA. CODE ANN. § 88-502.4(c) (1986).

\(^{523}\) KY. REV. STAT. ANN. § 202A.191(1)(g) (Baldwin 1985).


\(^{525}\) WIS. STAT. § 51.61(1)(b) (1985).

\(^{526}\) See, e.g., ALASKA STAT. § 47.30.130(b) (repealed 1981); CONN. GEN. STAT. ANN. § 17-206d(6) (West Supp. 1986).

\(^{527}\) Plotkin, supra note 234, at 499.


\(^{529}\) KAN. STAT. ANN. § 59-2929(6).

\(^{530}\) See, e.g., N.H. REV. STAT. ANN. § 135-B:15 (Supp. 1985); N.J. STAT. ANN. 30:4-24.2d(1) (West 1981); PA. STAT. ANN. tit. 50, § 7206 (Purdon Supp. 1986). A New Jersey state trial court interpreted that state's statute to imply that involuntarily committed patients did not have the right to refuse treatment. See In re Hospitalization of B., 156 N.J. Super. 231, 383 A.2d 760 (Law Div. 1977), a holding which led, in significant part to the litigation in Rennie. See supra note 14 for the history of this litigation.
states, however, statutes specifically empowered institutions to administer "adequate medical and psychiatric care and treatment" and stipulated that all treatment is the "sole responsibility" of the treating doctor. In short, prior to the major constitutional litigation in *Rennie v. Klein* and *Rogers v. Okin* sketching the constitutional contours of the involuntarily committed patient's right to refuse medication, few jurisdictions provided meaningful protections through state-level patients' bills of rights.

b. *litigation prior to Rennie and Rogers*

Several pre-1982 cases relied on state patients' bills of rights to find that involuntarily committed mentally disabled persons had a right to refuse treatment. The Colorado Supreme Court interpreted that state's statutes and common law to conclude that an involuntary patient had a right to withhold consent to the administration of an antipsychotic drug in "non-emergency circumstances.”

Similarly, the Oklahoma Supreme Court read then-recent amend-

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531. TEX. REV. CIV. STAT. ANN. art. 5547-70 (1958) (recodified as TEX. REV. CIV. STAT. ANN. art. 5547-82 (Vernon Supp. 1986)).
535. See, e.g., Perlin, supra note 72.
536. But see In re Hospitalization of B., 156 N.J. Super. 231, 383 A.2d 760 (1977), discussed supra at note 530.
538. The Colorado Supreme Court read the "entire tenor of the... [mental health statutes] to recognize and protect the dignity and legal rights of patients treated pursuant to its provisions." *Id.* at 410, 603 P.2d at 125 (footnote omitted). See, e.g., COLO. REV. STAT. § 27-10-101(1) (Supp. 1986) (purpose of law); *id.* § 27-10-104 (1986) (no forfeiture of rights by reason of being treated); *id.* § 27-10-116 (Supp. 1986) (right to treatment). See generally Goedecke, 198 Colo. at 410 n.6, 603 P.2d at 125 n.6.
539. The court cited with approval Justice Cardozo's famous language from *Schloendorff* that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." Goedecke, 198 Colo. at 411, 603 P.2d at 125 (quoting Schloendorff v. New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914)). The Court also cited Colorado state cases that acknowledged "the physician's obligation to obtain the patient's informed consent not only for surgery, but also for treatment with drugs having possible harmful side effects." *Id.* at 411 nn.7-8, 603 P.2d at 125 nn.7-8.
540. In this case, the antipsychotic drug is prolixin decanoate. *Id.* at 409, 603 P.2d at 123.
541. *Id.* at 411, 603 P.2d at 125; see also In re Freeman, 636 P.2d 1334, 1335 (Colo. Ct. App. 1981) (enforcing the holding of Goedecke).
ments to that state's mental health code as a "credible reform to end, in some areas, the blanket denial of personal rights to patients in mental institutions." It adopted the reasoning and holdings of the trial courts in Rennie and Rogers to hold that legally competent adults involuntarily admitted to state mental hospitals had the right to consent to the administration of antipsychotic drugs.

c. litigation since Rennie and Rogers

The Supreme Court's decision in Mills v. Rogers and the Third Circuit's decision in Rennie v. Klein following the Supreme Court's remand are not without their ambiguities and the law remains in a state of flux. Subsequent developments have not justified many of the Cassandra-esque interpretations which immediately followed in the wake of the decisions. Four years later, "in most jurisdictions, [the right to refuse is] alive and well."

542. See OKLA. STAT. ANN. tit. 43A, §§ 54.1, 64 (West 1979).
544. K.K.B., 609 P.2d at 749-52. The court specifically noted that "[t]here is no support in common law for the proposition that treatment, medical or psychiatric, constitutes a legally nonreversible medical decision." Id. at 751.
545. 457 U.S. 291.
546. 720 F.2d 266.
548. See Perlin, supra note 72.
549. See Perlin, supra note 74, at 8.
550. See, e.g., Note, supra note 235, at 1727 ("substantive remedy . . . effectively extinguished in 1982 by the Supreme Court"); Kenna, supra note 234, at 122 (Supreme Court "virtually extinguished . . . [the] right"); cf. Note, Right to Refuse Antipsychotic Medication: A Proposal for Legislative Consideration, 17 IND. L. REV. 1035, 1051 (1984) ("remand leaves uncertain both the scope of the federal right to refuse antipsychotic medication and the standards to be used by state mental institutions in order to protect this right").


For a recent state statute specifically elaborating on the right to refuse medication (and generally following the procedures approved in Rennie), see MD. HEALTH-GEN. CODE ANN. § 10-708 (Supp. 1985). For a statute mandating the provision to patients of certain substantive information about medications, see ALASKA STAT. § 47.30.825(c) (1985) ("A patient has the right to know the name of medication that the patient is asked to take, what its purpose is, and what side effects may occur with this medication"). But see id. § 47.30.825(c) ("Psychotropic medication shall be administered only on the order of a licensed physician when the physician"
Thus, in Arizona and Colorado, state appellate courts have underscored that state law required more extensive procedural and substantive protections than did the federal Constitution. The Arizona Court of Appeals followed state statutory law in ordering defendants to promulgate appropriate regulations governing the use of psychotropic drugs as restraints and written agency procedures as to the use of such drugs. The Colorado Supreme Court construed state law to mandate strict protections, including, in most circumstances, a pre-administration adversary hearing, and adherence to the principle of the least restrictive alternative in decisions to drug.

Other state statutory cases have considered the extent of procedural due process protections available in cases dealing with other treatments...
such as electroshock therapy.\textsuperscript{561} Thus, after the Kentucky Court of Appeals construed a state scheme\textsuperscript{562} to bar the compulsory imposition of such treatment in the absence of a finding of an emergency or a judicial declaration of incompetence,\textsuperscript{563} the state legislature "codified the . . . decision,"\textsuperscript{564} by requiring due process hearings at which the court must consider the patient's competence to consent to the treatment and the threat which would be posed by the patient if he were not to be so treated.\textsuperscript{565}

In California, an intermediate appellate court read state electroshock law\textsuperscript{566} together with the state's evidence code\textsuperscript{567} to mandate a finding that clear and convincing evidence was required to support an order that an incompetent community resident lacked the capacity to consent to or to refuse electroshock therapy.\textsuperscript{568} The court relied on prior case law,\textsuperscript{569} the extensive procedural safeguards built into the relevant state statutory sections,\textsuperscript{570} and a state attorney general's opinion which had found that the incompetent person's right to refuse medical treat-

\begin{footnotesize}
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\item[561.] See generally Plotkin, supra note 234, at 471-72; Note, Regulation of Electroconvulsive Therapy, 75 MICH. L. REV. 363 (1976); Comment, Informed Consent and the Mental Patient: California Recognizes a Mental Patient's Right to Refuse Psychosurgery and Shock Treatment, 15 SANTA CLARA L. REV. 725 (1975); see, e.g., Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983).
\item[562.] Under the then-existing statute, the state's Secretary of the Department of Human Resources was empowered to adopt rules and regulations enforcing certain patients' rights, including the right to "refuse intrusive treatments, such as electroshock therapy . . . ." KY. REV. STAT. ANN. § 202A.180(7) (Michie/Bobbs-Merrill 1977). Pursuant to this statute, a regulation was adopted providing for the provision of electroshock therapy to a patient if a court determined that such treatment was "in the best interest of the patient." 902 KY. ADMIN. REGS. 12:020, § 8 (1981); see Gundy v. Pauley, 619 S.W.2d 730, 731 (Ky. Ct. App. 1986).
\item[563.] Gundy v. Pauley, 619 S.W.2d at 731. The court cited the district court's initial opinion in \textit{Rennie}, 462 F. Supp. 1131, and the First Circuit's initial opinion in \textit{Rogers}, 634 F.2d 650, in support of the proposition that a person generally "has a constitutionally protected right to decide for himself whether to submit to serious and potentially harmful medical treatment." \textit{Gundy}, 619 S.W.2d at 731.
\item[565.] See KY. REV. STAT. ANN. § 202A.196(3) (Michie/Bobbs-Merrill 1983); see also \textit{In re W.S.}, 152 N.J. Super. 298, 301-03, 377 A.2d 969, 971 Juv. Dom. Rel. Ct. 1977) (construing N.J. STAT. ANN. 30:4-24.2d (2) (West 1981), and holding that "[m]entally ill patients have the right to be informed of and participate in the decision-making aspects of their treatment").
\item[566.] See CAL. WELF. & INST. CODE §§ 5325(f), 5325.1, 5326.2, 5326.5, 5326.7 (1984); see also Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976) (pre-\textit{Rennie} and pre-\textit{Rogers} analysis of similar aspects of the predecessor law); see generally, Hoffman, \textit{The "Due Process" Rights of Minors in Mental Hospitals}, 13 U.S.F. L. REV. 63, 63 n.3 (1978).
\item[567.] CAL. EVID. CODE §§ 115, 160 (West 1965).
\item[569.] \textit{Id.} at 321, 206 Cal. Rptr. at 606-07.
\item[570.] \textit{Id.} at 318-22, 206 Cal. Rptr. at 604-07.
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ment "‘involves such fundamental rights as . . . the right to the inviolability of one's person.’”

Most recently, in Keyhea v. Rushen, a California intermediate appellate court construed a state statute to provide mentally disabled prisoners with the right to a judicial determination of their competency to refuse treatment before they can be subjected to long-term involuntary psychotropic medication. In the course of its decision, the Keyhea court tracked the use of psychotropic drugs in cases involving institutional populations, noting that such medications serve as “a primary tool of public mental health professionals for treating serious mental disorders.” The court also found that these drugs "have many serious side effects," and "possess a remarkable potential for undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians.”

The Keyhea court construed state law—which it characterized as a "prison 'bill of rights'"—to effectuate an absolute grant of civil rights to prisoners (excepting where deprivation is necessary for security or safety reasons) "without cost/benefit considerations, presumably because of the importance of civil rights in a free society." It also read the provision of state law governing the involuntary medication of non-prisoners under conservatorship to mandate a prior judicial determination as to incompetency before the sanctioning of "involuntary long-term psychotropic medication.”

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572. See CAL. PENAL CODE § 2600 (West 1975) (prisoners may be deprived of only such rights "as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."); see generally De Lancie v. Superior Court, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982) (discussing legislative history).


574. Id. at 527, 223 Cal. Rptr. at 747.

575. Id.

576. Id. at 531, 223 Cal. Rptr. at 747.

577. Id. at 531, 223 Cal. Rptr. at 748.

578. Id. (quoting Gelman, Mental Hospital Drugs, Professionalism and the Constitution, 72 Geo. L.J. 1725, 1751 (1984)).

579. Id. at 534, 223 Cal. Rptr. at 750 (quoting In re Harrell, 2 Cal. 3d 675, 698, 470 P.2d 640, 655, 87 Cal. Rptr. 504, 522 (1970), cert. denied, 401 U.S. 914 (1971)).


582. Keyhea, 178 Cal. App. 3d at 536, 223 Cal. Rptr. at 751.
On the question of whether there was a general constitutional or common-law right on the part of nonprisoners to refuse the administration of such medication, the Keyhea court noted the "conflict" in other jurisdictions, but declined to resolve the question because the right was provided under state statute. After finding that nonprisoners thus had a right to a prior competency hearing, the court found that there would be no threat to prison security if such a right were extended to prisoners as well.

\[d. \text{ \textit{conclusion}}\]

The Supreme Court's decision to "sidestep" the constitutional issue of the right to refuse treatment in Mills has had little apparent impact on state courts interpreting state statutes in analogous cases. In fact, it may have strengthened the resolve of state court judges to articulate the right in question clearly and broadly. For instance, the California court concluded Keyhea, the prison case, with this ringing declaration:

We conclude that state prisoners, like nonprisoners under the [state] statutory scheme, are entitled to a judicial determination of their competency to refuse treatment before they can be subjected to long-term involuntary psychotropic medication. Mental health professionals and prison administrators may find this requirement cumbersome, but this is a price of life in a free society. Forced drugging is one of the earmarks of the gulag. It should be permitted in state institutions only after adherence to stringent substantive and procedural safeguards.

3. Other institutional rights and rights in the community
   
   a. "other" institutional rights

There has not been a significant amount of litigation construing state statutory sections providing patients with "other" substantive in-

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583. Id. at 540, 223 Cal. Rptr. at 754 (citing Rennie v. Klein, 720 F.2d 266, 266 (3d Cir. 1983); Goedecke v. State Dep't of Trust, 198 Colo. 407, 410-411, 603 P.2d 123, 125 (1979); In re K.K.B., 609 P.2d 747, 751-52 (Okla. 1980)).
585. Id. at 542, 223 Cal. Rptr. at 755.
586. See supra note 96.
587. Keyhea, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755-56. This position, it should be made clear, is not a unanimous one in prison cases. See, e.g., Gilliam v. Martin, 589 F. Supp. 680, 682-83 (W.D. Okla. 1984) (administration of psychotropic medication did not violate prisoners' federal constitutional right to be free from cruel and unusual punishment).
588. See generally Perlin, supra note 368.
In earlier cases involving the inspection of hospital records, courts had interpreted such laws to entitle former patients to inspect their records upon a showing of materiality or relevancy to subsequent litigation, but to bar such inspection by a patient's friend where such examination would not be in the patient's "best interest." In a more recent action, a federal district court denied an application for summary judgment and ordered a trial on the merits to determine whether seemingly conflicting provisions of Colorado's patients' bill of rights controlling release of medical records violated plaintiff's constitutional rights to a fair commitment hearing. In other matters, courts have held that visitation by a friend could be denied where such a visit would not be in the patient's "best interests." In another case, despite the entry of an omnibus federal consent order in an institutional conditions suit, a resident at the institution in question was found to have the right to file a civil action pursuant to the state patients' bill of rights challenging a staff decision which precluded her from receiving mail addressed to her under certain aliases.

b. rights in the community

Statutory community rights cases have established a right to deinstitutionalization and aftercare to be free from discrimination in housing


592. See COLO. REV. STAT. § 25-1-801 (Supp. 1986) (restricting release of medical records which, in the opinion of a qualified mental health professional, would have a "significant negative psychological impact" on the patient); id. § 27-10-116(1)(a) (providing for the general availability of treatment records).

593. Brown v. Jensen, 572 F. Supp. 193, 199-200 (D. Colo. 1983). See generally Gotkin v. Miller, 514 F.2d 125, 129 n.6 (2d Cir. 1975) (in granting hospitalized patients some degree of property interest in their records, state is not constitutionally required to grant patients all "traditional incidences" of property rights, including the right to inspect and copy such records).


and zoning decisions,\(^{598}\) and to procedural due process prior to deciding whether to undergo sterilization.\(^{599}\) In one recent case, the New York Court of Appeals ordered a trial on behalf of deinstitutionalized, homeless persons and hospitalized patients who met statutory discharge criteria but for whom no adequate aftercare placement was available.\(^ {600}\) Subsequently, the trial court partially denied defendant’s dismissal motion on the grounds that a state statute provided plaintiffs with the right to a written “service plan” including “a specific recommendation of the type of residence in which the patient is to live.”\(^ {601}\)

### F. Conclusion

Thus, although developments involving state patients’ bills of rights have received neither the attention nor the fanfare of constitutional developments in parallel substantive areas, recent decisions reflect a willingness on the part of most of the state courts that have faced these questions to interpret statutory rights broadly and expansively even in an environment where the Supreme Court has made it clear that such scope of decision is not required under the federal Constitution. However, because relatively little attention has been paid to this body of case law, its impact has not yet been particularly significant or far-reaching.

### IV. Conclusion

Just as our view of former golden ages—in the arts and recreation—may have been distorted a bit by our youth and by the relative novelty of the subject matter in question (at least its newness to us), so too perhaps have we unnecessarily deified the golden age of federal litigation on behalf of the mentally disabled. While there is no question that the early cases—*Jackson v. Indiana; Wyatt v. Stickney; O’Connor v. Donaldson*; the trial court decisions in *Rennie v. Klein, Mills v. Rogers, and Pennhurst State School & Hospital v. Halderman*—articulated a vision of

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equal rights for the handicapped that has neither been duplicated nor fulfilled in the intervening decade, examination of the first stages of litigation under state constitutions and state patients' rights statutes reveals that many of the same rights may be vindicated in state courts.

Although state tribunals are not without their problems in cases involving institutional relief (especially when there are serious financial implications), the meaning of Pennhurst II is stark for litigators representing institutionalized populations seeking broad-based relief in federal court. If the Supreme Court, as Justice Stevens has charged, has forgotten "its primary role as the protector of the citizen and not the warden or the prosecutor," then it appears likely that litigation in the next "golden age" will unfold on the battlefields of state courts. State courts may truly be, for the mentally disabled seeking judicial relief, the last frontier.

602. See generally Neuborne, supra note 33.
603. See supra text accompanying notes 31-49