The Hostility of the Burger Court to Mental Health Law Reform Litigation

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The Founding Fathers did not recognize the concept of an activist judiciary.

> The Judiciary, from the nature of its functions will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annot or injure them .... The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever.[1]

In recent years, many courts (and especially the federal courts) have become the focus for the pursuit of goals of major institutional reform in cases brought by advocates for prisoners, mental patients, students, and others.[2] These advocates turned to the courts because the legislative and executive branches were unwilling to devote larger shares of scarce resources to improving conditions at custodial institutions.[3] Primarily using the Civil Rights Act[4] as the basis for jurisdiction, advocates throughout the 1960s and 1970s brought many actions seeking institutional reform in the federal courts.[5] These actions, alleging the existence of unconstitutional conditions sought wide-ranging relief to remedy the unconstitutional conditions.[6] Frequently, such advocates found federal judges willing to tackle the task of changing institutions.[7]

After determining that constitutional violations existed, federal judges had to confront the issue of what relief was appropriate and necessary. Frequently, judges discovered that once they became involved with the effort to change an institution, a simple injunctive decree would not suffice.[8] Rather, a broad use of equitable power was necessary to accomplish the goals of upgrading an institution. As Professor Chayes noted, "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before courts and required the judge's continuing involvement in administration and implementation."[9] The active role of the courts was justified by the continuing failure of public officials to make changes voluntarily.[10]

Central to the development of activism of the federal courts has been an expansion of traditional equitable relief, especially the affirmative injunction.[11] Courts have used their power to specify particular requirements rather than simply to declare conditions to be violative of the Constitution and to leave the implementation to public officials.[12]

After determination of liability, law reform cases, unlike the usual civil case, do not simply end. Common to virtually all such cases is retention of jurisdiction by the trial court, which leads to an elaborate relief and im-

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plementation phase of the litigation.[13] This phase generally proves to be much longer and often more significant than the liability phase.[14]

When conditions at an institution are challenged, the response from judges overseeing implementation of change is often an attempt to set constitutionally acceptable standards. "These standards are frequently written in great detail, covering specific requirements on a wide range of issues, such as privacy in bathrooms, the provisions of staff on various work shifts, the use of seclusion, the nature of educational and recreational programs, standards for recordkeeping, and procedures for patient reviews."[15] Where courts have set out constitutionally adequate standards, they have relied on a variety of outside experts to assist in establishing what these standards should be.[16]

In addition to setting out minimally acceptable constitutional standards, judges, as part of their long-term functions in overseeing the operation of public institutions, often have become intimately involved in the operation of the institutions. Judges often have appointed a representative—denominated a master or a monitor—to be involved in the day-to-day functioning of the institution.[17] The two remedies—masters and monitors—traditionally have different purposes. Monitors generally have made recommendations to governmental defendants to make changes in the institutions and have required judicial involvement only when their initiatives have failed. The master, on the other hand, makes recommendations directly to the court and often acts as an arbiter between the parties.[18] When further judicial intervention has been required, some judges have appointed a receiver to run the institution.[19] The elected or appointed authorities are removed and the court-selected individual or group makes management decisions.[20]

All these remedial devices bring a court into daily management of public institutions and thereby into the political fabric of a community. Such involvement raises considerable question whether this is an appropriate function for a court.[21]

Frequently the principal conflict becomes one of funding. The increased judicial oversight of public institutions has meant dramatic increases in the expenditures for such institutions.[22] This impact has been particularly great because courts have rejected legal defenses based on lack of funds.[23] However, the funding role played by judges has been tricky because no court has directly ordered the expenditure of funds and been upheld. The reason is simple: the court may have authority over the executive branch in these lawsuits, but it lacks jurisdiction over legislatures.[24] In most cases, courts have successfully encouraged legislatures to appropriate funds by giving the state the simple choice of providing necessary funding or closing an institution by court order.[25]

One major long-term problem with institutional reform litigation is the extent of court involvement. Will a court really supervise expenditures of funds as long as it takes? The answer seems to be negative. As a rule, courts are willing to remain overseers only until the most egregious situations are

remedied.[26] Typically, courts have offered to withdraw from cases after some period of direct oversight to facilitate completion of a final decree.[27] Because of docket demands, judges simply cannot oversee an institution forever.

This recognition of the difficulty of long-term judicial supervision of public institutions has led to a retreat from the type of activist judicial oversight of public institutions that typified public law litigation in the 1960s and 1970s. While leadership for the activist phase came primarily from federal district courts in cases involving prisons, mental hospitals, and schools, the principal direction for retreat from activism comes from the Burger Court itself.

The U.S. Supreme Court has developed a consistent policy of deference to state and local governmental administrators and has thereby made more difficult the kind of sweeping law reform or structural litigation described earlier. This deference has been particularly striking in mental health cases. But the Supreme Court's efforts have been principally directed not only at substantive decision making but also at creation of a series of procedural hurdles that makes reaching of the merits in law reform litigation much more difficult.[28] Another major priority of the Burger Court has been recognition of the prerogatives of governmental officials and an unwillingness to second guess them in most situations.[29]

> In a series of decisions ranging from a section 1983 action brought to enjoin a pending state criminal proceeding to injunctive suits against local executive officials, the Court has added federalism to equity and comity as standards for determining the availability and scope of federal equitable relief.[30]

The U.S. Supreme Court has expanded concepts of standing and ripeness as well as sovereign immunity and the eleventh amendment to shield local public officials from damages suits and to make more difficult the bringing of law suits designed to create structural reforms.[31] This has been coupled with a clear intention of relying increasingly on the decisions of state courts and the policy judgment of state and local governmental officials.[32]

These developments are most visible in Supreme Court decisions limiting federal court intervention into state court proceedings and in the expansion of the standing doctrine. The first issue involved the expansion of the doctrine of *Younger v. Harris*[33] to influence executive as well as judicial action. The *Younger* doctrine drew on the traditional equitable notion that equity would not enjoin a crime, but it assumes the criminal proceedings would proceed fairly in the state court and that federal intervention was improper until the state court had acted.[34]

The impact of *Younger* was to put an end to the previous trend, allowing a broad right of access to the federal courts to challenge criminal proceedings on constitutional grounds.[35] "As a result of *Younger* and its progeny, there is a large category of civil rights cases where today federal jurisdiction

will be exercised only by the grace of the particular federal judge. Within the class of cases, federal jurisdiction for constitutional challenges is not a right, and the expectation is that it will not be allowed."[36]

The expansion of *Younger* to civil cases has served to eliminate federal jurisdiction from many institutional reform cases.[37] The most striking example of this trend is in *Rizzo v. Goode*,[38] where the U.S. Supreme Court reversed a decision that ordered broad-based relief to plaintiffs who alleged that practices of the Philadelphia Police Department discriminated against minorities. The district court had issued a mandatory injunction requiring development of policy manuals and civilian review boards. The Supreme Court chose to reverse the district court decision in the name of equitable abstention.[39] "*Rizzo* transforms abstention from the question of timing to something far more substantive."[40] The court developed an entirely new set of standards in *Rizzo*. After all, here were executive branch officials who were alleged to be indifferent to the civil rights of the plaintiffs. The impact of the decision was to entirely deny the plaintiffs a forum by deferring to officials "whose very imperviousness in the face of civil rights violations by subordinate police officers alleged to violate constitutional rights . . . ."[41] By denying the plaintiffs any remedies against the mayor and other community leaders, the Court prevented any broad-based class relief and left the plaintiffs with only damage remedies against individual police officers who were brutal. These eliminated the opportunity to reform the Police Department from the top. *Rizzo* sends a loud-and-clear signal that the Supreme Court does not want the federal courts to be specifying large-scale reforms in public institutions. The contrast from the spirit of reform indicated by such cases as *Wyatt v. Stickney*[42] could not be more obvious.

The same hostility toward reformist lawsuits is indicated in the Supreme Court's restrictive interpretations of standing. Traditionally, civil liberties lawyers have preferred to litigate in the federal courts.[43] However, access to the federal courts is made extremely difficult by decisions that prevent plaintiffs seeking broad-based relief from gaining the necessary standing to survive procedural objections to their bringing lawsuits.[44] These decisions have taken federalism and turned it on its head. Rather than providing for a balance between the state and federal governmental systems, the Supreme Court's limitation on access to the federal courts and its extreme deference to state and local governmental officials represents a major departure from the role of the federal courts as a protector of individual rights.[45]

The U.S. Supreme Court's reluctance to permit major institutional law reform measures to proceed is clearly illustrated in its response to efforts to improve the conditions of mental patients. While there have been major advances in mental health law, the willingness of the federal courts to order major structural reforms in institutions has faded. As in other areas, the lower federal courts have had to change their tune as the result of decisions of the U.S. Supreme Court.[45] The first illustration of this occurred in *O'Connor v. Donaldson*,[46] a case brought by an elderly man who had been

housed in a mental hospital for many years even though he was no longer considered dangerous. Although the Supreme Court upheld the damage award to Donaldson, the Court made clear that it was not creating any broad constitutional right to treatment. Rather, the decision was narrowly based and founded on tort principles.[47]

Three recent decisions illustrate the Supreme Court's reluctance to permit the federal courts to be a vehicle for major law reform in mental health law. In *Pennhurst State School and Hospital v. Halderman,*[48] the Court reversed a decision that had permitted a broad-based attack on conditions at a Pennsylvania state school for the retarded. The district court, concerned about the rights of habilitation of the residents, had ordered the institution to be closed.[49] The Court of Appeals for the Third Circuit had modified the district court's decision, basing the plaintiffs' cause of action on an implied right of action in the Developmental Disabilities Act.[50] The Supreme Court, however, found that the action could not be maintained. The Court, in a decision by Mr. Justice Rehnquist, found the Developmental Disabilities Act to be no more than a general statement of purposes.

> We are persuaded that s6010, which read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of "findings" and, as such, it is too thin a reed to support the right and obligations read into by the court below.[51]

In its analysis for congressional intent, the Court seems to be applying too rigid a test.[52] The *Pennhurst* plaintiffs needed access to the courts to present their claims that the conditions at the hospital violated constitutional standards. By being denied a jurisdictional basis for their claims, the plaintiffs were left with neither rights nor remedies unless they could bring their constitutional claims under s1983.[53] In the case of the *Pennhurst* plaintiffs, they have turned it to their advantage by finding an alternative theory for court jurisdiction based on state law.[54]

The Supreme Court's decision in *Pennhurst* is consistent with the general trend away from the Court's permitting the federal courts imposing financial obligations on public institutions to assist a particular group or class.[55] As with the other decisions that are ostensibly procedural in nature, the decision in *Pennhurst* has important substantive considerations. In denying a cause of action, the Court had to be aware that important legal rights of the patients might not be litigated.[56] Neither the Court's suspicions about the ability of a federal court to formulate relief nor its doubts about the ability of the federal judiciary to oversee an institution for the retarded justifies its conservative posture relative to access to federal courts.

In a second case originating from Pennhurst State School and Hospital, the Supreme Court continued its practice of narrowing rights of mental patients. In *Youngberg v. Romeo,*[57] the Court considered the state government's appeal of a decision that (among other things) recognized a liberty

interest in a program of habilitation to retarded patients.[58] The Plaintiff had brought a s1983 action seeking damages because of physical injuries he had suffered while a patient at Pennhurst. The Plaintiff also had been physically restrained as protection from self-inflicted injury. After an eight-day trial, the jury returned a verdict for the defendants, but the Third Circuit had reversed and remanded for a new trial.

With regard to constitutional issues involving safety and freedom from restraint, the Supreme Court had no difficulty finding for the patients since it had recognized the existence of such rights for prisoners.[59] Romeo's claim for a constitutional right to habilitation caused the court considerably more difficulty. The Court effectively dodged the issue by determining that Romeo was only seeking "training related to safety and freedom from restraints" rather than a per se constitutional right to habilitation.[60]

Even so, the Court was quick to note that "interference by the federal judiciary with the internal operations of these institutions should be minimized."[61] While the Court determined that mental patients should have greater rights than inmates of correctional facilities, the Court was unwilling to permit the judiciary to set standards for the institution in a manner that had characterized judicial intervention into mental facilities in an earlier era.[62] As a result, while *Romeo* is superficially a victory for the patients, it appears to be a victory without substantial meaning. The Court has reiterated its dislike for active judicial involvement that protects patients by setting out necessary constitutionally required standards and has merely recognized the existence of vague unarticulated rights for patients. *Romeo* ranks as an extremely hollow victory for patients.

The third major decision also illustrates how the Supreme Court has used procedural devices to limit the efforts directed at institutional law reform. In *Mills v. Rogers*,[63] the Court considered the appeal of a circuit court decision that recognized a constitutional right of mental patients to refuse psychotropic medication.[64] Whether such a constitutional right exists is probably the most controversial issue in forensic psychiatry today except for the insanity defense.[65] The Court could have provided important guidance to the lower courts by determining whether the constitutional right to refuse treatment is a liberty interest protected by the Fourteenth Amendment and, is such a right exists, how it should be implemented. The Boston State case provided the Supreme Court with an extraordinarily detailed record of the benefits and liabilities of psychotropic medications. Nonetheless, the Court declined the opportunity to reach the merits of the case. The Justices' reasoning for ducking the merits reveals another means for deferring to state institutions, in this case the Massachusetts judiciary. Soon after the Court of Appeals decided that Boston State appeal, the Supreme Judicial Court of Massachusetts issued an opinion that based a constitutional right to refuse psychotropic medication on state common law grounds as well as the U.S. Constitution.[66] This decision recognized a broader right to refuse psychotropic medication than has been recognized by other courts.[67]

The Supreme Court, following the tradition of deferring to state court decisions based on independent state grounds, declined to reach the merits and instead returned the case to the Court of Appeals for a determination of what the state law is.[68] In so doing, the Court postponed the time when it will determine the scope of the constitutional right to refuse treatment, but it is unlikely the issue will go away.[69] The court in taking the path of least resistance has probably only postponed the time when it will have to decide the issue.[70]

The net impact of these three decisions is that the rights of committed mental patients remain about as they were. The rather clear direction from the Supreme Court is that the federal judiciary should not oversee the operation of institutions and provide the kind of daily intervention some courts previously required. On the other hand, there has not been a denial of rights. Rather, the strict reading of statutes that might provide causes of action, the strict interpretation of pleading requirements, and the strict application of judicial abstention doctrines have all combined to limit the degree of intervention into mental health institutions by federal courts. The substantive impact is harder to gauge because of the absence of clear decisions on the merits. While perhaps no decision is better then a decision denying the existence of constitutional rights, it is an abdication of the Supreme Court's responsibility not to provide the kind of guidance the lower federal courts and public officials need. The abdication of judicial responsibility benefits nobody.

References

1. The Federalist No. 78 (A. Hamilton)
2. Diver: The judge as political power broker; superintending structural changes in public institutions. Va L Rev 65:43, 1979; Chayes: The role of the judge in public law litigation. Harv L Rev 89:1218, 1976; Note, Implementation problems in institutional reform litigation. Harv L Rev 92:428, 1977
3. McCormack: The expansion of federal question jurisdiction and the prisoner complaint caseload. Wis L Rev 1975:520, 530, 1975
   Mental health professionals have been unhappy about the active involvement of the federal courts in institutional decision making. See, for example, Appelbaum: Civil rights litigation and mental health; section 1983. Hospital and Community Psych 32:305, 1981. Lawyers have generally applauded the developments. "It does not seem to be an outrageous abuse of judicial authority for courts to supervise state and local authorities in order to insure that these officials protect the constitutional rights of prisoners, patients, and school children." Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:405, 1980
4. 42 U.S.C. s1983 (1981)
5. The history of institutional law reform dates from Brown v. Bd of Education (Brown II), 349 U.S. 294, 300 (1955), where the U.S. Supreme Court fashioned a broad remedy to eliminate segregated schools. "In fashioning and effectuating the decrees, the Court will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. The cases call for the exercise of these traditional attributes of equity power." Brown II at 300
   Examples of law reform efforts include cases involving corrections, Pugh v. Locke 406 F. Supp. 318 (M.D. Ala 1976) aff'd in part remanded in part per curiam Sub. Nom. Alabama v. Pugh, 438 U.S. 787 (1978) and mental health institutions, Wyatt v. Stickney, 344 F.Supp. 373 (M.D. Ala 1972) Aff'd in part remanded in part Sub. Nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); See generally Stickney: Problems in implementing the right to treatment in Alabama: the Wyatt v. Stickney Case. Hospital & Community Psych 25:453, 1974; Wald & Schwartz: Trying a juvenile right to treatment suit: Pointers and pitfalls for plaintiffs. Am Crim L Rev 12:25, 1974; Special Project. The remedial process in institutional reform litigation. Colum L Rev 78:784, 1978

6. See, for example, Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Swan v. Charlotte Mecklenberg School Dpt., 402 U.S. 1 (1971); Wyatt v. Stickney 325 F. Supp. 781 (M.D. Ala. 1972) enforced 344 F. Supp. 373 Aff'd Sub. Nom. Wyatt v. Aderholt 503 F.2d 1305 (5th Cir. 1974)
7. Judge Johnson wrote "When such transgressions are properly and formally brought before a court—and increasingly before federal courts—it becomes the responsibility of judiciary to insure that the Constitution and laws of the United States remain, in fact as well as in theory, the supreme law of the land." Johnson: The Constitution and the federal district judge. Tex L Rev 54:903, 905 1970
   Judge Friendly echoed this view, "It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the constitution against invasion by the states." Friendly H: Federal Jurisdiction: A General View. 90, 1973
   The most compelling justification for judicial activism appears in this case from the Virgin Islands. "This Court will not shy away in the face of charges of judicial activism when it acts to protect the fundamental rights of persons protected thereby, when we consent to the disparagement of the constitutional right of anything no matter how unacceptable that person may be in the eyes of society whether affirmatively or through implication by inactions then it becomes easier and easier to compromise these rights in the future when it comes to other classes of persons whom we may not care for. The strength of our constitutional guarantees can be measured by the protection which they afford to our weakest member. By denying them to some, they have less meaning for us all." Barnes v. Govt. of Virgin Islands, 415 F.Supp. 1218 (D.V.I. 1976). See also Wisdom: "The frictionmaking, exacerbating political rule of federal courts. Sw L J 21:411, 1967 and Diver: The judge as political powerbroker: superintending structural changes in public institutions. Va L Rev 65:43, 44-46, 1979
8. Mishkin: Federal courts as state reformers. Washington and Wis L Rev 35:949, 956, 1978 Before ordering a remedy, a judge must find a constitutional violation. The mere fact that a particular change may appear desirable does not provide the necessary legal justification for it. Note: Equitable remedies available to a federal court after declaring an entire prison system violates the eighth amendment. Capital U L Rev 1:101, 110, 1972
9. Chayes: The role of the judge in public law litigation. Harv L Rev 89:128, 1284 1976. Professor Chayes notes that broad-based relief has been most common in school desegregation, employment discrimination, and prison cases. See above 2 and materials cited therein.
10. See Sims v. Frink, 208 F.Supp. 431 (M.D. Ala. 1972) Aff'd Sub. Nom. Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment) and Griffin v. County School Board, 377 U.S. 218, 233 (1963) (School desegregation) See generally Note: Enforcement of judicial financing orders: constitutional rights in search of a remedy. Geo L Rev 59:393, 1970
11. Perez v. Boston Housing Authority, 379 Mass. 703, 400 N.E.2d 1231, 1247 (1980). Professor Chayes has said, with some exaggeration, "One of the most striking procedural developments of this century is the increasing importance of equitable relief. It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But simply the old sense of equitable remedies as extraordinary has faded." Chayes: The role of the judge in public law litigation. Harv L Rev 89:1281, 1292, 1976. See also Roberts: The extent of federal judicial equitable power: receivership of South Boston High School. N Eng L Rev 12:55, 66-67, 1976; Note: Equitable remedies available to a federal court after declaring an entire prison system violates the eighth amendment. Capital U L Rev 1:101, 102-103, 1972; Mishkin: Federal courts as state reformers. Washington and Lee L. Rev. 35:949, 956, 1978; Fiss: Dombrowski. Yale L J 86:1103, 1155, 1977. The historical bases for use of federal equity power to restrain state officials from acting improperly comes from Ex-parte Young, 93 U.S. 130 (1876)
12. Examples of broad decrees include Gates v. Collins 349 F.Supp. 881, 897 (N.D. Miss. 1972); Wyatt v. Stickney, 344 F.Supp 373, 383:384 (M.D. Ala. 1972) Aff'd Sub. Nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th. Cir. 1974). Martarella v. Kelley, 359 F. Supp. 478, 484 (S.D. N.Y. 1973); Jones v. Wittenberg, 330 F.Supp. 707, 720 (N.D. Ohio 1971) Aff'd Sub. Nom. Jones v. Metzger 456 F.2d 854 (6th Cir. 1972); Davis v. Watkins, 384 F.Supp. 1196, 1203-06 (N.D. Ohio 1976); New York State Ass'n for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D. N.Y. 1973)
13. Note: Implementation problems in institutional reform litigation. Harv L Rev 91:428, 438, 1977. The retention of jurisdiction gives the plaintiffs a continuing forum in which to voice their complaints. Id. at 441. These long implementation phases "have fashioned a new jurisprudence of structural reform." Diver: The judge as political power broker: superintending structural change in public institutions. Va L Rev 65:43, 44, 1979
14. See, for example, Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970) Aff'd 442 F.2d 304 (8th Cir. 1971). Jones v. Wittenberg, 330 F.Supp. 707, 721 (N.D. Ohio 1971) Wyatt v. Stickney, 344 F.Supp. 373 (M.D. Ala. 1972) Aff'd Sub. Nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)
15. Note: Implementation problems in institutional reform litigation. Harv L Rev 91:428, 430-431, 1977
16. "Judges have increasingly resorted to outside help—masters, amici, experts, panels, advisory committees—for information and evaluation of proposals for relief. These outside sources com-

monly find themselves exercising mediating and even adjudicatory functions among the parties." Chayes: The role of judge in public law litigation. Harv L Rev 89:1281, 1300-1301, 1976

17. Mishkin: Federal courts as state reformers. Washington and Lee L Rev 35:949, 959, 1978. "It is characteristic of decrees in the field of institutional reform that they appoint sundry parajudicial officers to assist the court not only in delineating remedies, but often in conducting or overseeing the actual implementation of the remedies. These agents or officers of the court are given functions accommodated to the particular needs. They are called by different names; masters special masters, examiners, experts, monitors, referees, commissioners, administrators, observers, visitors, ombudsmen, committees, panels, etc." Perez v. Boston Housing Authority, 379 Mass. 703, 400 N.E.2d 1231, 1249 (1980)
18. Note: Monitors: A new equitable remedy? Yale L J 70:103, 113-114, 1960. The Master has much greater power including the power to seek contempt of court citations. Note: Mastering intervention in prisons. Yale L J 88:1062, 1082, 1979. The Courts sometimes appoint masters in order to avoid the problem of a lack of funds. See Wyatt v. Stickney, 344 F.Supp. 373, 378 (M.D. Ala. 1972) See generally Diver: The judge as political power broker: Superintending structural change in public institutions. Va L Rev 65:43, 98-100, 1979. Monitors generally are less successful than masters because of a lack of authority. Note: Implementation problems in institutional reform litigation. Harv L Rev 91:428, 447, 1977. See Pennsylvania Association for Retarded Citizens v. Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1971) and 343 F.Sup. 279 (E.D. Pa 1972)
19. Note: Monitors: A new equitable remedy? Yale L J 70:103, 112, 1960. See Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975) Aff'd Sub. Nom. Morgan v. McDonough, 540 F.2d 527, 530 (1st Cir. 1976) (Appointment of a Receiver to operate public high school); Perez v. Boston Housing Authority 379 Mass 703, 400 N.E.2d 1231 (1980) (Appointment of Receiver to operate public housing Authority)
20. Idem.
21. "Our Constitution and laws have strictly limited the power of the federal judiciary to participate in what are essentially political affairs." Johnson: The Constitution and the federal district judge, Texas L Rev 54:903, 904, 1976. "The difficulty of enforcing far-reaching remedial decrees has raised serious doubts about the ability and desirability of litigation as a means of systemic reform in the mental health field." Note: Implementation problems in institutional, reform litigation. Harv L Rev 91:428, 431, 1977. "Courts should pause before ordering relief that will involve judges in continuous supervision of unfamiliar institutions." Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:465, 493, 1980
22. Frug: The judicial power of the purse. U Pa L Rev 126:715, 723, 1978
23. Idem at 725. "Let there be not mistake in the matter; the obligation of Respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or indeed upon what Respondents may actually be able to accomplish." Holt v. Sarver, 309 F. Supp. 302 (E.D. Ark. 1970) Aff'd 442 F.2d 304 (8th Cir. 1971). See also, Pugh v. Locke, 406 F.Supp. 318, 384 Fn. 95 and cases cited (M.D.Ala. 1976). Sometimes the state defendants may actually support the changes ordered by a court and the only recalcitrance comes from the legislature which must appropriate funds. Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D.Pa 1972). See Mishkin: Federal courts and state reformers. Washington and Lee L Rev 35:949, 958, 1978
24. Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982) (executive defendants can be ordered to use best efforts to obtain full funding but no more than that)
25. Pugh v. Locke, 406 F.Supp. 318, 330 (M.D. Ala. 1976). See generally Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:465, 1980
26. Frug: The judicial power of the purse. U Pa L Rev 127:715, 730, 1978. This is not to suggest that law reform is cheap. Professor Frug estimates that the cost of prison reform litigation in Louisiana has been $106 million. Idem at 727. Thus, long-term supervisors of institutions could lead to a major reallocation of resources. Idem at 728.
27. Note: Implementation problems in institutional reform litigation. Harv L Rev 91:428, 449, 1977. See Cooper: Garrity to quit Boston School case. Boston Globe, June 24, 1982, at 1 Col. 5 (after 10 years, Judge in Boston School case wants to withdraw)
28. Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:465, 498, 1980; Frug: The judicial power of the purse. U Pa L Rev 126:715, 716, 1978. This represents a major change. Five years ago, commentators stressed the apparent beginnings of an age of judicial intervention in mental health institutions. Note: Implementation problems in institutional reform litigation. Harv L Rev 91:428, 1977. That trend no longer exists. Developments. The interpretation of state constitutional rights. Harv L Rev 95:1324, 1339, 1982. One suspects that at bottom its procedural stance betoken a lack of sympathy with the substantive results and with the idea of the district courts as a vehicle of social and economic reform. Chayes: The role of the judge in public law litigation. Harv L Rev 89:1281, 1305, 1976. "The procedural issues are seen largely in

terms of how they will affect the substantive ones... restrictive jurisdictional practices may substitute for a value judgment that if articulated would reflect hostility to civil rights cases on the merits." Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 724, 1981. "The Court might have also avoided those grounds becuase of its reluctance to adopt the kind of affirmative remedies that lower court cases have ordered." Frug: The judicial power of the purse. U Pa L Rev 126:715, 773, 1978

29. Developments: The interpretation of state constitutional rights. Harv L Rev 95:1324, 1349, fn. 82, 1982. See Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Mills v. Rogers, 102 S. Ct. 2441 (1972). See generally Developments: Section 1983 and federalism. Harv L Rev 90:1133, 1174-1181, 1977 and Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:465, 500, 1980
30. Developments: Section 1983 and federalism. Harv L Rev 90:1133, 1174, 1977. Zacharias: Standing of public interest litigation groups to sue on behalf of their members. U Pa L Rev 39:453, 477-478, 1978; Eckhard: Citizens groups and standing. N Dak L Rev 51:359, 1974
31. Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:65, 500, 1980; Developments: Section 1983 and federalism Harv L Rev 90:1123, 174, 1977. The Supreme Court has interpreted Article III of the Constitution to require that litigants have a personal stake in litigation. Warth v. Seldin, 422 U.S. 490, 501 (1975) and that there be "a fairly traceable causal connection between the claimed injury and the challenged conduct." Arlington Heights v. Metropolitan Housing Corp. 429 U.S. 252, 261 (1977). "The essence of the standing inquiry is whether the parties seeking to invoke the courts jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assume that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Duke Power Co. v. Carolina Env. Study Group 43 U.S. 59, 72 (1978). The impact of this standard on law reform efforts has been to remove standing from organizations seeking to enforce rights on behalf of their membership. Simon v. Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). But see Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59 (1978) and Larson v. Valente, 102 S.Ct. 1673, 1680 (1982). One contrary trend is not requiring exhaustion of state administrative remedies before a s1983 suit is brought. Patsy v. Bd. of Regents of Florida, 102 S. Ct. 2557 (1982)
32. Idem. In many respects this trend is not new. "The inference seems to be conclusive, that the state courts would have concurrent jurisdiction in all cases arising order where it was not expressly prohibited. The Federalist No. 82 (A Hamilton) (H. Lodge ed. 1880) The Court has recognized this. See for example, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (Concurrent jurisdiction with state courts to enforce 42 U.S.C. s1982); O'Connor: Trends in the relationship between the federal and state courts from the perspective of a state court judge. William & Mary L Rev 22:801, 1981. The Supreme Court signaled its intention to return authority to the states more than 100 years ago Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)
33. 401 U.S. 37 (1971). Another example of the expansion of the federalism concept is National League of Cities v. Usery 426 U.S. 833 (1976)
34. The Warren Court had appended to permit active federal court intervention when there was a constitutionally based objection to state court prosecution. Dombrowski v. Pfister, 380 U.S. 479 (1965). Dombrowski represented the "deepest penetration into state criminal process." Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 620-621, 1979. "The Younger doctrine itself with antecedents reaching far back into the history of federal equity, centrally reflects the judgment that federal court interference with state court enforcement proceedings represents an extraordinary intervention, to be authorized only if there is a showing that the federal claim cannot be fully and fairly litigated in the enforcement court." Bator: The state courts and federal constitutional litigation. William and Mary L Rev 22:605, 620-621, 1981
35. Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 598-599 Douglas v. City of Jenrette 319 U.S. 157 (1943) "Notwithstanding the authority of the district court as federal court, to hear and dispose of the case petitioners are entitled to the relief prayed only if they established a cause of action in equity... Courts of equity in the exercise of their discretionary powers should... refuse to interfere with or embarrass threatened proceedings in state court save these exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent...." Douglas v. City of Jenrette, 319 U.S. 157 (1943). "More recent cases acknowledged the need for judicial deference recognizing judicial inability to deal with some problems and giving states wide discretion in administrative time and legislative areas." Nagel: Separation of powers and the scope of federal equitable remedies. Stan L Rev 30:661, 677, fn. 99, 1978. See Meachum v. Fano, 427 U.S. 215, 228-229 (1976); Goss v. Lopez, 419 U.S. 565, 578-80 (1975). The Standard for public official is whether he knew or should have known that conduct violates s1983. Idem att 1216 Fn. 152. See Estelle v. Gamble, 429 U.S. 97 (1976) "Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in

respect of Torts done in the cause on those duties-suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of government." Barr v. Matteo, 360 U.S. 546, 571 (1950). But See Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev, 59:597, 614 (1979). ("The antidote to state court insensitivity came in the form of an open channel to the federal courts under the mandate of section 1983, with an occasional passing assertion that resort to state forums was unlikely to offer an adequate remedy even under traditional equitable federalism. The court cast aside the requirement that a plaintiff exhaust available state remedies.") "The language of decisions emphasizing the availability of state causes of action to indicate the personal liberty interest threatened by the challenged state action while denying the existence of any federal claim suggests an enhanced willingness to view the state as an integral unit and to defer to its judgment on individual deprivations at least until the state courts have had an opportunity to apply state law." Developments: Section 1983 and federalism. Harv L Rev 90:1133, 1181, 1977. The reliance on state officials is further illustrated by decisions relating to immunity. See for example Scheuer v. Rhodes 416 U.S. 2332 (1974) (no absolute immunity for a governor-qualified good faith immunity.) Wood v. Stickland 420 U.S. 308 (1975). (Good faith standard may be both subjective and objective) Scheuer and Wood provide a defense based on reasonableness of conduct. Developments at 1213. The only exception to this has been the broadened right of access to the federal courts under Section 1983. Neuborne: otoward procedural parity in constitutional litigation. William & Mary L Rev 22:725, 736, 1981. The elimination of an exhaustion requirement under s1983 illustrates the broadened scope Barry v. Barch, 443 U.S. 55, 63, Fn. 10 (1979); Patsy v. Bd of Regents of Florida, 102 S. Ct. 2557 (1982)

36. Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 720 (1981). "The jurisprudence of abstention has not been entirely free of this kind of result orientation, which goes far to explain why critics of Younger v. Harris and its progeny suspect an ulterior desire on the part of members of the Burger Court to constrict the scope of s1983 under the rubric of federalism." Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 617, fn. 124, 1979; Sager: Fair measure: The legal status of under-enforced constitutional norms. Harv L Rev 91:1212, 1979; Laycock; Federal interference with state prosecutions: the cases Dombrowski Forgot. U Chi L Rev 46:636, 1979; Aldisert: On being civil to Younger. Conn L Rev 11:181, 1979. "The Younger doctrine is likely to serve as a discretionary tool of federal courts because it is unlikely they will apply the doctrine uniformly to exclude cases from federal courts in the way of doctrine's contours suggest. Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 719, 1981. See for example, Wooley v. Maynard, 430 U.S. 705 (1977) (Allowing federal injunction against state prosecution). See generally Nagel: Separation of powers and the scope of federal equitable remedies. Stan L Rev 30:661, 1978. "Abstention cases which followed Younger reflect something even more controversial, an explicit constriction of access, accomplished largely by disregarding decisions of the Warren Court, which has rejected the necessity of exhaustion of state judicial or administrative remedies in civil rights suits." Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 599, 1979. But see Mitchum v. Foster, 407 U.S. 225 (1972) "[the] legislature history of the Civil Rights Act of 1871 makes evident that Congress clearly conceived that it was altering the relationship between the states and the nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights it realized that state officers might in fact be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."
Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of s1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights to protect the people from unconstitutional action under color of state law. In carrying out that purpose Congress plainly authorized the federal courts to issue injunctions in s1983 actions by expressly authorizing a suit in equity as one of the means of orders.
37. Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 715, 1981. See Moore v. Sims, 442 U.S. 415, 423 (1979) (Younger "fully applicable to civil proceedings in which important state interest are involved.") See Johnson: The role of the judiciary with respect to the other branches of government. Ga L Rev 11:455, 1977
38. Rizzo v. Goode, 423 U.S. 362 (1976)
39. "Thus the principle of federalism which plays such an important part in the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of state or local government such as respondents here," Rizzo v. Goode, 423 U.S. 363, 380 (1976)

40. Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 624, 1979. See Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:465, 504, 1980
41. Rosenfeld goes on to say "Rizzo is an ill-founded invocaton of Younger carries abstention beyond its boundaries and should be laid to rest." Idem at 623.
42. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) enforced 344 F.Supp. 373 (M.D. Ala.) aff'd sub. nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th ir. 1974)
43. Neuborne: Toward procedural parity in constitutional litigation. William and Mary L Rev 22:725, 726, 1981
44. Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Article III requirement." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 (1976). Further the court has required, "that the exercise of the court's remedial powers would redress the claimant's injuries." Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 74 (1978). The impact of strict application of the principles has made standing difficult to achieve for law-reform-minded organizations. Watt v. Energy Acton Education Foundation, 454 U.S. 151 (1981); Gladstone Relators v. City of Bellwood, 441 U.S. 91, 100 (1979); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 262 (1977); Warth v. Seldin, 422 U.S. 490, 504 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976). Justice Brennan rather forcefully attacked the substantive implications of the court's decisions. "[t]he opinion [of the court] which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional can only be explained by an hostility to the claim on the merits." Warth v. Seldin, 422 U.S. 490, 522 (1975) (Brennan J. dissenting). See Chayes: The role of the judge in public law litigation. Harv L Rev 89:1281, 1305, 1976. But see Frug: The judicial power of the purse. U Pa L Rev 126:715, 739 (1978). Standing is not the only procedural device used to limit access to the federal courts. Other examples are restrictions on federal habeas corpus, Stone v. Powell, 428 U.S. 465 (1976), and use of the Eleventh Amendment to bar retroactive civil rights attorneys fees, Edelman v. Jordon, 415 U.S. 651 (1974). Professor Neuborne claims that 25 percent of litigation time is devoted to arguing federalism issues. Neuborne: Towards procedural parity of constitutional litigation. William and Mary L Rev 22:725, 732, Fn. 18 (1981)
45. See Allen v. McCurry 449 U.S. 987 (1980) where court rejects the notion that everyone has the opportunity to litigate in the federal courts. See generally Roberts: The extent of federal judicial equitable power: Receivership of South Boston High School. N Eng L Rev 12:55 1976; Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683 (1981); Cover: The uses of jurisdictional redundancy: interest, ideology, and innovation. William and Mary L Rev 22:639, 1981. Some solace may be offered by the state courts that retain jurisdiction over law reform efforts even in the absence of the federal courts. Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 653, 1979; Perez v. Boston High Authority. 379 Mass. 703, 400 N.E.2d 1231 (1980). But see Neuborne: Towards procedural parity of constitutional litigation. William and Mary L Rev 22:725 1981. Another limitation on institutional law reform actions and further illustration of the deference to public administration has been recognition of good faith immunity defenses for public officials Procunin v. Navarette, 434 U.S. 555 (1978); O'Connor v. Donaldson, 422 U.S. 563 (1979); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232, 242 (1974); Sowle: Qualified immunity in section 1983 cases: the unresolved issues of the conditions of its use and the burden of persuasion. Tul L Rev 55:326, 1981; Howard: The states and the Supreme Court. Cath. U L Rev 31:375, 403, 1982. Newborne: The myth of parity. Harv L Rev 90:1105, 1977. Freedman: Rights of the mentally handicapped: which way in the 1980s? Trial 17:42, March-April 1981; see Gutheil and Appelbaum: The judge, the adversary posture, and the rhetoric of generalization. Mass Med 5:92, 1980
46. 422 U.S. 563 (1975)
47. O'Connor v. Donaldson, 422 U.S. 503 (1975). The Court referred to being "Thrust into the middle of sensitive policy determination which it is ill-equipped to handle by nature of its inexperience in the administration of programs for the mentally retarded." Schoenfeld: A survey of the constitutional rights of the mentally retarded. Sw L J 32:605, 625 (1978). A revised and expanded analysis of this thesis is Brant J: Pennhurst, Rogers, and Romeo: mental health law reform in the age of the Burger Court. West N Eng L Rev (in press)
48. 451 U.S. 1 (1981)
49. Halderman v. Pennhurst State School and Hospital, 446 F.Suppl 295 (E.D. Pa. 1977)
50. Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3rd Cir. 1979). Other courts that had found causes of action in the s6010 are Naughton v. Bevilaqua, 458 F.Supp. 610 (D.R.I. 1978) Aff'd 605 F.2d 586 (1st Cir. 1979) and Medlery v. Ginsberg 492 F.Supp. 1294 (S.D.W.VA. 1980). The doctrine of implied causes of action comes from Cort v. Ash, 422 U.S. 66 (1974) which has a four part test: (1) Is the Plaintiff one of a class for whose benefit the statute was created? (2) Is there any

showing of legislative intent? (3) Is a private right of action consistent with the underlying purposes of the statute? (4) Is this a cause of action which is traditionally one of the state laws for which a federal cause of action would be inappropriate?
The Supreme Court in other contexts has indicated that the most important of the Cort factors is the statement of Congressional intent. TransAmerica Mtg. Advisors Inc. v. Lewis, 444 U.S. 11, 23-24 (1978). Transamerica indicates that both of the first two Cort factors must be met. The last two factors do not create jurisdiction by themselves. Touche Ross & Co. v. Redington, 442 U.S.; 560 (1979). The impact of these discussions is to move away from implied causes of action. Note: Implied private rights of action under federal statutes: congressional intent, judicial deference, or mutual abdication? Fordham L Rev 50:611, 1982. "Not only is it 'far better' for Congress to so specify when it intends private litigants to have cause of action, but for this very reason this court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the legislative branch." Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J. concurring)

51. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 19 (1981); In Maine v. Thiboutot, 448 U.S. 1 (1980), Justice Powell, in dissent had expressed the view that the Developmental Disabilities Act might provide an implied cause of action. Pennhurst seems to respond to Thiboutot by limiting its impact and suggesting that only s1983 provides a possible cause of action. Brown: Pennhurst as a source of defense for state and local government. Cath U L Rev 31:449, 550, 1982. See also Baker: Making the most of Pennhurst's clear statement rule. Cath U L Rev 31:439, 1982
52. The Conference Committee Report had expressed the hope that the rights of developmentally disabled persons could be enforced in court. Conf. Rep. No 473, 94th Cong. 1st Ses. 42 1975 Code Cong. & Add. News 943, 961. The House Report stated "These rights are generally included in recognition . . . that the developmentally disabled . . . have a right to receive appropriate treatment for the conditions for which they are institutionalized and that the right should be protected and assured by the Congress and the courts." 1975 U.S. Code Cong. and Ad. News 916, 961; H.R. Rep. No. 473, 94th Cong. 1st Sess
53. "The Pennhurst decision halted two decades of momentum toward increased recognition of legal rights for persons in retardation institutions." Note: Pennhurst v. Halderman; a bill of rights in name only. U Toledo L Rev 13:214, 216-217, 1981. Because of the broad reach of s1983, the pessimism about a lack of remedy is probably misplaced. Howard: The states and the Supreme Court. Cath U L Rev 31:375, 381, 1982. See Patsy v. Bd. of Regents of Florida, 102 S. Ct. 2557 (1972)
54. Halderman v. Pennhurst State School and Hospital, 673 F.2d 647 (3rd Cir. 1982). The Court followed a decision of the Pennsylvania Supreme Court, In re Joseph Schmidt, 494 Pa. 86, 429 A.2d 631 (1981), which found a state constitutional right to least restrictive environment. The Court rejected all governmental defenses Idem at 656. The major differences among the judges involved the propriety of broad-based relief, particularly the use of a master. Idem at 661-663. The implications of this are again before the U.S. Supreme Court. Halderman v. Pennhurst State School and Hospital, 673 F. 2d 647 (3rd Cir. 1982) cert. granted 102 S. Ct. 3034 (1982). Another court has distinguished Pennhurst and found an implied cause of action under Section 504 of the Rehabilitation Act. Miener v. Missouri, 673 F.2d 969, 974, fn. 4 (8th Cir. 1982). Accord, under Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1380-81 (10th Cir. 1981). Contra, Tatro v. Texas, 516 F.Supp. 968, 9984 (N.D. Tex. 1981)
55. Note: Pennhurst v. Halderman, a bill of rights in name only. U Toledo L Rev 13:214, 233, 1981
56. Note: The right to habilitation: Pennhurst State School and Hospital v. Halderman and Youngberg v. Romeo. Conn L Rev 14:557, 570, 1982
57. 102 S. Ct. 2457 (1982)
58. Romeo v. Youngberg, 644 F.2d 147 (3rd Cir. 1980)
59. Ingraham v. Wright, 430 U.S. 651, 673 (1979); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, (1979)
60. Youngberg v. Romeo, 102 S. Ct. 2457 (1982)
61. Idem at 2464
62. Idem at 2466. The Court cited correctional cases for the proposition that the judiciary should defer to institutional decision makers. Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979). Three Justices recognized a broader constitutional right. Chief Justice Burger "would hold flatly that respondent has no constitutional rights to training or 'habilitation' per se." Idem at 2466
63. 102 S. Ct. 2441 (1982)
64. The case involved a class action brought by patients at Boston State Hospital The patients lost their damage claims but prevailed upon their constitutional claims. Rogers v. Okin, 478 F.Supp.1342 (D. Mass 1979) Aff'd in part rev'd in part 634 F.2d 650 (1st Cir. 1980). Remanded 102 S. Ct. 2442 (1982)
65. The literature on the subject is legion. Note: A mental patient's right to refuse anti-psychotic drugs: a constitutional right needing protection. Notre Dame Law 57:406, 1980; Appelbaum and Gutheil:

The patient always pays: reflections on the Boston State case and the right to rot. Mass Med 5:3, 1980; Gutheil: The Boston State hospital case: involuntary mind control, the constitution, and the right to rot. Am J Psychiatry 137:720, 1980; Perr: Effect of the Rennie decision on private hospitalization in New Jersey. Am J Psychiatry 138:1170, 1981; Gutheil and Eisenberg: Involuntary commitment and the treatment process: a clinical perspective. Bull Am Acad Psychiatry and Law 8:44, 1980; Tanay: The right to refuse treatment and the abolition of involuntary hospitalization of the mentally ill. Bull Am Acad Psychiatry and Law 8:1, 1980; Stone: The right to refuse treatment: why psychiatrists should and can make it work. Arch Gen Psych 38:358, 1982; Rhoden: The right to refuse psychotropic drugs. Harv Civ RCL L Rev 15:363, 1980. A Doudera and J Swazey, eds: The Right to Refuse Medication in Mental Health Institutions—Values in Conflict Aupha Press 1982; Comment: Madness and medicine: forceable administration of psychotropic drugs. Wis L Rev 1980:497, 1980; Brooks: The constitutional right to refuse antipsychotic medications. Bull Am Acad Psychiatry and Law 9:179, 1981; Appelbaum and Gutheil: The right to refuse treatment: the real issue is quality of care. Bull Am Acad Psychiatry and Law 9:199, 1981; Dix: Realism and drug refusal: a reply to Appelbaum and Gutheil. Bull Am Acad Psychiatry and Law 9:180, 1981; Mills: The rights of involuntary patients to refuse pharmacotherapy: what is reasonable? Bull Am Acad Psychiatry and Law 8:313, 1980; Schultz: The Boston State hospital case: its impact on the handling of future mental health litigation. Bull Am Acad Psychiatry and Law 8:35, 1980; Besides Rogers there have been a number of major cases considering the issue of right to refuse treatment. Rennie v. Klein, 653 F2d 836 (3rd Cir. 1981); Davis v. Hubbard, 500 F.Supp.915 (N.D. Ohio 1980); In re KKB, 609 P.2d 747 (Okla. 1980); Godicke v. State Dep't Institutions; 118 Colo. 407 410, 603 P.2d 123 (1979)

66. In re Roe, 383 Mass. 415, 421 N.E.2d 40, 42, Fn. 1 (1981) See Comment: Medication and adjudication: extending In re Richard Roe III to institutional psychiatric patients. N Eng L Rev 17:1029, 1982
67. The Court determined that the Right was absolute unless a court determined by proof beyond a reasonable doubt that the refusal should be overcome.
68. Mills v. Rogers, 102 S. Ct. 2442 (1972). The case has been remanded to the Supreme Judicial Court of Massachusetts for consideration of Massachusetts law. Rogers v. Commission of Mental Health No. 2995
69. One impact may well be that Massachusetts will develop one legal standard and the rest of the county another. This would not be the first time. With regard to involuntary civil commitment, Massachusett's standard burden of proof is "beyond a reasonable doubt," Superintendent of Worcester State Hospital v. Hagberg 374 Mass. 271, 372 N.E.2d 242 (1978), while the Supreme Court has required only clear and convincing evidence, Addington v. Texas, 441 U.S. 418 (1979). See generally Brant: Bucking the Burger Court. Boston Observer 1:1 (July 9, 1982)
70. The Supreme Court remanded Rennie v. Klein for reconsideration in light of Rogers. Rennie v. Klein, 653, F2d 836 (3rd Cir. 1981), remanded 102 S. Ct. 2959 (1982). Another example of a situation (in this case, mootness) to avoid a major constitutional decision was the area of reverse discrimination. Compare DeFunis v. Odegaard, 416 U.S. 312 (1975) with Regents of the University of California v. Bakke, 438 U.S. 265 (1978) □