



10-1981

Mills v. Rogers

Lewis Powell Jr.

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Case has been ~~repeal~~
remanded & review now
would be premature

PRELIMINARY MEMORANDUM

April 17, 1981 Conference
List 3, Sheet 3

Cert to CA1 (Coffin,
Campbell, Davis [CtCl])

No. 80-1417

OKIN et al. [physicians]

v.

ROGERS et al. [patients]

Federal/Civil

Timely

1. SUMMARY: The basic question is whether involuntarily committed mental patients have a right to refuse antipsychotic drugs that their doctors want to administer.

2. FACTS AND DECISION BELOW: Resps are patients at Massachusetts state mental hospitals. Petrs, who are

Important case, but I don't think it's ripe
for review at this point, for the reasons
stated herein. Paul C.

physicians at those hospitals, routinely administer antipsychotic drugs such as thorazine and mellaril. Those drugs have been shown to alleviate some psychoses, especially schizophrenia, but they also have dangerous potential side effects. Resps, contending in essence that they have a constitutional right to refuse treatment, sued for an injunction to restrict the circumstances under which the hospitals can forcibly administer antipsychotic drugs.

The proceedings are somewhat tangled. After a trial, the district court granted an injunction that the CA left largely intact. The reasoning of the CA, insofar as pertinent here, is as follows. The court noted at the outset that it is "intuitively obvious," and not disputed by the parties, that mental patients have a due process right to decide for themselves whether to submit to medical treatment. The question, therefore, is whether the state's interests in the forcible administration of drugs override the individual's protected interest. The CA found two sources of legitimate state authority: the police power and the parens patriae power.

Under the police power, all parties agree that the state can forcibly administer drugs if necessary to protect the patient, other patients, or hospital staff from harm. The controversy centers around the likelihood of harm necessary to justify forced medication. The district court had held that forced medication could be performed only if, without

medication, it is "more likely than not" that the patient or others would be harmed. The CA found this standard too strict. It noted that prediction of violence often cannot be reduced to such probabilities, and the state should not be impaired in its effort to protect its citizens because of medical uncertainty. Yet, the CA also noted that forced medication should not be used unless, in light of all the facts and circumstances, it was necessary. Weighing these conflicting interests, the CA held:

The court should leave this difficult, necessarily ad hoc balancing to state physicians and limit its own role to designing procedures for ensuring that the patients' interests in refusing antipsychotics are taken into consideration and that antipsychotics are not administered absent a finding by a qualified physician that those interests are outweighed and less restrictive alternatives are unavailable.

The precise nature of the necessary procedures was left to be determined by "creative" work by the district court on remand.

Under the parens patriae power, the CA noted that the state may act as "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972), quoting W. Blackstone, Commentaries 47. The parens patriae power permits the state to "go beyond the mere protection of the mentally ill from harm to the forcible administration of treatment thought curative." Antipsychotic drugs have been shown to be useful in treatment, and thus may be administered under the parens patriae power. However, the

state only can act under this power when the individual himself is incapable of making a competent decision concerning treatment; in other words, the sine qua non of the state's power is the individual's lack of capacity. The state concedes that some individuals who are involuntarily committed nevertheless are capable of making competent decisions with respect to treatment. The CA reasoned, therefore, that drugs may not be involuntarily administered without a judicial determination, with respect to each patient, that he lacks the capacity to decide whether to undergo that form of treatment. According to the CA, the original commitment hearing itself is not sufficient. Under Massachusetts law, a person may be committed upon a showing of risk of harm to himself or others. It is not necessary to show that the person is incapable of making decisions concerning his treatment, and it does not follow that all those who present risks of harm are incapable of deciding whether or not to accept treatment. The CA did not specify the minimum procedural standards that such a judicial determination must observe. It did, however, note that the probate guardianship procedures would be constitutionally adequate. The CA did acknowledge two exceptions to the general constitutional requirement of pretreatment competency hearings. First, no formal hearing with full trappings is necessary if immediate action is necessary to prevent deterioration of the patient's psychiatric condition. Under those circumstances, some lesser protections would be constitutionally adequate.

The CA noted that, upon remand, the district court could develop alternative procedures suitable for expedited emergency competency determinations. The CA's second exception really is more in the nature of a clarification. Under it, once incompetency has been established and a guardian appointed, the doctors constitutionally need not consult with the guardian before each episode of involuntary medication. However, the doctors constitutionally must act "with the aim of making treatment decisions as the individual himself would were he competent to do so." Toward this end, there perhaps should be "some mechanism for periodic review by non-treating physicians" to "ensure that the treating physicians are in fact attempting to make treatment decisions as the patients themselves would were they competent." The CA left open precisely what procedures of this sort were constitutionally required. The court instructed the district court to develop these on remand.

In conclusion, the CA asked the district court on remand to "explor[e] and evaluat[e]" procedural safeguards necessary to fulfill the general constitutional requirements identified above.

The parties then returned to the district court to discuss the various issues open on remand. A dispute developed over the extent to which the CA had vacated the district court's original injunction. The district judge said the injunction had been vacated only with respect to an issue not relevant here. Counsel for the state, however, thought that

the whole injunction had been vacated. The state petitioned the CA for clarification. The CA issued the following statement.

We think it would be premature to attempt to review the district court's intentions under our recent opinion where so little time has passed and where no definitive steps have yet been taken. The district court has indicated an intention to move expeditiously. Its decrees, when they emerge, will, of course, be subject to appellate review in the ordinary course.

The state now petitions for certiorari. Although, as noted, proceedings have occurred in the district court after remand, the instant petition was timely filed here, counting from the date of the original CA decision.

3. CONTENTIONS: Petrs at the outset dispute the CA's premise. It is not "intuitively obvious"--and petrs definitely do not concede--that a committed mental patient has a constitutionally protected interest in being left free to refuse antipsychotic medication. By definition, an institutionalized person does not enjoy the privacy of a person in his own home; what would be a private decision for a person at home becomes the state's decision because an institutionalized person's interests are "inexplicably [sic] intertwined ... with the interests of the state and other patients." Nothing in Roe v. Wade or other "privacy" cases suggests the result that the CA reached.

Because there is no "fundamental right to privacy" at issue in this case, the CA should only have looked to see

whether the state's methods bore a reasonable and substantial relation to legitimate state objectives. Instead, the CA demanded that the state treat patients in the "least restrictive manner." This is an inappropriate level of scrutiny. It is clear that many patients require antipsychotic medication, whether for their own benefit or for the protection of others. The CA has demanded individualized determinations, but the fit between the means and ends does not have to be precise in this context.

In any event, an adjudication of civil commitment ought to suffice to permit the state to take what it believes to be necessary medical procedures. That threshold finding gives the state substantial powers. It is unreasonable to require a day-to-day judicial declaration of incompetency to make decisions relevant to treatment. As a Harvard Developments piece stated:

Inherent in an adjudication that an individual should be committed under the state's *parens patriae* power is the decision that he can be forced to accept the treatments found to be in his best interest; it would be incongruous if an individual who lacks the capacity to make a treatment decision could frustrate the very justification for the state's action by refusing such treatments.

Developments in the Law--Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1344 (1974).

Even if the CA is right that a protected interest is at issue, the court defined too narrowly the emergencies under which the state may act alone. The CA acknowledged that the

state could act to prevent imminent psychiatric deterioration. But it failed to recognize the need to prevent immediate severe suffering.

Petr's say that it is important that the court grant cert now to resolve these questions. Since the injunction has been in effect, about 10-12 patients per day refuse their medication. An "atmosphere of violence" developed in the hospitals and it is difficult to attract and retain staff. Under the injunction, the number of patients who must be transferred to maximum security facilities has tripled.

Finally, petr says there is a conflict with the decision of the Minnesota Supreme Court in Price v. Sheppard, 307 Minn. 250 (1976). That case held that if the state may civilly commit someone and thereby deprive him of his liberty, the state also may "assume the treatment decision."

In opposition, resps concede that the question is important and that the Court will want to grant cert at some point. According to resps, however, review now would be premature for three reasons. First, the CA left open for decision on remand the specifics of the program that it thought the constitution required. Second, the case In re Guardianship of Richard Roe is pending in the Massachusetts Supreme Court. One of the issues in that case is whether incompetents like resps have a right to refuse treatment as a matter of state law. If they do, that would render it unnecessary to decide the constitutional question. Third, this Court should wait for

more lower federal courts to rule on the question before venturing into the thicket. The asserted conflict with Price v. Sheppard, supra, does not exist. It is true that this case held that committed patients do not have the right to refuse treatment. But the court reached that decision essentially as a matter of state law. It found that, under Minnesota law, the very fact of commitment on the ground of mental illness amounts to an adjudication that the individual is unable rationally to make treatment decisions. 307 Minn. at 259 & n.7. The CA's decision in this case rested on a finding that involuntary commitments under Massachusetts law do not subsume an adjudication of incompetency to make treatment decisions.

4. DISCUSSION: The case is important, but resps reasons for denying cert are on target. (1) The CA in effect held that a protected interest was involved and that procedural protections were necessary before that interest could be subordinated to that of the state. But the CA left to the district court on remand the task of identifying precisely the procedures that the constitution required. The CA told the district court to be "creative" in developing novel procedures to reconcile the rights of patients with the legitimate needs of the state. It is not known now exactly what the district court will order and whether the CA will affirm that order. The precise scope of the final order will determine the nature of the burden on the state. That burden is highly relevant to the inquiry into what due process requires. Thus, prudential

considerations--and perhaps the final judgment rule--counsel against reviewing this case before the scope of the ultimate procedural scheme is known. (2) It also is relevant that the pending state-law case could make it unnecessary to decide the constitutional question. (3) Finally, there is no real conflict with the Minnesota Supreme Court case for the reason stated by resp.

There is a reponse.

04/09/81

Cane

Opn in appdx.

No. 80-1417

[illegible]

Review 2 12/24 Superb memo.

(Right to refuse "antipsychotic drug" case)

rhf 12/14/81 Since CA1 decided this case involving validity of the practice in Mass. mental institutions, the law of mass has been clarified - if not changed by the Mass. decision in In re Roe III (12,3)

Two Qs arise in cases on this subject (12,4)

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Dick Fallon
DATE: December 14, 1981
RE: No. 80-1417, Mills v. Rogers

Question Presented

This case presents the question whether patients committed to a State mental institution have a constitutional right to refuse treatment with antipsychotic drugs.

I. INTRODUCTION

A. Posture of the Case

When the Court granted this case, there was concern about its ripeness for review. The concern arose from the vagueness of Cal's opinion. The court of appeals cast its opinion in the most general terms. It articulates the considerations to be weighed, but ultimately shrinks from weighing them. Having given some general guidance, it remands the case to the district court to formulate the standards under which drug therapy may and may not be administered to resisting patients.

The procedural posture of the case presents no jurisdictional barrier to review by this Court. Nonetheless, I believe that the Court should now DIG this case on the basis of an intervening decision by the Massachusetts Supreme Judicial Court, In re Roe, III, 421 N.E.2d 40 (1981).

In Roe III the Massachusetts court considered the right, not of institutionalized patients, but of a noninstitutionalized mental incompetent, to resist drug treatment. Resting its decision jointly on Massachusetts and on federal law, the Court held that a guardian could not submit to drug therapy on behalf of his ward. A "judicial hearing" was required. More generally, a crucial determination in the hearing concerned the ward's substituted judgment. The question was not limited to the ward's "best interests." On the contrary, the court "emphasize[d] that the determination is not what is medically in the ward's best interests The determination of what the incompetent individual would do if

CAI's
opinion

We do
have
more.

out
Dick
thinks
we should
DIG

Holding
of
recent
Mass.
Court

absurd { competent will probe the incompetent individual's values and preferences, and such an inquiry, in a case involving antipsychotic drugs, is best made in courts of competent jurisdiction." 421 N.E.2d at 51-52.

But Dick notes he is reading man. decision broadly

I should say at the outset that my recommendation may be based on an excessively broad reading of Roe III. The Massachusetts court said explicitly that it "decline[d] to rule on the right of patients confined against their will to State hospitals to refuse antipsychotic medication." 421 N.E.2d at 62. Nonetheless, Roe III makes a number of very important holdings of "Massachusetts law," which the Massachusetts court said were "not directed toward a single case but rather [to] identify the decisionmaking processes necessary to reach outcomes in a type of cases." Id. A number of those holdings--both substantive and procedural--are inextricably connected with issues raised in this case.

nevertheless {

B. The Issues in This Case

Q

This case raises the general question whether mental patients have a constitutional right to refuse treatment with antipsychotic drugs. The question is one of general importance, which has arisen in a number of recent decisions by the federal district courts and by various state courts. Nonetheless, it is somewhat misleading to speak of a single "question." Most courts seem to have concluded that patients sometimes do have a right to refuse antipsychotic drugs but sometimes do not.¹ Their opinions have characteristically

Footnote(s) 1 will appear on following pages.

addressed at least two issues. (1) Under what circumstances may a mental institution forcibly impose unwanted treatment? (2) What procedures are necessary to determine whether the requisite circumstances in fact exist in a particular case? In this case, CA1 addressed both issues in terms of unusual generality. The problem raised by Roe III is that both issues may implicate questions of State law. And Roe III has very arguably changed the law of Massachusetts since the time that this case was decided.

CA1's
opinion
too
general

II. DECISIONS BELOW

The case at bar originated in 1975, when seven patients at the Boston State Hospital invoked the jurisdiction of the DC under 42 U.S.C. §1983. Alleging violation of their constitutional rights, they sought a TRO and ultimately a permanent injunction barring their involuntary seclusion or medication except where there was a serious threat of violence. Plaintiffs also sought relief in damages. The trial court quickly entered a TRO, which remained in effect until the issuance of a permanent injunction on October 29, 1979. Trial of the case began in December 1977. It ultimately included 72

¹See, e.g., Rennie v. Klein, 462 F.Supp. 1131 (D.N.J. 1978), ___ F.2d ___ (CA3 1981) (decision based on due process grounds); Scott v. Plante, 532 F.2d 939 (CA3 1973) (decision on privacy and First Amendment bases); Mackey v. Procunier, 477 F.2d 877 (CA9 1973) (First and Eighth Amendments); Knecht v. Gillman, 488 F.2d 1136 (CA8 1973) (Eighth Amendment); Winters v. Miller, 446 F.2d 65 (CA2 1971) (First-Amendment religious grounds).

days of testimony.

The lengthy opinion of the trial court (Tauro, J.) found that the psychiatrists at the hospital had acted in good faith, 478 F. Supp. at 1382, and that their use of compulsory medication constituted "reasonable medical practice." Id. at 1386. Most patients had "showed eventual improvement." Ibid. But the court also found that the patients had a constitutional right of privacy, and that forcible medication infringed on this right. It elaborated on this analysis by holding that the right of privacy "embodies First Amendment concerns," id. at 1366, to which forced medication constituted an affront. It impinged on the committed patient's "right to produce a thought-or refuse to do so...." Id. at 1367. The court also stressed that even a committed patient was presumed to be "competent" under Massachusetts law. Id. at 1366. Accordingly, the court ruled that an objecting patient could be medicated only under one of two conditions:

1. Drugs could be administered in an "emergency situation." (1)

This was defined as a situation in which it was "more likely than not," see 478 F. Supp. at 1364-1365, that a failure to administer medication "would result in ... physical harm to that patient, other patients, or to staff members of the institution." Id. at 1365.

2. In non-emergency situations, drugs could be administered only after a patient had been adjudged incompetent at a judicial hearing, and a court-appointed guardian had consented on his behalf. (2)

DC &
PAT
opinion

DC held:
Objecting
patient
may be
medicated
only on
one of two
conditions

On cross-appeal, the First Circuit afirmed in part, CA1 reversed in part, vacated, and remanded.

In a structurally complex and even confusing opinion, Judge Coffin reasoned that the case called for a balancing the individual's right to privacy against the state's interests in administering medication. The characterization of the individual's interest in avoiding medication was more intuitive *yes!* than analytical: "We begin our analysis with what seems to us to be an intuitively obvious proposition: a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F.2d at 653.

curious framing of a "court right"

Against the personal interest in privacy, the court balanced two State interests. First there was a police power interest in "protecting persons from physical harm at the hands of the mentally ill." Like the DC, CA1 held this interest sufficient to justify forcible medication of patients in order to prevent violence. But it rejected the DC's test for the triggering of this interest, involving a "unitary standard of quantitative likelihood" of violence, and instead required "an individualized estimation of the possibility and type of violence, the likely effects of particular drugs on a particular individual, and an appraisal of alternative, less-restrictive courses of actions."

This is one of CA1's most crucial holdings. But Judge Coffin left entirely unclear what it means. He said, inter

He did indeed ↗

alia, that: "Instead of second-guessing defendants, the court should have taken as true their asserted difficulties in applying" a more-likely-than-not standard; that "the array of relevant factors" causes any professional judgment almost to defy reviewability; that on remand the DC should consider imposing a requirement that institutions "rule out" all "reasonable alternatives" and less intrusive means before administering antipsychotic drugs; that due process required individualized judgments before drugs could be involuntarily administered; and that the DC should design the procedures under which psychiatrists would be permitted to make the required individual judgments about the necessity of drug treatment. But Judge Coffin did not suggest with any precision how the individual interests should be weighed, and he left development of the requisite procedures entirely for the district court.

At the conclusion of his discussion of the state's police powers, Judge Coffin turned to a second State interest in administering antipsychotic drugs--this the state's parens patriae interest in acting, on behalf of the incompetent patient, to seek a cure for the patient's mental illness. The court quoted at length from a Developments in the Law--Civil Commitment of the Mentally Ill article in 87 Harvard L. Rev. (1974) at 1344: "Inherent in the adjudication that an individual should be committed under the state's parens patriae power is the decision that he can be forced to accept the treatments found to be in his best interest; it would be

incongruous if an individual who lacks the capacity to make a treatment decision could frustrate the very justification for the state's action by refusing such treatment."

Having said this, however, the court--like the DC--turned to the Massachusetts statutes. These established a distinction between the standards for institutionalization (including a requirement that a person must be adjudicated to be mentally ill) and the standards for judging a person "incompetent." Finding a distinction between the two, it held that "Nothing in the statutory scheme ... suggests that a finding of mental illness is equivalent to a finding that the individual is incapable of deciding for himself whether commitment and treatment are in his own best interest." The commitment decision was therefore "an inadequate predicate to the forcible administration of drugs to an individual where the purported justification for that action is the state's *parens patriae* power."

However, consistent with its emphasis on the State's *parens patriae* status, CA1 plainly rejected the DC's requirement that a guardian must approve non-emergency medication of an objecting mental patient. Again, however, the court's precise holding is not free from ambiguity. As I read its opinion, the court, *inter alia*, stated that: there must ordinarily be an "adjudication" of the patient's incompetency, but that this need not be--at least as a matter of constitutional law--a "fullblown probate proceeding" as provided under current Massachusetts statutes; that this

"adjudication" requirement was subject to an exception for cases in which any delay could result in "significant deterioration of the patient's mental health"; that, following a determination of incompetency, "state actions based on parens patriae interests must be taken with the aim of making treatment decisions as the individual himself would were he competent to do so"; and that some minimal procedures must be developed to insure compliance with this requirement. Again, however, CAL did not specify the procedures required; it did not attempt to give constitutional content to the concept of "competency"; and it did not define the constitutional requirements for a fair competency hearing, saying on this point only that the Massachusetts probate statutes exceeded the minimum by so much that the legislature might want to consider their revision.

Additionally, CAL held that "voluntary patients enjoy no special rights as a matter of constitutional law. They may be required to accept the treatment prescribed or to leave the hospital. If they choose to leave, they may be converted to involuntary status. If so, they would enjoy precisely the rights of other involuntary patients. Finally, CAL upheld the DC in denying relief on the claim for damages.

III. ARGUMENTS AND CONCERNS OF THE PARTIES

A. Anti-Psychotic Drugs

Because both parties devote significant portions of their briefs to a discussion of antipsychotic drugs, it may aid analysis to lay out their differences at the outset. Not

surprisingly, the parties differ fundamentally about the effects and the effectiveness of anti-psychotic drugs. In the view of the petitioners, the drugs are so effective that a decision to refuse them as an aspect of treatment constitutes prima facie evidence of mental incompetence. To respondents, the drugs are of uncertain effectiveness and possess alarming side-effects. It is difficult for a layman to choose between their positions.

The antipsychotic drugs, sometimes called "major tranquilizers" or "neuroleptics," were introduced into psychiatry in the early 1950s. It is estimated that up to 250 million Americans have taken them since that time. Although they differ structurally, anti-psychotic drugs produce a common set of neurological effects. In crude terms, the drugs influence chemical transmissions to the brain, affecting both activatory and inhibitory functions. For unknown reasons, their predominant detectable effect is to reduce the level of various psychotic symptoms, including delusions and impulses to violence. Respondents mount a mild challenge to the effectiveness of antipsychotic drugs in achieving even this short-term medical goal of symptomatic relief. But the literature seems generally to support their use; and, in any case, as to this point the professional judgment of the petitioner doctors should almost certainly be respected.

Respondents' more troubling challenge involves two principal arguments. First, there is no doubt that the drugs are "mind-altering." They change the way that a patient thinks

I don't know
at any time
total population
(25% under 21)
has not exceeded
225 million

The
drugs

Yes

Drugs are
mind-
altering

"right of free thought" as
pre-condition to free expression^{11.}

and views the world. Indeed, this is what makes them successful. But there is a powerful argument that the First Amendment "right of free expression encompasses--as a matter of conceptual logic--a right of free thought. (How could anyone express himself freely if he were not given freedom to formulate the thoughts he later expressed?) If so, anti-psychotic drugs impinge on this freedom in a way different from traditional psychotherapy. By its very nature, psychotherapy cannot succeed without the cooperation of the patient. Organic therapy operates independently of the patient's wishes. It is therefore "coercive" in a different and arguably more objectionable way.

Second, antipsychotic drugs can have a variety of alarming side-effects, including four neurological syndromes:

1. Parkinsonisms, characterized by mask-like face, retarded volitional movements, and tremors;
2. Akathasis, the clinical name for restlessness or a general inability to stay still;
3. Dystonic reactions, including grimacing and other muscle spasms; and
4. Tardive dyskinesia, characterized by involuntary muscle movements, especially around the mouth. Unlike the other three syndromes, tardive dyskinesia persists long after the drugs have been taken, and it is often resistant to treatment. There seems to be a real debate about the prevalence of tardive dyskinesia. Some studies have found its symptoms among over 50% of all chronically hospitalized schizophrenics and among

frightening
side-
effects

*Peter relies on the findings
that must be made before
involuntary commitment.*

12.

over 40% of schizophrenic outpatients who have been treated with antipsychotic drugs. Other studies have generated more optimistic results.

B. Arguments of Petitioners and Amici

In arguing that CAL unduly limited their capacity to administer drugs, petitioners stress two main arguments. First they emphasize the nexus between commitment and mental illness. The justification for commitment is that the patient is incompetent to manage his life and therefore needs to be cured or rehabilitated. Second, they emphasize that the decision to administer drugs lies within the professional expertise of the institutional psychiatrist. Their professional judgments require expert knowledge of two kinds of factors beyond the competence of the courts. One involves the therapeutic value of various modes of treatment. The other concerns the institutional dynamics of a mental hospital, with all its potential for physical violence--and, what may be nearly as significant, for the disruption of carefully planned courses of therapy for unstable individuals.

According to petitioners, the fundamental mistake of the lower courts lay in their focus on "competency" under Massachusetts law. A patient cannot be committed unless his condition has been found to (1) create a likelihood of serious harm and (2) to constitute a mental illness. Mass. Gen. Laws, c. 123, §8. This finding must be made beyond a reasonable doubt. Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271 (1978). The finding of mental illness, ample to

justify taking away someone's freedom, justifies the State as parens patriae in making decisions on the patient's behalf. It cannot be otherwise if the patient is to be cured. Ambivalence about treatment is a classic symptom of mental illness. The lower courts attempted to rely on "incompetency" as the predicate for the State's acting parens patriae. But this is unworkable. Competency varies day-by-day, even while mental illness--which requires constancy of treatment--remains unaltered. This fact of "illness" demonstrates the fallacy of holding that psychotic thought and speech somehow merit First Amendment protection.

Petitioners argue at length that antipsychotic drugs are therapeutically effective, and that long-term side-effects can usually be controlled. They assert that "failure to medicate a psychotic patient early in his illness invites chronicity." Brief at 61. These drugs are responsible for the reduction in patient populations. The lower courts assumed the availability of alternative yet effective treatments; this is a dream, sustained by only a relative handful of experienced institutional psychiatrists.

D/P safeguards As to process safeguards, those followed by the hospital were more than ample. Patients' medications were regularly reviewed by the entire staff, functioning in regular collective meetings, in teams, and in individual rounds. Due process is a flexible concept, amenable to situations. In the context the process provided by the hospital is sufficient. Involving either the judiciary or a guardian imposes burdens that neither

is prepared to meet; it is also bad for the patient, because it fosters the notion that his interests somehow diverge from those of the doctors treating him.

Finally, with regard to Roe III, the petitioner make two arguments. First, the court's references to the "common law" are ambiguous. The decision rests on the federal constitution and its conclusions are not binding on this Court. Second, Roe III is not on point. The court was careful to limit its holding to the peculiar context of that case, involving a noninstitutionalized patient.

*Amici
Briefs* *petrs* ?
Briefs in support of the ~~respondents~~ position have been filed by the ✓ American Psychiatric Association (APA) and the ✓ American College of Neuropsychopharmacology (ACN). The APA urges that the decision to commit should not be unhinged from the decision to treat. If it is unconstitutional to treat a patient, it is irrational to confine him in a hospital. The ACN makes similar arguments, but offers one unique suggestion. Conceding arguendo that there is a limited constitutional right to refuse treatment, it suggests that due process would be satisfied by the establishment of a hospital review board to hear patient complaints. Judicial process should not be invoked, however, and there should be no post-commitment requirement of "competency" hearings.

C. Arguments of Respondents and Amici

Respondents begin from the proposition that the forced administration of antipsychotic drugs impinges on three fundamental liberty interests recognized by the Constitution.

First, compulsory treatment encroaches on a person's interest in bodily integrity. Second, it denies a patient his right to make independent decisions on his own behalf. Third, forced administration of drugs invades the interest in private thoughts, beliefs, and feelings. Because of these interests, a number of lower courts have held that mental patients at least sometimes have a right to refuse psychiatric treatment. See Brief at 43-44 (citing cases). These interests have received traditional common law protection in the doctrine of informed consent. See 2 Harper and James, The Law of Torts 61 (1968 Supp.).

In addition to the liberty interests arising from the Constitution and the common law tradition, the State of Massachusetts has created liberty interests entitled to respect under the due process clause. In its recent decision in In the Matter of the Guardianship of Richard Roe III, 421 N.E.2d 40, 51-52 (1981), the Supreme Judicial Court affirmed that all persons in Massachusetts--incompetent as well as competent--have a fundamental right to refuse treatment in the absence of "an overwhelming state interest."

In the absence of an emergency, the State has no right to impose drug treatment on persons not adjudged to be legally incompetent. Both the District Court and the Court of Appeals found, as a matter of Massachusetts law, that a committed patient may not be deemed, without more, to be incapable of making treatment decisions. In Roe III, supra, 421 N.E.2d at 55, the Massachusetts Supreme Court recently affirmed that, as

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a matter of Massachusetts law, the "commitment decision itself is an inadequate predicate to the forcible administration of drugs to an individual where the purported justification for that action is the State's parens patriae power." Id., at 55 & n.15.

The petitioners assume that the fact of commitment will itself suffice to justify the imposition of drug therapy. But the individual himself must be incapable of making a competent decision on his own. Otherwise the very justification for the state's purported exercise of its parens patriae powers--its citizens' inability to care for themselves--would be missing. Here the district found this predicate to be absent: "The weight of evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks and discomfort that may reasonably be expected from receiving psychotropic medication. This is particularly true for patients who have experienced such medication and, therefore, have some basis for assessing comparative advantages and disadvantages." 478 F. Supp., at 1361. To assume such patients to be incompetent, without further adjudication, would be to deny them due process of law.

Even if Massachusetts law did not require a competency determination prior to forced treatment, this is required by the Due Process Clause. The three part-balancing test of ✓ Matthews v. Eldridge, 424 U.S. 319, 335 (1976) must be applied.

(1) The personal interest is high. (2) The cost of erroneous

deprivation is great. (3) The Government's legitimate interests are adequately protected by judicial determinations of competency. As the Massachusetts court found in Roe III, supra, in an emergency a court can make an incompetency determination in a matter of hours.

Under the "police power," the State should be able to administer drugs only where there is clear and convincing evidence of impending harm.

Petitioners argue that principles of comity and federalism require the Court to stay its hand in a case such as this, due to the magnitude of the State's parens patriae interest. This argument is frivolous. The issues here implicate the most fundamental constitutional rights. The federal courts cannot abdicate their responsibility.

Amicus briefs in support of the respondents have been filed by the Massachusetts Mental Health Legal Advisors Committee, the American Psychological Association, Patients' Rights Advocacy Services, Inc., and the Advocates for Basic Legal Equality.

IV. ANALYSIS ON THE MERITS

A. State and Federal Law

Assuming that the Court does reach the merits, it will be confronted with an extraordinarily complex relationship between state and federal law. In this section of the memorandum, I aim simply to describe that relationship in highly general terms, in order to elucidate in advance the nature of the problems that emerge later in the discussion. These arise

largely because a case like this implicates claims of both substantive and procedural rights. In this case the patients claim substantive rights to resist treatment under both State, e.g., Roe III, supra, and federal law, see Vitek v. Jones, 445 U.S., at 491-494 (identifying liberty interest of state prison inmates not created by state statutes). State law may also create procedural rights. And, if the state creates substantive rights, those rights--as well as federal substantive rights--will be entitled to federal due process protection. E.g., Greenholtz v. Nebraska Penal Inmates, supra, 442 U.S., at 7.

The state-federal relationship creates two main forms of complexity. First, state law may be more "generous" than federal law. In that case a federal constitutional opinion would effectively be advisory only; it would not determine the scope of the patients' legal rights. Second, the scope of federal procedural rights may depend on the underlying state substantive rights that the procedures must protect. *yes*

Substantive Rights

The parties agree that this issue requires some balancing of State interests against the individual's constitutional interests in resisting treatment. (Both seem implicitly to accept the need for a Matthews v. Eldridge balancing test.) But a deep question in cases of this kind is how to identify the individual's interests that may be at stake. Prima facie, the individual may appear incompetent to assert them. In fact, the first "state law problem" arises at this point: It is that

Massachusetts provides a different standard for judging "incompetency" than it does for imposing involuntary institutionalization. Roe III, supra, 421 N.E.2d at 55. Thus, under Massachusetts law, even persons in mental institutions must be presumed competent to assert their own constitutional interests in, e.g., freedom from bodily invasion.

curious

In Roe III the Massachusetts court held that all persons--incompetent as well as competent--have a right to refuse treatment "[a]bsent ^{an "overwhelming"} a compelling State interest." Id. at 51-52. This raises the second question: Which state interests rise to this level?

Mass
law

In Roe III, the Massachusetts Supreme Court held that the State's "generalized parens patriae interest in removing obstacles to individual development does not outweigh the fundamental individual rights" that might be invoked on behalf of the incompetent. Id. at 59-60 & n.20. Very arguably its mode of analysis had a double effect. Not only does it announce State-law substantive rights. It may also effect a diminution of the State's parens patriae interest, rendering it narrower and therefore less weighty.

Procedural Rights

State law liberty interests are protected by the federal due process clause. E.g., Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979); Wolff v. McDonnell, 418 U.S. 539, 556-557 (1974). Thus, if Roe III did recognize new State law rights, the procedures prescribed by the courts in this case may no longer give the protection required by Due Process.

True

CAL showed considerable willingness to respect the judgments of treating physicians. But it is doubtful whether they can count as sufficiently competent and "neutral decisionmakers" under Roe III, which held that a patient's individual preferences and "substituted judgment" must be weighed in treatment decisions involving unwanted administration of drugs.

B. Sources of State Power

In a Matthews v. Eldridge balancing test, the individual interest must be weighed against the state interest. Analysis may best begin with the state's asserted interests. Both the district and CAL considered two possible sources for the State's claim to administer unwanted drugs: (1) a "police power"¹³ interest in protecting against immediate violence; and (2) a "parens patriae interest"¹⁴ in promoting effective treatment. Under both, as suggested in the preceeding discussion, two kinds of question arise: (a) the substantive conditions that must exist to justify involuntary treatment; and (b) the procedures necessary to protect the patient's substantive rights.

1. Police Power

(a) Substantive Rights

In this Court the State's police power authority is not seriously disputed. The district held that "a committed mental patient may be forcibly medicated in an emergency situation in which a failure to do so would result in a substantial likelihood of physical harm to that patient, other patients, or to staff members of the institution." 478 F. Supp. at 1365. Although basically in sympathy with this standard, the Court of

State's
interest

DC
held
have
- sensible

Appeals apparently required some some greater measure of respect for professional judgment. It termed the standard "overly rigid," 654 F.2d, at 634, and recognized that there could be no precise quantification of the likelihood of violence or its probable effects. What was needed was a "professional judgment call" based on "individualized estimations." Id. at 655.

If there is any difficulty about this section of CAL's holding, it arises from vagueness and imprecision. But it would be hard to do better. The police power will justify medication only to prevent imminent violence. In the face of such a threat, I agree with CAL that professional judgment needs to be trusted. I think it therefore inappropriate for this Court to attempt to formulate a substantive standard more precise than that propounded by CAL.

(b) Procedural Rights

CAL did, however, also hold that the district court should seek to formulate the procedural rules necessary to provide due process. Again on this point, I think the approach of CAL to be sound. Considerable confusion unfortunately arises from the vagueness with which CAL framed its decision. This is particularly true regarding CAL's statement that the district should "explore the possibility" that the State be required to find that "less restrictive means" were not available before drugs could be administered involuntarily. More clearly and significantly, however, CAL held that "the determination that medication is necessary must be made by a qualified physician

As to
State's
"police
power"
interest,
it's ok.
is acceptable

as to each individual patient to be medicated." Id. at 656. Given the weight of the individual's interest in not being drugged unnecessarily, this does not seem to me to be an excessive imposition on professional judgment. Further, I think that this ultimate deference to a doctor's professional judgment subsumes the court's ambiguous suggestion with regard to "less restrictive alternatives."

Finally, Roe III does not seem to have raised serious difficulties with the "police powers" section of the CAL opinion.

In sum, regarding medication under the police power, I think that CAL could simply be affirmed. If any criticism is in order, it might be that the court failed fully to appreciate that "due process is a flexible concept." If for some reason a physician were unavailable in an emergency, prompt action by other personnel might be needed. As a norm, however, I think that individualized judgments, by a physician, should be required.

2. Parens Patriae

(a) Substantive Rights

This is the issue that is much more problematic: When can the State, in order to protect interests unrelated to the immediate threat of violence, impose forced medication as an element of treatment? It is difficult, legally as well as practically, to know how to approach this question. There is no doubt that "the state has a legitimate interest under its parens patriae powers in providing care to its citizens who are

As to
"police
powers"
interest

unable to care for themselves...." Addington v. Texas, 441 U.S. 418, 426 (1979). However, for the State to invoke this rationale to impose unwanted treatment, the lower courts both held that the individual himself must be incapable of making competent judgments for himself.

It is at this point that the relationship between state and federal law becomes complex. The petitioners seem to argue that the fact of involuntary commitment necessarily suffices to establish incompetency to make treatment decisions as a matter of federal constitutional law. If this is so, it must be because the Massachusetts commitment standards--in order to survive the federal constitutional minimum, cf. O'Connor v. Donaldson, supra--must establish a degree of mental disability that makes a person incompetent (within the contemplation of federal law) to resist professional treatment decisions.

Unfortunately the decision most nearly on point, O'Connor v. Donaldson, 422 U.S. 564 (1975), gives little guidance. O'Connor clearly held that, even "assuming ... that the mentally ill can be identified with reasonable accuracy, there is still no basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." Id., at 575. O'Connor thus seems to hold that a person cannot be institutionalized unless dangerous, either to himself or others. This sets a high constitutional standard, which would arguably suffice to justify treatment--with drugs--against the patient's will. On the other hand, O'Connor also seems to have credited the personal preferences of the mentally ill. See

id., at 575 ("[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.") If their preferences are credited, then the State's interest in preventing violence may be sufficient to justify institutionalization (the "least restrictive alternative"), but not to justify the further intrusion of imposing a drug regimen that the individual disliked. Cf. Vitek v. Jones, 445 U.S. 480, 491 (1981) (even a committed prisoner retains a "residuum of liberty" that may not be infringed without due process protection).

The issue is further complicated by the uncertain relevance of Massachusetts law, which establishes separate standards for imposing institutionalization and adjudicating incompetency. What is the relationship of state law--and the state law definitions of "commitability" and "incompetency"--to the federal constitutional claims presented on this appeal?

CAL seems first to have held that the Massachusetts "commitment" scheme was constitutional under federal standards. See 634 F.2d at 659 ("The Massachusetts scheme goes well beyond the minimum requirements mandated by the First Amendment."). But it then proceeded to find that the State's commitment standards were inadequate to justify forced administration of drugs. The basis for this holding--whether rooted in federal scrutiny of the state standard or in the state's adoption of a separate "competency" statute--is somewhat unclear.

As I read its opinion, CAL put its opinion on federal grounds. Again as I understand it, CAL held that

"incompetency" was federally required before the State could impose mandatory drug therapy. And the Massachusetts commitment statute did not--as a matter of State law--require a finding of "incompetency" in the requisite "federal" sense.

Thus, among the questions before the Court is this: Was CA1 correct in holding that the federal constitution requires a finding of "incompetency"--distinct from a finding that someone is (a) mentally ill, (b) dangerous to himself or others, and (c) needs to be committed--before a patient can be forced to take drugs as an undesired element of treatment?²

As indicated above, I think that O'Connor v. Donaldson provides strong support for--although it probably does not require--an affirmative conclusion. Consistent with this view, both the district court and the court of appeals found that something more is needed to justify drugging a patient than to justify institutionalizing him in the first place. It is true,

² Although the proccessional amici are split, the psychiatric profession seems generally to draw a distinction between mental illness and mental incompetence. See Joint Information Service of the American Psychiatric Ass'n, quoted in Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 N.W. L. Rev. 461, 483 (1977), at 489 ("It must be clearly understood that the establishment of a mental illness does not ipso facto warrant a finding of incompetency....From a medical point of view there is not, necessarily, any connection between the two."). A number of states now expressly provide for separate adjudications to determine the competence of involunatrily committed mental patients. For a statutory survey as of December 1, 1977, see Plotkin, supra. In this case the defendants conceded, as a factual matter, that not all patients hospitalized for mental illness were incapable of making their own treatment decisions. See 634 F.2d at 659.

as petitioners argue, that the presumptive rationale for institutionalization is treatment. But drug therapy is treatment of an exceptionally intrusive kind. It involves restrictions of thought processes and invasions of bodily integrity not implicated by other forms of therapy, in which the patient's willing cooperation is generally required. See generally Rennie v. Klein, 653 F.2d 836, 842-843 (CA3 1981).

Assuming, then, that "incompetency" is one prerequisite to the forcible administration of drugs, what other factors need to be considered? There is little guidance, if any, in the decisions of this Court. But the courts seem agreed that "mere incompetency" is not enough. In Roe III, supra, for example, the Massachusetts court suggested the relevance, inter alia, of: the likelihood of "success"; the patient's personal drug history; the person's actual preferences, despite incompetence; and the patient's "substituted judgment"--that is, some guess about how he would feel about drug therapy if he were sane. The Third Circuit--in Rennie v. Klein, supra, 653 F.2d at 846-847--required that drug therapy must be the "least restrictive alternative" with a reasonable prospect for success. CA1 hinted at the desirability of such an analysis by medical decisionmakers, but seems to have fallen just short of requiring it. See 634 F.2d at 656. Perhaps most confusingly of all, the Massachusetts Supreme Court's Roe III opinion reaffirmed that Massachusetts law requires a "substituted judgment" test before drug therapy can be imposed on an unwilling patient. This means, in effect, that drug therapy

must be the alternative that the patient would choose for himself if he were competent to do so: "The determination of what the incompetent would do if competent will probe the incompetent individual's values and preferences." 421 N.E. 2d at 52. It is hard to know what this test means--and it may be required under Massachusetts law. It establishes, however, that "The question presented by the [incompetent's] refusal to take drugs is only incidentally a medical question."

As I have emphasized, it is hard to know what is and is not required under Massachusetts law, as distinct from the Massachusetts' courts interpretation of federal law. Assuming that this Court can concern itself only with federal substantive standards, it is very hard to develop a list of the relevant substantive criteria, and a bit dangerous as well. Factors of this kind define "substantive," rather than "procedural," rights; and it is hard to root these rights either in specific provisions of the constitution or in past decisions of this Court. Further, this is an area in which professional medical expertise cannot be ignored--one in which the possibility of judicially manageable standards must be doubted.

On balance, I would be inclined to hold that a patient has a right to resist drug treatment unless:

(a) he is incompetent;

(b) drug treatment is the only reasonable medical alternative, from the perspective of achieving either relief from symptoms of underlying distress or of achieving a cure.

*Dickes
v. New*

Although the term is not terribly precise, the CA3 has required a "least restrictive alternative" analysis.

In concluding this section, I note again, however, that Massachusetts law may well give incompetents a right that is more far reaching--a right to resist drug therapy unless they would "personally" consent under a "substituted judgment" analysis.

Procedural Rights

In any event, assuming that "something more" than "incompetency" is "substantively" required to justify drugging than is needed to justify institutionalization, it does not follow that the Massachusetts procedural requirement of "competency" adjudications needs to be "constitutionalized." And most emphatically it does not follow that particular treatment decisions--decisions to administer a drug on a particular occasion--need to be made by a judge or by a court-appointed guardian. As the petitioners argue, "competency" may vary day-by-day. Moreover, as a practical matter, a patient's competency to refuse treatment--just as his need for treatment--may need to be assessed by professionals within the hospital.

The question is: What procedures are required?

Here the decision most nearly on point is probably Parham v. J.R., 442 U.S. 584 (1979), in which the Court applied the three-factor balancing test of Mathews v. Eldridge, 424 U.S. 319, 335, to determine the procedures required for admitting children to a state mental hospital. The Court in that case held that a the admission decision must be made by an impartial

Yes!

The Q
is
what
procedures

decisionmaker, but that this decisionmaker need not be a judge. A hospital physician would in fact suffice; and even he need not conduct a formal hearing. The Court held that the hospital must then develop internal procedures for conducting periodic reviews of whether institutionalization remained necessary for particular patients.

It is hard to know how Parham might bear on the case at hand. The Mathews v. Eldridge test plainly cannot be applied in the usual way. The first factor would require an assessment of the patient's interest in avoiding treatment. Yet the patient's own assertion of his interests cannot be credited in the usual way. Precisely what is in issue is whether the patient is competent to know his own interests. Further, it is hard to weigh the "risk of erroneous deprivation" without making medical judgments about the likelihood of "success" and the risk of serious "side-effects."

CAL attempted to deal with this complexity in the following way:

(1) Reversing the dist court, it held that judicial determinations of incompetency should not be required in cases where delay "could result in significant deterioration of the patient's mental health." 634 F.2d, at 660. It remanded for the district court to develop procedures applicable in such situations.

(2) It held that some judicial determination of incompetency must otherwise be made. But it suggested that the requisite substantive and procedural standards could be

somewhat looser than those currently prescribed by Massachusetts statute.

(3) It held that some on-the-spot procedures would then be required before drugs could be involuntarily administered in a particular instance. But it did not say what those procedures should be, beyond suggesting--which is important--that they should weigh the patient's subjective preferences as well as his rational best interests; it left the elaboration of this standard for the remand to the district court. CAL specifically reversed a holding of the district court that the decisions must be made by court-appointed guardians.

If there is anything objectionable about CAL's decision concerning the state's *parens patriae* power--Roe III difficulties aside--it might be the requirement that the initial determination of a patient's incompetency should require judicial decision. Nonetheless, this seems to me to be a very close issue. Such a requirement would be time-consuming and expensive; and it is hard to know what a judge could responsibly do to assess the professional judgment of an institutional psychiatrist. See Parham v. J.R., supra (due process satisfied by decisions of doctors in children's psychiatric hospital); but cf. Vitek v. Jones, supra, 445 U.S., at 496-497 ("the medical nature of the inquiry [whether a prisoner needs to be transferred to a psychiatric hospital] does not justify dispensing with due process requirements," including judicial hearing).

As indicated above, however, the forced administration of

drugs threatens interests in bodily integrity and freedom of thought. The importance of any unjustified violation counsels the provision of judicial review at least at some point. If Massachusetts inquired into "competency" as a prerequisite to commitment, this might suffice. As a matter of state law, however, it does not. Under these circumstances, I think CA1 was right to require a judicial determination of competency before drugs could ever be administered to an unwilling patient. In assessing the intrusion on hospital management, it is important, I think, that CA1 held that this judicial determination must only be made once. Cf. Roe III, 421 N.E.2d, at 51-52 (requiring judicial approval of each administration of drugs, on the theory that the question was generally of of "substituted judgment", to which medical expertise was irrelevant).

After the initial determination of incompetency, CA1 suggested that some on-the-spot procedures might be required, but that the decision would be made by doctors, not judges. This is consistent with the model outlined in Parham v. J.R., supra. It also accords with the "compromise" proposal made in the amicus brief of the American College of Neuropsychopharmacology. These procedures should not need to be in an adversary mode, which would create stress not conducive to the success of long-range treatment. Amici have suggested that this review might occur before an institutional committee of one or another kind. Personally, I would tend to favor such a suggestion; but I understand the need for

flexibility, and I am uncertain about the effects of such procedures on doctor-patient relations.

Finally, with regard to Roe III, I believe that it has very arguably created new state-law rights to resist unwanted medication and placed new restrictions on the scope of the State's parens patriae interest as a matter of Massachusetts law. Since federal due process attaches to state law substantive rights, I think that the Roe decision strongly counsels a DIG or a remand for reconsideration in light of Roe III. However, if the Court wishes to decide the case as presented, I reiterate that the Massachusetts Supreme Court explicitly distinguished this case from the one before it.

B. Federalism Issue

Petitioners have also raised the argument that the lower federal courts violated important principles of federalism by seeking to control state behavior in an area of its parens patriae concern. Neither party devotes much briefing to this issue, which I think insubstantial. The claims raised in the district court involved important constitutional rights--a matter of obvious federal concern. Further, no argument is made to differentiate this case from other areas of state concern--such as prison conditions and school desegregation--that equally implicate central interests of the State.³

³See Procunier v. Martinez, 416 U.S. 396, 405 (1974) ("A policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution.").

SUMMARY

Man. case may have found a state law liberty interest

I think that the Court should either DIG or remand for consideration in light of Roe III, supra. Roe III strongly suggests--although it does not explicitly hold--that mental patients have "state law substantive rights not recognized by the dist ct or by CAL in this case. If so, those rights are "liberty interests" created by state law. As such, they are entitled to federal procedural protection under the Due Process Clause.

yes

II If the Court does reach the merits, ^{we} ~~it~~ should hold that mental patients have constitutional interests that may be offended by "forced administration of drugs" ^{must change}--first amendment interests in freedom of thought and privacy interests in freedom from bodily invasion. To determine when drugs may be administered to unwilling patients, these interests must be weighed against the competing state interests.

aff'ine as to drugs to prevent violence

Police Power Interest. Substantively, CAL held that drugs could be administered involuntarily only ¹ to prevent immediate ^{??} physical violence. Procedurally, it held that ² the decision must be made by a physician. I think that both the substantive and procedural holdings should be affirmed.

Parens Patriae Interest. CAL held that this interest will justify the forced drugging only of patients adjudicated to be "incompetent." When a patient is "incompetent," the State's parens patriae interest will justify efforts to restore competency. Beyond that, it suggested in vague terms that further conditions should be satisfied. I am in general

agreement with this approach. Even if a patient is incompetent, other factors--such as prognosis, side-effects, personal and religious preferences of the patient, etc.--should also be considered. It is hard, however, to know whether the construction of a list of factors lies within the judicial competence. *No*

Procedurally, CA1 required an initial adjudication of incompetency; then, before drugs could be administered on a particular occasion, further on-the-spot procedures would be required. The court did not state what these might be. This Court might suggest that a physician could decide, cf. Parham, supra; or it might suggest the desirability of review by a hospital committee. Either would be consistent with the vague decision of CA1.

SUMMARY

Man. case may have found a state law liberty interest

I think that the Court should either DIG or remand for conisderation in light of Roe III, supra. Roe III strongly suggests--although it does not explicitly hold--that mental patients have "state law substantive rights not recognized by the dist ct or by CA1 in this case". If so, those rights are "liberty interests" created by state law. As such, they are entitled to federal procedural protection under the Due Process Clause.

Yes

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Affirm as to drugs to prevent violence

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80-1417 Muller v. Rogers

12/24

(Right to refuse "anti psychotic drug" case)

I DIG or Remand on In re Roe III.

Since CAI's decision, Sup Ind Ct. of Mass' decision in Roe clarified - if not changed - the relevant State law.

II. Merits - if we reach them.

1. Involuntarily committed mental patients have (a) 1st amendment right not to have "thought processes distorted," and (b) liberty interest in freedom from bodily harm (physical side effects of drugs ~~are~~ can be severe).

2. Under Mathews, ^{we} balance this individual rights vs. state interests: (a) police power to prevent violence is compelling - at least when imminent or unpredictable.

(b) parens patriae interest is compelling only when patient has been adjudged "incompetent". In Marr, a commitment adjudication ^{of mental illness} is not enough. There must be separate finding of "mental incompetence".

3. Procedures required to safeguard patients rights need to be outlined generally & left to remand.

III On merits, Affirming ⁱⁿ general but Remand

After ten then study any thoughts on merits are less certain.

One can be mentally ill w/o being incompetent. But I'm not sure.

80-1417 MILLS v. ROGERS

Argued 1/13/82

Schultz (Ant AG of Mass)

A decision of commitment is not equivalent to a finding of incompetence.*

CAI ~~sets up~~ set-up "arbitrary distinction" bet. patients who are dangerous all the time & other

Imp.
point

CAI has changed substantive law. It has set up different groups of patients.

CAI did not decide on procedural D/P - it applied substantive D/P

Doctors ~~don't~~ don't ask what is least restrictive ^{medication} They ask what ~~is best~~ medication is best for patient.

Can't expect doctors to find that one day patient is competent & next day not.

* But there is a limited "competency" - doesn't include competency as to treatment.

replied

Cole (Resh)

DC found most patients were competent to ~~consent~~ consent or refuse ~~anesthetic~~ anesthetic drugs. A competent adult has right to refuse med. treatment. Fundamental right.

In Roe, ct. said patients a competent to decide, have a right to refuse

2. CA1 said that if a doctor decides a ~~patient~~ patient is dangerous at the time, the drug may be administered even if patient is competent to object

CA1 distinguished dangerous patients from those not dangerous, & held that that - if competent - the latter may decline treatment.

x x x

Roe disposes of this case.

~~We should discuss or meet~~

Don't know whether case is moot.

Schultz (Reply)

Roe is decided in Fed Court.

Man Ct expressly said it was not affecting this case.

[

JLR

80-#1417 Mills v Rogers { 1/14/82 - after
hearing argument
+ reading Roe III.
Mass. anti-psychotic case.

I Remand in light of Roe III.

Various
sub-
jects.
Also.

The ~~basic~~ ^{general} Q is whether ^{mental} patients
— here confined involuntarily ~~and~~ and
voluntarily — in ~~so~~ state institutions
have a Court-right to refuse treatment
with potentially ~~mind~~ mind changing drugs.

x x x

Roe III, decided after CA1 decided
this one, expanded — if not changed —
Mass. substantive law.
(See my notes on Xerox of Roe)

State law goes beyond any holding
of this Court.

The DC & CA1 are better able
than we to (1) determine what
State law is now — especially w/respect
to institutionalized patients. Roe III
dealt only with a guardian & ward;
and (2) what procedures ~~now~~ D/P
requires to protect the rights Mass
has created.

II Merits — Affirms generally but with modifications because of Roe & also because I'm not sure I agree ~~with~~ with all of CA1's ok.

The Chief Justice Pass (never did vote)
Roe III does int control.

See my notes on 80-1429
- discussion of the two
cases together resulted in
confusion. My notes
are incomplete & unreliable

Once incompetency has been
judicially determined, maybe
their continued in effect.
(I did not agree on judicial hearing
A review committee would be sufficient)

Justice Brennan Affirm - but may reason it out differently in some respects.
In this case, as contrasted ~~in~~ in CA3, the patients
are capable of giving consent(?). When one has been
involuntarily committed, he retains liberty interest
to withhold consent to medication. Court. right.
CA1 correctly rejected argument that fact of
commitment establishes incompetency. CA1 generally
right.

Can't certify Qs to Man. Ct. We can frame Qs.
If patient refuses, there has to be a judicial
determination of competency. (C & I said he agrees
with this!) (After discussion, WJB agreed to Remand
on Roe.)

Justice White

Reverse in part & Affirm in part.

Doesn't agree with WJB as to judicial
review. (Byron was leaving & spoke
briefly. I think we would apply Seitz
standard in both cases)

? Would not Remand on Roe. We
should decide ^{not} on state law?
^

Justice Marshall

Possibly affirm but write differently

Leave primarily to doctors
but generally affirm here.

Do not agree with W & B as
to jud. review.

x x x

After discussion, TM agreed
on Vacate & Remand on Roe.

Justice Blackmun

Lots to be said for remand on Roe or
D & G on Roe. Would not oppose remand
on Roe. Situation is different.

x x x

Final vote was to remand on Roe

Justice Powell

1st Vote. Vacate & remand on Roe III (I elaborated)

2nd Vote. If we reach merits, I'd emphasize
— role of doctors. Perhaps ~~and~~ a judicial

Justice Stevens

Vacate & Remand on Roe

A patient has ^{Court} right to refuse any kind of medication. This right may be over-ridden by a substantial state interest.

~~If~~ What is being done in Mass ~~by~~ ^{may} violate state law, the institution ~~may~~ violate state law.

Fair reading of Roe is that Mass is far more protective of patients' rights than any other case.

Roe doesn't rely on Fed Court. It is state law, & CA1 should have

Justice O'Connor

Would not vacate & remand on Roe

On merits, CA1's op. goes too far. There is some liberty interest, if patient is competent, there should be some protective ~~at~~ procedure.

Should limit op. to anti-psychotic drugs to keep ~~case~~ op. narrow.

In emergency, forced med. is OK

1fp/ss 03/16/82

MEMORANDUM

TO: Dick

DATE: March 16, 1982

FROM: Lewis F. Powell, Jr.

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80-~~1714~~ Mills v. Rogers

Your first draft (3/16) is very well done. Apart from minor editing and a question or two, I have no changes.

A few questions are noted in the margin. In addition, I am not entirely clear as to what you are saying in Subpart C, especially on page 15 and 16. In prior sections, you have correctly noted that both substantive and procedural issues are presented by the case. It seems to me that this distinction is not clearly maintained in some of what is said in Subpart C.

After stating that Roe III appears to recognize liberty interests more broadly than the Constitution requires, the draft says: "If so, these state recognized interests may be entitled to the protection of procedural due process". This is clear. In the next sentence, however, you say that it therefore "would be unnecessary for this Court (or the Court of Appeals) to determine the scope of substantive protection, citing Ashwander". In general terms, the substantive interest is the right of a patient to decline drugs of this kind. But this right can be defined, as well as the interests to be weighed against it, in

different ways. Is it clear, therefore, that determination of what process is "due" would invariably make it unnecessary for this Court to consider the appropriate definition of the substantive right? I read Roe III as finding a substantive right - regardless of mental capacity - to reject medication, and at least where anti-psychotic drugs are concerned the Massachusetts court would go so far procedurally as to require that this substantive right be protected by the appointment of a guardian who would make a substitute judgment in every case. Would this procedure foreclose the possibility of our concluding, if the case comes back, that the state constitutional right does not comport with the federal right?

Probably I simply do not understand this particular page or two, and may need to read it more carefully.

I think it is almost self evident that Massachusetts has gone well beyond any federal constitutional right in both its view of substantive and procedural rights. I am tempted to say this, but agree that you have gone about as far as we properly can in this respect.

One final unimportant comment: I do not like to have so many footnotes. Each one, when read by itself, seems justifiable if not affirmatively helpful. I would not

object if you concluded that two or three notes are expendable or at least can be shortened.

This case is in an extremely important and evolving area of the law. We are in agreement that you and Mary should be in accord in the terminology used as well as in any reasoning that may be relevant to both cases. As David has taken a preliminary look at Mary's case, perhaps a "tripartite" editing among the three of you is desirable.

I appreciate your moving ahead so promptly - and so well - with this draft.

L.F.P., Jr.

ss

1fp/ss 03/16/82

MEMORANDUM

TO: Dick DATE: March 16, 1982

FROM: Lewis F. Powell, Jr.
1417
80-1714 Mills v. Rogers

Your first draft (3/16) is very well done. Apart from minor editing and a question or two, I have no changes.

A few questions are noted in the margin. In addition, I am not entirely clear as to what you are saying in Subpart C, especially on page 15 and 16. In prior sections, you have correctly noted that both substantive and procedural issues are presented by the case. It seems to me that this distinction is not clearly maintained in some of what is said in Subpart C.

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I appreciate your moving ahead so promptly - and so well - with this draft.

L.F.P., Jr.

SS

L.F.O.

Reviewed.

On a first
reading this
looks fine.

See my memo
to Dick.

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rhf March 16, 1982

FIRST DRAFT

No. 80-1417, Mills v. Rogers

10

The Court granted certiorari in this case to 15
determine whether involuntarily committed mental patients
have a constitutional right to refuse treatment with
antipsychotic drugs.

I

This litigation began on April 27, 1975, when 20
respondent Rubie Rogers and six other persons filed suit

against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution.

During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.¹ Alleging that forcible administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs--respondents here--sought

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¹As used in this litigation, the term "antipsychotic drugs" refers to medications such as Thorazine, Mellaril, Prolixin and Haldol that are used in treating psychoses, especially schizophrenia. See Rogers v. Okin, 478 F. Supp. 1342, 1359-1360 (D. Mass. 1979), aff'd in part and reversed in part, 634 F.2d 650, 653 (CA1 1981). Sometimes called "major tranquilizers, these compounds were introduced into psychiatry in the early 1950s. See Cole & Davis, Antipsychotic Drugs, in 2 A. Freeman, H. Kaplan, and B. Sadock, Comprehensive Textbook of Psychiatry II 1921 (2d ed. 1975). It is not disputed that such drugs are "mind-altering." Their effectiveness resides in their capacity to achieve such effects. Citing authorities, petitioners assert that such drugs are essential not only to the treatment of individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17-41, 54-100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by mask-like face, retarded volitional movements, and tremors; akathasis, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, characterized by involuntary muscle movements, especially around the mouth. See Rogers v. Okin, supra, 478 F. Supp., at 1360; Byck, Drugs and the Treatment of Psychiatric Disorders, in L. Goodman and A. Gilman, The Pharmacological Basis of Therapeutics 169 (2d ed. 1975). Unlike the other three syndromes, tardive dyskinesia may persist long after drug treatment has ended. Ibid.

*Dick -
The
claims
of parties
usually
go into
the text
Is there
a reason
for
preparing
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?*

compensatory and punitive damages and injunctive relief.²

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The District Court certified the case as a class action. See Rogers v. Okin, 478 F. Supp. 1342, 1352 n.1 (D.Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.³ The District Court found that an involuntary "commitment" provided no basis for an inference of legal "incompetency" to make this decision under Massachusetts law. Id., at 1359-1362.⁴ Until a judicial finding of incompetency had

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²The plaintiffs also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted various claims under state tort law. Id., at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See id., at 1371, 1374. Neither this decision, nor the denial of relief on the state tort law claims, is in issue before this Court.

³The District Court characterized liberty to make "the intimate decision whether to accept or refuse [antipsychotic] medication" as "basic to any right of privacy" and therefore protected by the Constitution. See 478 F. Supp., at 1366. It did not derive this right from any particular constitutional provision, although it did observe that the "concept of a right of privacy ... embodies First Amendment concerns." Ibid. In relying on the First Amendment the court reasoned that "the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." Id., at 1367.

⁴Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized

Footnote continued on next page.

been made, the court concluded, the wishes of the patients generally must be respected. Id., at 1365-1368. Even when a state court had rendered a determination of incompetency, the District Court found that the patient's right to make treatment decisions was not forfeited, but must be exercised on his behalf by a court-appointed guardian. Id., at 1364. Without consent either by the patient or his guardian, the court held, the patient's liberty interests could be overridden only in an emergency.⁵

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touchings by a physician. See, e.g., Superintendent of Belchertown Hospital v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977); W. Prosser, Torts § 18 (4th ed. 1971). In this case the defendants had argued--as they continue to argue--that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann. ch. 123 (1979), provided a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 ("No person shall be deprived of the right to manages his affairs ... solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent"), and Mass. Gen. Laws Ann. ch. 123, § 25 ("No person shall be deemed to be incompetent to manage his affairs ... solely by reason of his admission or commitment in any capacity"). The court also appears to have engaged in independent fact-finding leading to the same conclusion: "The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic

Footnote continued on next page.

Footnote(s) 5 will appear on following pages.

The Court of Appeals for the First Circuit affirmed in part and reversed in part. Rogers v. Okin, 634 F.2d 650 (1981). ~~The Court of Appeals~~ ^{It} agreed that mental patients had a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. Id., at 653.⁶ It also accepted the trial court's conclusion that Massachusetts law recognized even involuntarily committed persons as presumptively competent to assert this interest in their own behalf. See id., at 657-659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty

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medication." 478 F. Supp., at 1361.

⁵The District Court defined an emergency as a situation in which failure to medicate "would result in a substantial likelihood of physical harm to the patient, other patients, or to staff members of the institution." 478 F. Supp., at 1365.

⁶The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F.2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this interests is unclear," ibid., it concluded that "a source in the Due Process Clause of the Constitution for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." Ibid. The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

interests of the patient.

The Court of Appeals found that the State had two
 interests *that must be weighed against the*
~~potentially in competition with~~ liberty 65

interests asserted by the patient: a police power interest
 in maintaining order within the institution and in
 preventing violence, see 634 F.2d, at 655, and a parens
patriae interest in alleviating the sufferings of mental
 illness and in providing clinically effective treatment, 70
 see 634 F.2d, at 657. The court held that the State,
 under its police powers, could administer medication
 forcibly only upon a determination that "the need to
 prevent violence in a particular situation outweighs the
 possibility of harm to the medicated individual" and that 75
 "reasonable alternatives to the administration of
 antipsychotics [have been] ruled out." 634 F.2d, at 656.
 Criticizing the District Court for imposing what it
 regarded as a more rigid standard, the Court of Appeals
 held that a hospital's professional staff must have 80
 substantial discretion in deciding when an impending
 emergency required involuntary medication.⁷ The Court of

Footnote(s) 7 will appear on following pages.

Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the "police power" standard accorded adequate procedural protection to "the interests of the patients."⁸ 85

With regard to the State's parens patriae powers, the Court of Appeals accepted the District Court's state law distinction between patients who had and patients who had not been adjudicated incompetent. Where a patient had not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,⁹ the court ruled that the parens patriae interest would justify involuntary medication only when necessary to prevent 90 95

⁷The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See 634 F.2d, at 656.

⁸It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." 634 F.2d, at 656.

⁹A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw. U. L. Rev. 461, 504-525 (1977). Several courts of appeals have held that civil commitment does not raise even a presumption of incompetence. See Winters v. Miller, 446 F.2d 65 (CA2 1971); Scott v. Plante, 532 F.2d 939, 946 (CA3 1976).

further deterioration in the patient's mental health. See 634 F.2d, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make non-emergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's parens patriae interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself ... were he competent" to decide. Id., at 661.¹⁰ Procedurally, the Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected by a judicial determination of "incompetency."¹¹ If such a

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¹⁰In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See ibid. ("In so holding, we do not imply that the Constitution). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: "Cf. Superintendent of Belchertown v. Saikewicz," 373 Mass. 728, 370 N.E.2d 417 (1978). Saikewicz held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded man incapable of giving informed consent. In Saikewicz the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See id., at 424-425. But it also referred to "the constitutional right to privacy," id., at 426, thus creating some doubt as to the extent that the decision had an independent state law basis.

Footnote(s) 11 will appear on following pages.

determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. Id., at 661.¹² 110

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,¹³ we granted certiorari. ____ U.S. ____ (1982). 115

II

A

~~As the Court of Appeals correctly emphasized,~~ The principal question on which we granted certiorari ^{is} whether an involuntarily committed mental patient has a 120

¹¹The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann. ch. 123 § 25; see ch. 201 §§ 1, 6, 12, 12 (appointment and powers of guardians). It suggested, however, that non-judicial procedures would satisfy the federal constitutional requirements of due process. See 634 F.2d, at 659-660.

¹²The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See 634 F.2d, at 661.

¹³Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent cases, including Rennie v. Klein, 653 F.2d 836 (CA3 1980), and Davis v. Hubbard, 506 F. Supp. 915 (D. Ohio 1980). On the issues raised, see generally Plotkin, supra; Shapiro, Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, 47 S. Cal. L. Rev. 237 (1974).

constitutional right to refuse treatment with antipsychotic drugs,¹⁴ *a question that* has both substantive and procedural aspects. 634 F.2d, at 656, 661; see Rennie v. Klein, 653 F.2d 836, 841 (CA3 1981). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.¹⁵ The substantive issue thus involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. Cf. Bell v. Wolfish, 441 U.S. 520, 560 (1979); Roe v. Wade, 410 U.S. 113, at 147-154 (1973); Jacobson v. Massachusetts, 197 U.S. 11 (1905).¹⁶ The procedural issue concerns the minimum

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¹⁴Pet. 1a.

¹⁵In this Court petitioners appear to concede the existence of a constitutional interest in freedom from bodily invasion, see Brief for Petitioners at 42-49, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. Id., at 54-68.

¹⁶This is illustrated by the opinion of the Court of Appeals. The court began by recognizing an individual liberty interest. It then found that the State had two interests potentially in competition with that liberty interest--a police power interest in maintaining order within the institution and preventing violence, see 634 F.2d, at 655, and a parens patriae interest in alleviating the sufferings of mental illness and in providing clinically effective treatment, see 634 F.2d, at 657. Finally, the Court of Appeals balanced the State's

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This note seems marginal.

procedures required by the Constitution for determining
 that the individual's liberty interest actually is 135
 outweighed in a particular instance.

The substantive and procedural issues both are
 intertwined with state law. State law may define liberty
 interests that, once defined, are protected by the due
 process clause of the Federal Constitution. See, e.g., 140
Vitek v. Jones, 445 U.S. 480, 488 (1980); Greenholtz v.
Nebraska Penal Inmates, 442 U.S. 1, 7 (1979); Wolff v.
McDonnell, 418 U.S. 539, 556-557 (1974). In addition, a
 State may confer procedural protections of liberty
 interests that extend beyond those minimally required by 145
 the Constitution of the United States. See, e.g., Kremer
v. Chemical Construction Corp., ____ U.S. ____, ____ (1982).
 If a State does so, the procedures minimally required by
 the Federal Constitution need not be identified.

B 150

Roughly five months after the Court of Appeals

interests separately against the liberty interests of
 patients who had been committed involuntarily, and reached
 different conclusions in the two cases.

decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its decision in In the Matter of Guardianship of Richard Roe, III, 421 N.E.2d 40 (1981) ("Roe III"). Roe 155

III involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,¹⁷ Massachusetts' highest court held in Roe 160

III that a person has a protected liberty interest in "'decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.'" 420 N.E. 2d, at 51 n.9.¹⁸ The court found-- 165

¹⁷See 421 N.E. 2d, at 42 and n.1, 51 n.9.

¹⁸Although the Massachusetts court quoted this formulation from the decision of the Court of Appeal in Mills v. Rogers, *supra*, 634 F.2d, at 653, the quotation is used to define the right, rather than to identify its legal source. Roe III noted that Mills v. Rogers had found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussing by stating its reliance on three bases, two of then not cited in Mills v. Rogers: the "inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth," and the "common law" right of persons to decide what will be done with their bodies. 420 N.E.2d, at 51 n.9.

again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States--that this interest of the individual was of such importance that it could be overcome only by "an overwhelming state interest." Id., at 51. Roe III 170

further held that a person did not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remained entitled to have ^a~~his~~ "substituted judgment" exercised on his behalf. Ibid. Defining this "substituted judgment" as one for which "[n]o medical 175 expertise is required," id., at 52, the Massachusetts Supreme Court required a judicial determination of substituted judgment before drugs could be administered in a particular instance,¹⁹ except possibly in cases of a

¹⁹See ibid.:

"The determination of what the incompetent individual would do if competent will probe the incompetent individual's values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction."

Having held that "a ward possesses but is incapable of exercising personally" the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the "primary dispute" as over "who ought to exercise this right on behalf of the ward." Id., at 51. The Supreme Court in Roe III identified six "relevant" but "not exclusive" factors that should guide the decisions of the lower

Judicial

Footnote continued on next page.

medical emergency.²⁰

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C

In Roe III the Massachusetts Supreme Court stated that its decision was limited to cases involving noninstitutionalized mental patients. See 420 N.E.2d, at

42, 55, 61-62.²¹ Nonetheless, respondents have argued^{convincingly} in

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this Court that Roe III may influence the correct disposition of the case at hand. ~~We agree.~~⁶

Especially in the wake of Roe III, it is distinctly possible that Massachusetts state law recognizes liberty interests of incompetent persons broader than those protected directly by the Constitution of the United

*Quirk, Resp
urged us
to DIG
because
of Roe III
cite its
motion to
dismiss*

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courts: "(1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." Id., at 57. It emphasized that the determination "must give the fullest possible expression to the character and circumstances" of the individual patient and that "this is a subjective rather than an objective determination." Id., at 56.

²⁰See id., at 54-55.

²¹But cf. id., at 50 ("because of the likelihood of ... the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination"), and at 62 ("We do not mean to imply that these patients' rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do, suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests").

States. Compare Roe III, supra, 420 N.E.2d, at 51
 (protected liberty interest in avoiding unwanted treatment
 continues even when a person becomes incompetent and
 creates a right of incompetents to have their "substituted
 judgment" determined) with Addington v. Texas, 441 U.S.
 418, 429-430 (1979) (because a person "who is suffering
 from a debilitating mental illness" is not "wholly at
 liberty," and because the complexities of psychiatric
 diagnosis "render certainties virtually beyond reach,"
 "practical considerations" may require "a compromise
 between what it is possible to prove and what protects the
 rights of the individual"). If so, those state-recognized
 interests may be entitled to the protection of procedural
 due process under the Federal Constitution. But in that
 case it would be unnecessary for this Court or indeed for
 the Court of Appeals to determine the scope of the
substantive protection that the Constitution affords
 against the involuntary administration of antipsychotic
 drugs.²² The broader protections afforded by state law

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²²It is this Court's settled policy to avoid unnecessary decisions of constitutional issues in cases
 Footnote continued on next page.

would be controlling.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protection of relevant liberty interests than the minimum adequate to survive ~~scrutiny~~ ^{review} under the due process clause. Compare Roe III, supra, 420 N.E.2d, at 51 ("We have ... stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment....") with Parham v. J.R., supra, 442 U.S., at 608 n.16 (Courts must not "unduly burden[] the legitimate efforts of the States to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.").²³

presenting possible alternative bases for decision. See, e.g., City of Mesquite v. Aladdin's Castle, ___ U.S. ___, (1982); New York Transit Authority v. Beazer, 440 U.S. 568, 582-583 n.22 (1979); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347-348 (1936) (Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. United States v. Hastings, 296 U.S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of abstract opinion").

²³Even prior to Roe III, the Court of Appeals concluded that Massachusetts state law, which it construed

Footnote continued on next page.

Again on this hypothesis state law would be dispositive of the procedural issues in the case at bar, which then would present no proper occasion for us to decide what procedures would represent the constitutional minimum.

Finally, even if state procedural law itself remains unchanged by Roe III, the federally mandated procedures will depend on the nature and weight of the state interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be ^{weighed} balanced against an individual's liberty interests, this Court frequently has consulted state law. See, e.g., Roe v. Wade, 410 U.S. 113, 148 and n.42, 151 and nn.48-50 (1973); Ingraham v. Wright, 430 U.S. 651, 661-663 (1977). We view the underlying state law predicate for weighing asserted state interests as

as requiring judicial determinations of incompetency separate from involuntary commitment proceedings, see 634 F.2d, at 658-659, "in many respects ... goes well beyond the minimum requirements mandated by the Fourteenth Amendment," id., at 659. Roe III now has taken the further step of requiring judicial procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent. [From our perspective of unfamiliarity with Massachusetts law, we hesitate to draw inferences--either positive or negative--about how a Massachusetts court would determine the procedural rights of institutionalized incompetents under the law of that State.]

Deck -
Roe v. Wade
is not a
model or
an opinion.
Can you
find another
case?

Deck -
I am
inclined to
omit this.
The opinion
itself is
neutral.

being put into doubt, if not altered, by Roe III.²⁴

Because the Court of Appeals ^{frequently considers} ~~regularly confronts~~ questions of Massachusetts law, it is better situated than we to determine how Roe III may have changed the law of Massachusetts and how any changes may affect this case. 245

Based on its greater familiarity with Massachusetts law, the Court of Appeals should determine in the first instance whether the decision in Roe III fairly requires a certification of potentially dispositive state law questions to the Supreme Judicial Court of Massachusetts. 250

See Bellotti v. Baird, 428 U.S. 132, 150-151 (1976).²⁵

The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-819 (1976). Moreover, in 255 an area where important federal questions are interrelated

²⁴In Roe III the Massachusetts court explicitly considered the implicated state interests, see 420 N.E.2d, at 59, and concluded that the trial judge had erred in finding that the State had a "vital" parens patriae interest in "seeing that its residents function at the maximum level of their capacity," ibid.

²⁵A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

- differing with the Court of Appeals in this case

The Ct of Appeals in this case had found a parens patriae interest. (Citation)

*Disak, I don't want to convey
impression that we ^{19.}
expect this case to return here.*

with state law, ~~it may aid our decisionmaking to give the~~
~~Court of Appeals an opportunity to clarify how it~~
~~perceives the relationship between state and federal law.~~
~~in the context of this case.~~

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III

~~For the reasons stated in this opinion,~~ The judgment
of the Court of Appeals is vacated and the case is
remanded for further proceedings consistent with this
opinion.

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So ordered.

*if there should be any further
occasion for consideration by
this Court of the questions
in this case, it would be
especially helpful to have
a clarification by the Ct. of
Apprs of*

Dick - All editing has
been stylistic ~~except~~ except
~~for~~ perhaps for pp. 6 & 8.

I'd like to circulate this
with Romeo if it is ready
~~to-day~~ to-day. We can make
stylistic changes in 2nd draft

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: Justice Powell

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1417

MARK J. MILLS, ET AL., PETITIONERS v.
RUBIE ROGERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The Court granted certiorari in this case to determine whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs.

I

This litigation began on April 27, 1975, when respondent Rubie Rogers and six other persons filed suit against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution. During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.¹ Alleging that forcible

¹ As used in this litigation, the term "antipsychotic drugs" refers to medications such as Thorazine, Mellaril, Prolixin and Haldol that are used in treating psychoses, especially schizophrenia. See *Rogers v. Okin*, 478 F. Supp. 1342, 1359-1360 (D. Mass. 1979), aff'd in part and reversed in part, 634 F. 2d 650, 653 (CA1 1981). Sometimes called "major tranquilizers, these compounds were introduced into psychiatry in the early 1950s. See Cole & Davis, *Antipsychotic Drugs*, in 2 A. Freeman, H. Kaplan, and B. Sadock, *Comprehensive Textbook of Psychiatry* II 1921 (2d ed. 1975). It is not disputed that such drugs are "mind-altering." Their effectiveness resides in their capacity to achieve such effects. Citing authorities, petitioners assert that such drugs are essential not only to the treatment of

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administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs—respondents here—sought compensatory and punitive damages and injunctive relief.²

The District Court certified the case as a class action. See *Rogers v. Okin*, 478 F. Supp. 1342, 1352 n. 1 (D.Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.³ The District Court found that an involuntary “commitment” provided no basis for an inference of legal

individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17-41, 54-100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by mask-like face, retarded volitional movements, and tremors; akathasis, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, characterized by involuntary muscle movements, especially around the mouth. See *Rogers v. Okin*, *supra*, 478 F. Supp., at 1360; Byck, *Drugs and the Treatment of Psychiatric Disorders*, in L. Goodman and A. Gilman, *The Pharmacological Basis of Therapeutics* 169 (2d ed. 1975).

²The plaintiffs also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted claims for damages under state tort law. *Id.*, at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See *id.*, at 1371, 1374. Neither this decision, nor the denial of relief on the damages claims, is in issue before this Court.

³The District Court characterized liberty to make “the intimate decision whether to accept or refuse [antipsychotic] medication” as “basic to any right of privacy” and therefore protected by the Constitution. See 478 F. Supp., at 1366. It did not derive this right from any particular constitutional provision, although it did observe that the “concept of a right of privacy . . . embodies First Amendment concerns.” *Ibid.* In relying on the First Amendment the court reasoned that “the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection.” *Id.*, at 1367.

respondents

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“incompetency” to make this decision under Massachusetts law. *Id.*, at 1359–1362.⁴ Until a judicial finding of incompetency had been made, the court concluded, the wishes of the patients generally must be respected. *Id.*, at 1365–1368. Even when a state court had rendered a determination of incompetency, the District Court found that the patient’s right to make treatment decisions was not forfeited, but must be exercised on his behalf by a court-appointed guardian. *Id.*, at 1364. Without consent either by the patient or his guardian, the court held, the patient’s liberty interests could be overridden only in an emergency.⁵

petitioner
⁴ Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, e. g., *Superintendent of Belchertown Hospital v. Saikewicz*, 373 Mass. 728, 738–739, 370 N. E. 2d 417, 424 (Mass. 1977); W. Prosser, *Torts* § 18 (4th ed. 1971). In this case the defendants had argued—as they continue to argue—that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann. ch. 123 (1979), provided a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 (“No person shall be deprived of the right to manage his affairs . . . solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent”), and Mass. Gen. Laws Ann. ch. 123, § 25 (“No person shall be deemed to be incompetent to manage his affairs . . . solely by reason of his admission or commitment in any capacity. . . .”). The court also appears to have engaged in independent fact-finding leading to the same conclusion: “The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic medication.” 478 F. Supp., at 1361.

⁵ The District Court defined an emergency as a situation in which failure to medicate “would result in a substantial likelihood of physical harm to the patient, other patients, or to staff members of the institution.” 478 F.

The Court of Appeals for the First Circuit affirmed in part and reversed in part. *Rogers v. Okin*, 634 F. 2d 650 (1981). It agreed that mental patients had a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. *Id.*, at 653.⁶ It also accepted the trial court's conclusion that Massachusetts law recognized even involuntarily committed persons as presumptively competent to assert this interest in their own behalf. See *id.*, at 657-659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty interests of the patient.

The Court of Appeals found that the State had two interests that must be weighed against the liberty interests asserted by the patient: a police power interest in maintaining order within the institution and in preventing violence, see 634 F. 2d, at 655, and a *parens patriae* interest in alleviating the sufferings of mental illness and in providing clinically effective treatment, see 634 F. 2d, at 657. The court held that the State, under its police powers, could administer medication forcibly only upon a determination that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual" and that "reasonable

Supp., at 1365.

⁶The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F. 2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this interest is unclear," *ibid.*, it concluded that "a source in the Due Process Clause of the Constitution for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." *Ibid.* The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

alternatives to the administration of antipsychotics [have been] ruled out." 634 F. 2d, at 656. Criticizing the District Court for imposing what it regarded as a more rigid standard, the Court of Appeals held that a hospital's professional staff must have substantial discretion in deciding when an impending emergency required involuntary medication.⁷ The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the "police power" standard accorded adequate procedural protection to "the interests of the patients."⁸

With ~~regard~~^{respect} to the State's *parens patriae* powers, the Court of Appeals accepted the District Court's state law distinction between patients who had and patients who had not been adjudicated incompetent. Where a patient had not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,⁹ the court ruled that the *parens patriae* interest would justify involuntary medication only when necessary to prevent further deterioration in the patient's mental health. See 634 F. 2d, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make non-emergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's

⁷The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See 634 F. 2d, at 656.

⁸It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." 634 F. 2d, at 656.

⁹A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. Rev. 461, 504-525 (1977). Several courts of appeals have held that civil commitment does not raise even a presumption of incompetence. See *Winters v. Miller*, 446 F. 2d 65 (CA2 1971); *Scott v. Plante*, 532 F. 2d 939, 946 (CA3 1976).

parens patriae interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself . . . were he competent" to decide. *Id.*, at 661.¹⁰ Procedurally, the Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected by a judicial determination of "incompetency."¹¹ If such a determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. *Id.*, at 661.¹²

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sentence

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,¹³ we granted certiorari. — U. S. — (1982).

¹⁰ In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See *ibid.* ("In so holding, we do not imply that the Constitution . . ."). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: "*Cf. Superintendent of Belchertown v. Saikewicz*," 373 Mass. 728, 370 N. E. 2d 417 (1977). *Saikewicz* held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded man incapable of giving informed consent. In *Saikewicz* the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See *id.*, at 738–738, 370 N. E. 2d, at 424–425. But the court characterized its analysis as having identified a "constitutional right of privacy," *id.*, at 739, 370 N. E. 2d, at 426, thus creating some doubt as to the extent that the decision had an independent state law basis.

¹¹ The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann. ch. 123 § 25; see ch. 201 §§ 1, 6, 12, 12 (appointment and powers of guardians). It suggested, however, that non-judicial procedures would satisfy the federal constitutional requirements of due process. See 634 F. 2d, at 659–660.

¹² The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See 634 F. 2d, at 661.

¹³ Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent

II

A

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs.¹⁴ This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie v. Klein*, 653 F. 2d 836, 841 (CA3 1981). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.¹⁵ The substantive issue thus involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. Cf. *Bell v. Wolfish*, 441 U. S. 520, 560 (1979); *Roe v. Wade*, 410 U. S. 113, at 147-154 (1973); *Jacobson v. Massachusetts*, 197 U. S. 11 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham v. J.R.*, 442 U. S. 584, 606 (1979); *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's federally protected liberty interest without reference to state

cases, including *Rennie v. Klein*, 653 F. 2d 836 (CA3 1980), and *Davis v. Hubbard*, 506 F. Supp. 915 (D. Ohio 1980). On the issues raised, see generally Plotkin, *supra*; Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237 (1974).

¹⁴ Pet. 1a.

¹⁵ In this Court petitioners appear to concede the existence of a constitutional interest in freedom from bodily invasion, see Brief for Petitioners at 42-49, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54-68.

law.¹⁶ Having done so, it then might proceed to adjudicate the procedural protection required by the due process clause for the federal interest alone. Cf. *Vitek v. Jones*, 445 U. S. 480, 491-494 (1980). For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. See *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 7, 12 (1979); *Oregon v. Hass*, 420 U. S. 714, 719 (1975); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State. The federal guarantees would not be "substantively" controlling.

Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, see, e. g., *Vitek v. Jones*, *supra*, at 488; *Greenholtz v. Nebraska Penal Inmates*, *supra*, at 7, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If

¹⁶ As do the parties, *however*, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution, cf. *O'Connor v. Donaldson*, 422 U. S. 563 (1975), and that these interests are implicated by the involuntary administration of antipsychotic drugs.

In view of our decision to remand this case (see Part III D, ~~supra~~ *infra* p 13 ~~et seq~~), we need not decide the question that prompted us to grant this case.

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a State does so, the minimal requirements of the Federal Constitution would not be controlling, and ~~would not need to~~ ^{not} be identified in order to determine the legal rights and duties of persons within that State.

B

Roughly five months after the Court of Appeals decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its decision in *In the Matter of Guardianship of Richard Roe, III*, — Mass. —, 421 N. E. 2d 40 (1981) ("*Roe III*"). *Roe III* involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,¹⁷ Massachusetts' highest court held in *Roe III* that a person has a protected liberty interest in "'decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.'" — Mass., at —, 420 N. E. 2d, at 51 n. 9.¹⁸ The court found—again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States—that this interest of the individual was of such importance that it could be overcome only

¹⁷ See — Mass., at —, 421 N. E. 2d, at 42 and n. 1, 51 n. 9.

¹⁸ Although the Massachusetts court quoted this formulation from the decision of the Court of Appeal in *Mills v. Rogers*, *supra*, 634 F. 2d, at 653, the quotation is used to define the right, rather than to identify its legal source. *Roe III* noted that *Mills v. Rogers* had found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussion by stating its reliance on three bases, two of then not cited in *Mills v. Rogers*: the "inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth," and the "common law" right of persons to decide what will be done with their bodies. — Mass., at —, 420 N. E. 2d, at 51 n. 9. ^{however,}

by "an overwhelming state interest." *Id.*, at —, 420 N. E. 2d, at 51. *Roe III* further held that a person did not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remained entitled to have his "substituted judgment" exercised on his behalf. *Ibid.* Defining this "substituted judgment" as one for which "[n]o medical expertise is required," *id.*, at —, 420 N. E. 2d, at 52, the Massachusetts Supreme Court required a *judicial* determination of substituted judgment before drugs could be administered in a particular instance,¹⁹ except possibly in cases of a medical emergency.²⁰

C

In *Roe III* the Massachusetts Supreme Court stated that its decision was limited to cases involving *noninstitutionalized* mental patients. See — Mass., at —; 420 N. E. 2d, at 42, 55, 61-62.²¹ Nonetheless, respondents have argued in

¹⁹ See *ibid.*:

"The determination of what the incompetent individual would do if competent will probe the incompetent individual's values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction."

Having held that "a ward possesses but is incapable of exercising personally" the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the "primary dispute" as over "who ought to exercise this right on behalf of the ward." *Id.*, at —, 420 N. E. 2d, at 51. The Supreme Judicial Court in *Roe III* identified six "relevant" but "not exclusive" factors that should guide the decisions of the lower courts: "(1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." *Id.*, at —, 420 N. E. 2d, at 57. It emphasized that the determination "must 'give the fullest possible expression to the character and circumstances'" of the individual patient and that "this is a subjective rather than an objective determination." *Id.*, at —, 420 N. E. 2d, at 56.

²⁰ See *id.*, at —, 420 N. E. 2d, at 54-55.

²¹ But cf. *id.*, at —, 420 N. E. 2d, at 50 ("because of the likelihood of

this Court that *Roe III* may influence the correct disposition of the case at hand.²² We agree.

Especially in the wake of *Roe III*, it is distinctly possible that Massachusetts state law recognizes liberty interests of incompetent persons broader than those protected directly by the Constitution of the United States. Compare *Roe III*, *supra*, — Mass., at —, 420 N. E. 2d, at 51 (protected liberty interest in avoiding unwanted treatment continues even when a person becomes incompetent and creates a right of incompetents to have their “substituted judgment” determined) with *Addington v. Texas*, 441 U. S. 418, 429–430 (1979) (because a person “who is suffering from a debilitating mental illness” is not “wholly at liberty,” and because the complexities of psychiatric diagnosis “render certainties virtually beyond reach,” “practical considerations” may require “a compromise between what it is possible to prove and what protects the rights of the individual”). If ~~so~~ the substantive protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protec-

The state interest is broader.

... the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination”), and at —, 420 N. E. 2d, at 62 (“We do not mean to imply that these patients’ rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do, suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests. . . .”).

²² Respondents first presented this argument in a Motion to Dismiss or in the Alternative Certify Certain Questions to the Supreme Judicial Court of Massachusetts, filed October 1, 1981. In their brief on the merits, respondents argue that *Roe III* provides an alternative basis on which this Court could affirm the judgment of the Court of Appeals.

tion of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe III*, *supra*, — Mass., at —, 420 N. E. 2d, at 51 (“We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment. . . .”) with *Parham v. J.R.*, *supra*, 442 U. S., at 608 n. 16 (Courts must not “unduly burden[] the legitimate efforts of the States to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.”).²³ Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe III*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual’s liberty interests, this Court frequently has consulted state law. See, *e. g.*, *Roe v. Wade*, 410 U. S. 113, 148 and n. 42, 151 and nn. 48–50 (1973); *Ingraham v. Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe III*.²⁴

²³ Even prior to *Roe III*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, “in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment,” *id.*, at 659. *Roe III* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a non-institutionalized incompetent.

²⁴ In *Roe III* the Massachusetts court explicitly considered the implicated state interests, see — Mass., at —, 420 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a “vital” *parens*

D

It is unclear on the record presented whether respondents, in the District Court, did or did not argue the existence of “substantive” state law liberty interests as a basis for their claim to procedural protection relief under the federal Due Process Clause, or whether they may have claimed state law procedural protections for substantive federal interests.²⁵ In their brief in this Court, however, respondents clearly assert state law arguments as alternative grounds for affirming both the “substantive” and “procedural” decisions of the Court of Appeals. See Brief for Respondents, esp. at 61, 71-72, 92-95.

Until certain questions have been answered, we think it would be inappropriate for this Court to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independently of state law. It is this Court’s settled policy to avoid unnecessary decisions of constitutional issues. See, e. g., *City of Mesquite v. Aladdin’s Castle*, — U. S. —, — (1982); *New York Transit Authority v. Beazer*, 440 U. S. 568, 582-583 n. 22 (1979); *Ashwander v. Tennessee Valley Authority*, 297

patriae interest in “seeing that its residents function at the maximum level of their capacity,” *ibid.* The Court of Appeals in this case had found and weighed a *parens patriae* interest. 634 F. 2d, at 657-661.

²⁵ Although relying primarily on federal constitutional grounds, the respondent’s original complaint in the District Court could be construed as raising state law guarantees either as alternative or as interrelated bases for relief. See Complaint, No. 75-160-T (D. Mass.) (filed April 25, 1975). In their briefs in the Court of Appeals, respondents relied unambiguously on state law in support of both the “substantive” and “procedural” rights that they now claim in this Court. See Brief for Plaintiff-Appellants, No. 79-1649, at 44 (“Massachusetts law created a legal entitlement to be free from forced medications except in emergencies. . . .”; Brief for Plaintiff-Appellees, No. 79-1648, at 54 (“[T]he lower court’s requirement that a guardian must decide whether an incompetent patient will receive psychotropic medication in a non-emergency was the correct application of state law and was not based on constitutional authority.”) (emphasis omitted).

U. S. 288, 347-348 (1936)(Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. *United States v. Hastings*, 296 U. S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of abstract opinion").

In applying this policy of restraint, we are uncertain here which if any constitutional issues now must be decided to resolve the controversy between the parties. In the wake of *Roe III*, we ~~could not~~ say with confidence that adjudication based solely on identification of federal constitutional interests would determine the actual rights and duties of the parties before us. And, as an additional cause for hesitation, our reading of the opinion of the Court of Appeals has left us in doubt as to the extent to which state issues were argued below and the degree to which the court's holdings may rest on subsequently altered state law foundations.

Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than we to determine how *Roe III* may have changed the law of Massachusetts and how any changes may affect this case. Accordingly, we think it appropriate for the Court of Appeals to determine in the first instance whether *Roe III* requires revision of its holdings or whether it may call for the certification of potentially dispositive state law questions to the Supreme Judicial Court of Massachusetts, see *Bellotti v. Baird*, 428 U. S. 132, 150-151 (1976).²⁶ The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 813-819 (1976).

The judgment of the Court of Appeals is therefore vacated

²⁶ A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

cannot

and the case is remanded for further proceedings consistent with this opinion.

So ordered.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **MAY 10 1982**

Recirculated: _____

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SUPREME COURT OF THE UNITED STATES

No. 80-1417

MARK J. MILLS, ET AL., PETITIONERS *v.*
RUBIE ROGERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The Court granted certiorari in this case to determine whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs.

I

This litigation began on April 27, 1975, when respondent Rubie Rogers and six other persons filed suit against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution. During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.¹ Alleging that forcible

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administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs—respondents here—sought compensatory and punitive damages and injunctive relief.²

The District Court certified the case as a class action. See *Rogers v. Okin*, 478 F. Supp. 1342, 1352 n. 1 (D.Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.³ The District Court found that an involun-

treatment of individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17-41, 54-100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by mask-like face, retarded volitional movements, and tremors; akathisia, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, a disease characterized in its mild form by involuntary muscle movements, especially around the mouth. Tardive dyskinesia can be even more disabling in its most severe forms. See *Rogers v. Okin*, *supra*, 478 F. Supp., at 1360; Byck, *Drugs and the Treatment of Psychiatric Disorders*, in L. Goodman and A. Gilman, *The Pharmacological Basis of Therapeutics* 169 (2d ed. 1975).

²The respondents also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted claims for damages under state tort law. *Id.*, at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See *id.*, at 1371, 1374. Neither this decision, nor the denial of relief on the damages claims, is in issue before this Court.

³The District Court characterized liberty to make "the intimate decision whether to accept or refuse [antipsychotic] medication" as "basic to any right of privacy" and therefore protected by the Constitution. See 478 F. Supp., at 1366. The court did not derive this right from any particular constitutional provision, although it did observe that the "concept of a right of privacy . . . embodies First Amendment concerns." *Ibid.* In relying on the First Amendment the court reasoned that "the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Id.*, at 1367.

tary "commitment" provides no basis for an inference of legal "incompetency" to make this decision under Massachusetts law. *Id.*, at 1361-1362.⁴ Until a judicial finding of incompetency has been made, the court concluded, the wishes of the patients generally must be respected. *Id.*, at 1365-1368. Even when a state court has rendered a determination of incompetency, the District Court found that the patient's right to make treatment decisions is not forfeited, but must be exercised on his behalf by a court-appointed guardian. *Id.*, at 1364. Without consent either by the patient or his guardian, the court held, the patient's liberty interests may be overridden only in an emergency.⁵

⁴ Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, e. g., *Superintendent of Belchertown Hospital v. Saikewicz*, 373 Mass. 728, 738-739, 370 N. E. 2d 417, 424 (1977); W. Prosser, *Torts* § 18 (4th ed. 1971). In this case the petitioners had argued—as they continue to argue—that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann. ch. 123 (1979), provided a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 ("No person shall be deprived of the right to manage his affairs . . . solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent"), and Mass. Gen. Laws Ann. ch. 123, § 25 ("No person shall be deemed to be incompetent to manage his affairs . . . solely by reason of his admission or commitment in any capacity. . . .")). The court also appears to have engaged in independent fact-finding leading to the same conclusion: "The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic medication." 478 F. Supp., at 1361.

⁵ The District Court defined an emergency as a situation in which failure to medicate "would result in a substantial likelihood of physical harm to th[e] patient, other patients, or to staff members of the institution." 478

The Court of Appeals for the First Circuit affirmed in part and reversed in part. *Rogers v. Okin*, 634 F. 2d 650 (1980). It agreed that mental patients have a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. *Id.*, at 653.⁶ It also accepted the trial court's conclusion that Massachusetts law recognizes even involuntarily committed persons as presumptively competent to assert this interest on their own behalf. See *id.*, at 657-659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty interests of the patient.

The Court of Appeals found that the State has two interests that must be weighed against the liberty interests asserted by the patient: a police power interest in maintaining order within the institution and in preventing violence, see 634 F. 2d, at 655, and a *parens patriae* interest in alleviating the sufferings of mental illness and in providing clinically effective treatment, see 634 F. 2d, at 657. The court held that the State, under its police powers, may administer medication forcibly only upon a determination that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual" and that "reasonable

F. Supp., at 1365.

⁶The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F. 2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this interest is unclear," *ibid.*, it concluded that "a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." *Ibid.* The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

alternatives to the administration of antipsychotics [have been] ruled out." 634 F. 2d, at 656. Criticizing the District Court for imposing what it regarded as a more rigid standard, the Court of Appeals held that a hospital's professional staff must have substantial discretion in deciding when an impending emergency requires involuntary medication.⁷ The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the "police power" standard accord adequate procedural protection to "the interests of the patients."⁸

With respect to the State's *parens patriae* powers, the Court of Appeals accepted the District Court's state law distinction between patients who have and patients who have not been adjudicated incompetent. Where a patient has not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,⁹ the court ruled that the *parens patriae* interest will justify involuntary medication only when necessary to prevent further deterioration in the patient's mental health. See 634 F. 2d, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make non-emergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's

⁷ The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See 634 F. 2d, at 656.

⁸ It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." 634 F. 2d, at 656.

⁹ A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. Rev. 461, 504-525 (1977). The Court of Appeals for the Second Circuit has held that civil commitment does not raise even a presumption of incompetence. See *Winters v. Miller*, 446 F. 2d 65 (1971).

parens patriae interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself . . . were he competent" to decide. *Id.*, at 661.¹⁰ The Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected procedurally by a judicial determination of "incompetency."¹¹ If such a determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. *Id.*, at 661.¹²

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,¹³ we granted certiorari. — U. S. — (1982).

¹⁰ In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See *ibid.* ("In so holding, we do not imply that the Constitution . . ."). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: "*Cf. Superintendent of Belchertown v. Saikewicz*," 373 Mass. 728, 370 N. E. 2d 417 (1977). *Saikewicz* held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded man incapable of giving informed consent. In *Saikewicz* the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See *id.*, at 738-741, 370 N. E. 2d, at 424-425. But the court characterized its analysis as having identified a "constitutional right of privacy," *id.*, at 739, 370 N. E. 2d, at 426, thus creating some doubt as to the extent that the decision had an independent state law basis.

¹¹ The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann. ch. 123 § 25; see ch. 201 §§ 1, 6, 12, 12 (appointment and powers of guardians). It suggested, however, that non-judicial procedures would satisfy the federal constitutional requirements of due process. See 634 F. 2d, at 659-660.

¹² The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See 634 F. 2d, at 661.

¹³ Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent

II

A

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs.¹⁴ This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie v. Klein*, 653 F. 2d 836, 841 (CA3 1980). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.¹⁵ The substantive issue thus involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. Cf. *Bell v. Wolfish*, 441 U. S. 520, 560 (1979); *Roe v. Wade*, 410 U. S. 113, 147-154 (1973); *Jacobson v. Massachusetts*, 197 U. S. 11, 25-27 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham v. J.R.*, 442 U. S. 584, 606 (1979); *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's

cases, including *Rennie v. Klein*, 653 F. 2d 836 (CA3 1980), and *Davis v. Hubbard*, 506 F. Supp. 915 (D. Ohio 1980). On the issues raised, see generally Plotkin, *supra*; Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237 (1974).

¹⁴ Pet. 1.

¹⁵ In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion, see Brief for Petitioners at 43-47, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54-68.

federally protected liberty interest without reference to state law.¹⁶ Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone. Cf. *Vitek v. Jones*, 445 U. S. 480, 491-494 (1980). For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. See *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 7, 12 (1979); *Oregon v. Hass*, 420 U. S. 714, 719 (1975); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.

Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, see, e. g., *Vitek v. Jones*, *supra*, at 488; *Greenholtz v. Nebraska Penal Inmates*, *supra*, at 7, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer *procedural* protections of liberty interests that extend beyond those mini-

¹⁶ As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution, cf. *O'Connor v. Donaldson*, 422 U. S. 563 (1975), and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only "assuming" the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests.

mally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.

B

Roughly five months after the Court of Appeals decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its decision in *In the Matter of Guardianship of Richard Roe, III*, — Mass. —, 421 N. E. 2d 40 (1981) (“*Roe III*”). *Roe III* involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,¹⁷ Massachusetts’ highest court held in *Roe III* that a person has a protected liberty interest in “‘decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.’” — Mass., at —, 420 N. E. 2d, at 51 n. 9.¹⁸ The court found—again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States—that this interest of the individual is of such importance that it can be overcome only by

¹⁷ See — Mass., at —, 421 N. E. 2d, at 42 and n. 1, 51 n. 9.

¹⁸ Although the Massachusetts court quoted this formulation from the decision of the Court of Appeal in *Mills v. Rogers*, *supra*, 634 F. 2d, at 653, the quotation is used to define the right, rather than to identify its legal source. *Roe III* noted that *Mills v. Rogers* found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussion by stating its reliance on three bases, two of them not cited in *Mills v. Rogers*: the “inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth,” and the “common law” right of persons to decide what will be done with their bodies. — Mass., at —, 420 N. E. 2d, at 51 n. 9.

“an overwhelming State interest.” *Id.*, at —, 420 N. E. 2d, at 51. *Roe III* further held that a person does not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remains entitled to have his “substituted judgment” exercised on his behalf. *Ibid.* Defining this “substituted judgment” as one for which “[n]o medical expertise is required,” *id.*, at —, 420 N. E. 2d, at 52, the Massachusetts Supreme Judicial Court required a *judicial* determination of substituted judgment before drugs could be administered in a particular instance,¹⁹ except possibly in cases of medical emergency.²⁰

C

The Massachusetts Supreme Court stated that its decision was limited to cases involving *noninstitutionalized* mental patients. See — Mass., at —; 420 N. E. 2d, at 42, 55, 61–62.²¹ Nonetheless, respondents have argued in this

¹⁹ See *ibid.*:

“The determination of what the incompetent individual would do if competent will probe the incompetent individual’s values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction.”

Having held that a “ward possesses but is incapable of exercising personally” the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the “primary dispute” as over “who ought to exercise this right on behalf of the ward.” *Id.*, at —, 420 N. E. 2d, at 51. The Supreme Judicial Court in *Roe III* identified six “relevant” but “not exclusive” factors that should guide the decisions of the lower courts: “(1) the ward’s expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward’s family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment.” *Id.*, at —, 420 N. E. 2d, at 57. It emphasized that the determination “must ‘give the fullest possible expression to the character and circumstances’” of the individual patient and that “this is a subjective rather than an objective determination.” *Id.*, at —, 420 N. E. 2d, at 56 (citation omitted).

²⁰ See *id.*, at —, 420 N. E. 2d, at 54–55.

²¹ But cf. *id.*, at —, 420 N. E. 2d, at 50 (“because of the likelihood of

Court that *Roe III* may influence the correct disposition of the case at hand.²² We agree.

Especially in the wake of *Roe III*, it is distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States. Compare *Roe III, supra*, — Mass., at —, 420 N. E. 2d, at 51 (protected liberty interest in avoiding unwanted treatment continues even when a person becomes incompetent and creates a right of incompetents to have their “substituted judgment” determined) with *Addington v. Texas*, 441 U. S. 418, 429–430 (1979) (because a person “who is suffering from a debilitating mental illness” is not “wholly at liberty,” and because the complexities of psychiatric diagnosis “render certainties virtually beyond reach,” “practical considerations” may require “a compromise between what it is possible to prove and what protects the rights of the individual”). If the state interest is broader, the *substantive* protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protec-

. . . the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination”), and at —, 420 N. E. 2d, at 62 (“We do not mean to imply that these [involuntarily committed] patients’ rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do, suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests. . .”).

²² Respondents first presented this argument in a Motion to Dismiss or in the Alternative Certify Certain Questions to the Supreme Judicial Court of Massachusetts, filed in this Court on October 1, 1981. In their brief on the merits, respondents argue that *Roe III* provides an alternative basis on which this Court could affirm the judgment of the Court of Appeals.

tion of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe III*, *supra*, — Mass., at —, 420 N. E. 2d, at 51 (“We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment. . . .”) with *Parham v. J.R.*, *supra*, 442 U. S., at 608 n. 16 (Courts must not “unduly burden[] the legitimate efforts of the States to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.”).²³ Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe III*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual’s liberty interests, this Court may look to state law. See, *e. g.*, *Roe v. Wade*, 410 U. S. 113, 148 and n. 42, 151 and nn. 48–50 (1973); *Ingraham v. Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe III*.²⁴

²³ Even prior to *Roe III*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, “in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment,” *id.*, at 659 (footnote omitted). *Roe III* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent.

²⁴ In *Roe III* the Massachusetts court explicitly considered the implicated state interests, see — Mass., at —, 420 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a “vital” *parens patriae* interest in “seeing that its residents function at the maximum level

D

It is unclear on the record presented whether respondents, in the District Court, did or did not argue the existence of “substantive” state law liberty interests as a basis for their claim to procedural protection relief under the federal Due Process Clause, or whether they may have claimed state law procedural protections for substantive federal interests.²⁵ In their brief in this Court, however, respondents clearly assert state law arguments as alternative grounds for affirming both the “substantive” and “procedural” decisions of the Court of Appeals. See Brief for Respondents, esp. at 61, 71–72, 92–95.

Until certain questions have been answered, we think it would be inappropriate for us to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independently of state law. It is this Court’s settled policy to avoid unnecessary decisions of constitutional issues. See, e. g., *City of Mesquite v. Aladdin’s Castle*, — U. S. —, — (1982); *New York Transit Authority v. Beazer*, 440 U. S. 568, 582–583 n. 22 (1979); *Poe v. Ullman*, 367 U. S. 497, 502–509 (1961); *Ashwander v.*

of their capacity,” *ibid.* The Court of Appeals in this case had found and weighed a *parens patriae* interest. 634 F. 2d, at 657–661.

²⁵ Although relying primarily on federal constitutional grounds, the respondent’s original complaint in the District Court could be construed as raising state law guarantees either as alternative or as interrelated bases for relief. See Complaint, No. 75-160-T (D. Mass.) (filed April 27, 1975). In their briefs in the Court of Appeals, respondents relied unambiguously on state law in support of both the “substantive” and “procedural” rights that they now claim in this Court. See Brief for Plaintiff-Appellants, No. 79-1649, at 44 (“Massachusetts law created a legal entitlement to be free from forced medications except in emergencies. . . .”; Brief for Plaintiff-Appellees, No. 79-1648, at 54 (“[T]he lower court’s requirement that a guardian must decide whether an incompetent patient will receive psychotropic medication in a non-emergency was the correct application of state law and was not based upon constitutional authority.”) (emphasis omitted).

Tennessee Valley Authority, 297 U. S. 288, 341, 347-348 (1936) (Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. *United States v. Hastings*, 296 U. S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of abstract opinion").

In applying this policy of restraint, we are uncertain here which if any constitutional issues now must be decided to resolve the controversy between the parties. In the wake of *Roe III*, we cannot say with confidence that adjudication based solely on identification of federal constitutional interests would determine the actual rights and duties of the parties before us. And, as an additional cause for hesitation, our reading of the opinion of the Court of Appeals has left us in doubt as to the extent to which state issues were argued below and the degree to which the court's holdings may rest on subsequently altered state law foundations.

Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than we to determine how *Roe III* may have changed the law of Massachusetts and how any changes may affect this case. Accordingly, we think it appropriate for the Court of Appeals to determine in the first instance whether *Roe III* requires revision of its holdings or whether it may call for the certification of potentially dispositive state law questions to the Supreme Judicial Court of Massachusetts, see *Bellotti v. Baird*, 428 U. S. 132, 150-151 (1976).²⁸ The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 813-819 (1976).

The judgment of the Court of Appeals is therefore vacated

²⁸ A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

and the case is remanded for further proceedings consistent with this opinion.

So ordered.

CHAMBERS OF

JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States
Washington, D. C. 20543

May 18, 1982

No. 80-1417 Mills v. Rogers

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

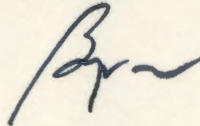
May 19, 1982

Re: 80-1417 - Mills v. Rogers

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **MAY 20 1982**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1417

MARK J. MILLS ET AL., PETITIONERS *v.*
RUBIE ROGERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The Court granted certiorari in this case to determine whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs.

I

This litigation began on April 27, 1975, when respondent Rubie Rogers and six other persons filed suit against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution. During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.¹ Alleging that forcible

¹As used in this litigation, the term "antipsychotic drugs" refers to medications such as Thorazine, Mellaril, Prolixin and Haldol that are used in treating psychoses, especially schizophrenia. See *Rogers v. Okin*, 478 F. Supp. 1342, 1359-1360 (D. Mass. 1979), *aff'd* in part and reversed in part, 634 F. 2d 650, 653 (CA1 1980). Sometimes called "major tranquilizers," these compounds were introduced into psychiatry in the early 1950s. See Cole & Davis, *Antipsychotic Drugs*, in 2 A. Freeman, H. Kaplan, and B. Sadock, *Comprehensive Textbook of Psychiatry II*, at 1921-1922 (2d ed. 1975). It is not disputed that such drugs are "mind-altering." Their effectiveness resides in their capacity to achieve such effects. Citing authorities, petitioners assert that such drugs are essential not only to the

administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs—respondents here—sought compensatory and punitive damages and injunctive relief.²

The District Court certified the case as a class action. See *Rogers v. Okin*, 478 F. Supp. 1342, 1352 n. 1 (D. Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.³ The District Court found that an involun-

treatment of individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17-41, 54-100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by mask-like face, retarded volitional movements, and tremors; akathisia, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, a disease characterized in its mild form by involuntary muscle movements, especially around the mouth. Tardive dyskinesia can be even more disabling in its most severe forms. See *Rogers v. Okin*, *supra*, 478 F. Supp., at 1360; Byck, *Drugs and the Treatment of Psychiatric Disorders*, in L. Goodman and A. Gilman, *The Pharmacological Basis of Therapeutics* 169 (2d ed. 1975).

²The respondents also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted claims for damages under state tort law. *Id.*, at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See *id.*, at 1371, 1374. Neither this decision, nor the denial of relief on the damages claims, is in issue before this Court.

³The District Court characterized liberty to make "the intimate decision whether to accept or refuse [antipsychotic] medication" as "basic to any right of privacy" and therefore protected by the Constitution. See 478 F. Supp., at 1366. The court did not derive this right from any particular constitutional provision, although it did observe that the "concept of a right of privacy . . . embodies First Amendment concerns." *Ibid.* In relying on the First Amendment the court reasoned that "the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Id.*, at 1367.

tary "commitment" provides no basis for an inference of legal "incompetency" to make this decision under Massachusetts law. *Id.*, at 1361-1362.⁴ Until a judicial finding of incompetency has been made, the court concluded, the wishes of the patients generally must be respected. *Id.*, at 1365-1368. Even when a state court has rendered a determination of incompetency, the District Court found that the patient's right to make treatment decisions is not forfeited, but must be exercised on his behalf by a court-appointed guardian. *Id.*, at 1364. Without consent either by the patient or his guardian, the court held, the patient's liberty interests may be overridden only in an emergency.⁵

⁴ Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, e. g., *Superintendent of Belchertown Hospital v. Saikewicz*, 373 Mass. 728, 738-739, 370 N. E. 2d 417, 424 (1977); W. Prosser, *Torts* § 18 (4th ed. 1971). In this case the petitioners had argued—as they continue to argue—that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann. ch. 123 (1979), provided a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 ("No person shall be deprived of the right to manage his affairs . . . solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent"), and Mass. Gen. Laws Ann. ch. 123, § 25 ("No person shall be deemed to be incompetent to manage his affairs . . . solely by reason of his admission or commitment in any capacity. . . .")). The court also appears to have engaged in independent fact-finding leading to the same conclusion: "The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic medication." 478 F. Supp., at 1361.

⁵ The District Court defined an emergency as a situation in which failure to medicate "would result in a substantial likelihood of physical harm to th[e] patient, other patients, or to staff members of the institution." 478

The Court of Appeals for the First Circuit affirmed in part and reversed in part. *Rogers v. Okin*, 634 F. 2d 650 (1980). It agreed that mental patients have a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. *Id.*, at 653.⁶ It also accepted the trial court's conclusion that Massachusetts law recognizes even involuntarily committed persons as presumptively competent to assert this interest on their own behalf. See *id.*, at 657-659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty interests of the patient.

The Court of Appeals found that the State has two interests that must be weighed against the liberty interests asserted by the patient: a police power interest in maintaining order within the institution and in preventing violence, see 634 F. 2d, at 655, and a *parens patriae* interest in alleviating the sufferings of mental illness and in providing clinically effective treatment, see 634 F. 2d, at 657. The court held that the State, under its police powers, may administer medication forcibly only upon a determination that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual" and that "reasonable

F. Supp., at 1365.

⁶The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F. 2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this interests is unclear," *ibid.*, it concluded that "a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." *Ibid.* The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

alternatives to the administration of antipsychotics [have been] ruled out." 634 F. 2d, at 656. Criticizing the District Court for imposing what it regarded as a more rigid standard, the Court of Appeals held that a hospital's professional staff must have substantial discretion in deciding when an impending emergency requires involuntary medication.⁷ The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the "police power" standard accord adequate procedural protection to "the interests of the patients."⁸

With respect to the State's *parens patriae* powers, the Court of Appeals accepted the District Court's state law distinction between patients who have and patients who have not been adjudicated incompetent. Where a patient has not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,⁹ the court ruled that the *parens patriae* interest will justify involuntary medication only when necessary to prevent further deterioration in the patient's mental health. See 634 F. 2d, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make non-emergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's

⁷The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See 634 F. 2d, at 656.

⁸It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." 634 F. 2d, at 656.

⁹A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. Rev. 461, 504-525 (1977). The Court of Appeals for the Second Circuit has held that civil commitment does not raise even a presumption of incompetence. See *Winters v. Miller*, 446 F. 2d 65 (1971).

parens patriae interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself . . . were he competent" to decide. *Id.*, at 661.¹⁰ The Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected procedurally by a judicial determination of "incompetency."¹¹ If such a determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. *Id.*, at 661.¹²

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,¹³ we granted certiorari. — U. S. — (1982).

¹⁰ In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See *ibid.* ("In so holding, we do not imply that the Constitution. . . ."). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: "*Cf. Superintendent of Belchertown v. Saikewicz*," 373 Mass. 728, 370 N. E. 2d 417 (1977). *Saikewicz* held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded man incapable of giving informed consent. In *Saikewicz* the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See *id.*, at 738-741, 370 N. E. 2d, at 424-425. But the court characterized its analysis as having identified a "constitutional right of privacy," *id.*, at 739, 370 N. E. 2d, at 426, thus creating some doubt as to the extent that the decision had an independent state law basis.

¹¹ The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann. ch. 123 § 25; see ch. 201 §§ 1, 6, 12, 12 (appointment and powers of guardians). It suggested, however, that non-judicial procedures would satisfy the federal constitutional requirements of due process. See 634 F. 2d, at 659-660.

¹² The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See 634 F. 2d, at 661.

¹³ Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent

II

A

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs.¹⁴ This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie v. Klein*, 653 F. 2d 836, 841 (CA3 1980). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.¹⁵ Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. Cf. *Bell v. Wolfish*, 441 U. S. 520, 560 (1979); *Roe v. Wade*, 410 U. S. 113, 147-154 (1973); *Jacobson v. Massachusetts*, 197 U. S. 11, 25-27 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham v. J.R.*, 442 U. S. 584, 606 (1979); *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's

cases, including *Rennie v. Klein*, 653 F. 2d 836 (CA3 1980), and *Davis v. Hubbard*, 506 F. Supp. 915 (D. Ohio 1980). On the issues raised, see generally Plotkin, *supra*; Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237 (1974).

¹⁴ Pet. 1.

¹⁵ In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion, see Brief for Petitioners at 43-47, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54-68.

federally protected liberty interest without reference to state law.¹⁶ Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone. Cf. *Vitek v. Jones*, 445 U. S. 480, 491-494 (1980). For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. See *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 7, 12 (1979); *Oregon v. Hass*, 420 U. S. 714, 719 (1975); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.

Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, see, e. g., *Vitek v. Jones*, *supra*, at 488; *Greenholtz v. Nebraska Penal Inmates*, *supra*, at 7, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer *procedural* protections of liberty interests that extend beyond those mini-

¹⁶ As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution, cf. *O'Connor v. Donaldson*, 422 U. S. 563 (1975), and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only "assuming" the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests.

mally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.

B

Roughly five months after the Court of Appeals decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its decision in *In the Matter of Guardianship of Richard Roe, III*, — Mass. —, 421 N. E. 2d 40 (1981) (“*Roe III*”). *Roe III* involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,¹⁷ Massachusetts’ highest court held in *Roe III* that a person has a protected liberty interest in “‘decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.’” — Mass., at —, 420 N. E. 2d, at 51 n. 9.¹⁸ The court found—again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States—that this interest of the individual is of such importance that it can be overcome only by

¹⁷ See — Mass., at —, 421 N. E. 2d, at 42 and n. 1, 51, n. 9.

¹⁸ Although the Massachusetts court quoted this formulation from the decision of the Court of Appeal in *Mills v. Rogers*, *supra*, 634 F. 2d, at 653, the quotation is used to define the right, rather than to identify its legal source. *Roe III* noted that *Mills v. Rogers* found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussion by stating its reliance on three bases, two of them not cited in *Mills v. Rogers*: the “inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth,” and the “common law” right of persons to decide what will be done with their bodies. — Mass., at —, 420 N. E. 2d, at 51, n. 9.

“an overwhelming State interest.” *Id.*, at —, 420 N. E. 2d, at 51. *Roe III* further held that a person does not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remains entitled to have his “substituted judgment” exercised on his behalf. *Ibid.* Defining this “substituted judgment” as one for which “[n]o medical expertise is required,” *id.*, at —, 420 N. E. 2d, at 52, the Massachusetts Supreme Judicial Court required a *judicial* determination of substituted judgment before drugs could be administered in a particular instance,¹⁹ except possibly in cases of medical emergency.²⁰

C

The Massachusetts Supreme Court stated that its decision was limited to cases involving *noninstitutionalized* mental patients. See — Mass., at —; 420 N. E. 2d, at 42, 55, 61–62.²¹ Nonetheless, respondents have argued in this

¹⁹ See *ibid.*:

“The determination of what the incompetent individual would do if competent will probe the incompetent individual’s values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction.”

Having held that a “ward possesses but is incapable of exercising personally” the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the “primary dispute” as over “who ought to exercise this right on behalf of the ward.” *Id.*, at —, 420 N. E. 2d, at 51. The Supreme Judicial Court in *Roe III* identified six “relevant” but “not exclusive” factors that should guide the decisions of the lower courts: “(1) the ward’s expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward’s family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment.” *Id.*, at —, 420 N. E. 2d, at 57. It emphasized that the determination “must ‘give the fullest possible expression to the character and circumstances’” of the individual patient and that “this is a subjective rather than an objective determination.” *Id.*, at —, 420 N. E. 2d, at 56 (citation omitted).

²⁰ See *id.*, at —, 420 N. E. 2d, at 54–55.

²¹ But cf. *id.*, at —, 420 N. E. 2d, at 50 (“because of the likelihood of

Court that *Roe III* may influence the correct disposition of the case at hand.²² We agree.

Especially in the wake of *Roe III*, it is distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States. Compare *Roe III, supra*, — Mass., at —, 420 N. E. 2d, at 51 (protected liberty interest in avoiding unwanted treatment continues even when a person becomes incompetent and creates a right of incompetents to have their “substituted judgment” determined) with *Addington v. Texas*, 441 U. S. 418, 429–430 (1979) (because a person “who is suffering from a debilitating mental illness” is not “wholly at liberty,” and because the complexities of psychiatric diagnosis “render certainties virtually beyond reach,” “practical considerations” may require “a compromise between what it is possible to prove and what protects the rights of the individual”). If the state interest is broader, the *substantive* protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protec-

. . . the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination”), and at —, 420 N. E. 2d, at 62 (“We do not mean to imply that these [involuntarily committed] patients’ rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do, suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests. . .”).

²² Respondents first presented this argument in a Motion to Dismiss or in the Alternative Certify Certain Questions to the Supreme Judicial Court of Massachusetts, filed in this Court on October 1, 1981. In their brief on the merits, respondents argue that *Roe III* provides an alternative basis on which this Court could affirm the judgment of the Court of Appeals.

tion of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe III*, *supra*, — Mass., at —, 420 N. E. 2d, at 51 (“We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment. . . .”) with *Parham v. J.R.*, *supra*, 442 U. S., at 608 n. 16 (Courts must not “unduly burden[] the legitimate efforts of the States to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.”).²³ Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe III*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual’s liberty interests, this Court may look to state law. See, e. g., *Roe v. Wade*, 410 U. S. 113, 148 and n. 42, 151 and nn. 48–50 (1973); *Ingraham v. Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe III*.²⁴

²³ Even prior to *Roe III*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, “in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment,” *id.*, at 659 (footnote omitted). *Roe III* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent.

²⁴ In *Roe III* the Massachusetts court explicitly considered the implicated state interests, see — Mass., at —, 420 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a “vital” *parens patriae* interest in “seeing that its residents function at the maximum level

D

It is unclear on the record presented whether respondents, in the District Court, did or did not argue the existence of “substantive” state law liberty interests as a basis for their claim to procedural protection relief under the federal Due Process Clause, or whether they may have claimed state law procedural protections for substantive federal interests.²⁵ In their brief in this Court, however, respondents clearly assert state law arguments as alternative grounds for affirming both the “substantive” and “procedural” decisions of the Court of Appeals. See Brief for Respondents, esp. at 61, 71-72, 92-95.

Until certain questions have been answered, we think it would be inappropriate for us to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independently of state law. It is this Court’s settled policy to avoid unnecessary decisions of constitutional issues. See, e. g., *City of Mesquite v. Aladdin’s Castle*, — U. S. —, — (1982); *New York Transit Authority v. Beazer*, 440 U. S. 568, 582-583 n. 22 (1979); *Poe v. Ullman*, 367 U. S. 497, 502-509 (1961); *Ashwander v.*

of their capacity,” *ibid.* The Court of Appeals in this case had found and weighed a *parens patriae* interest. 634 F. 2d, at 657-661.

²⁵ Although relying primarily on federal constitutional grounds, the respondent’s original complaint in the District Court could be construed as raising state law guarantees either as alternative or as interrelated bases for relief. See Complaint, No. 75-160-T (D. Mass.) (filed April 27, 1975). In their briefs in the Court of Appeals, respondents relied unambiguously on state law in support of both the “substantive” and “procedural” rights that they now claim in this Court. See Brief for Plaintiff-Appellants, No. 79-1649, at 44 (“Massachusetts law created a legal entitlement to be free from forced medications except in emergencies. . . .”; Brief for Plaintiff-Appellees, No. 79-1648, at 54 (“[T]he lower court’s requirement that a guardian must decide whether an incompetent patient will receive psychotropic medication in a non-emergency was the correct application of state law and was not based upon constitutional authority.”) (emphasis omitted).

Tennessee Valley Authority, 297 U. S. 288, 341, 347-348 (1936) (Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. *United States v. Hastings*, 296 U. S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of abstract opinion").

In applying this policy of restraint, we are uncertain here which if any constitutional issues now must be decided to resolve the controversy between the parties. In the wake of *Roe III*, we cannot say with confidence that adjudication based solely on identification of federal constitutional interests would determine the actual rights and duties of the parties before us. And, as an additional cause for hesitation, our reading of the opinion of the Court of Appeals has left us in doubt as to the extent to which state issues were argued below and the degree to which the court's holdings may rest on subsequently altered state law foundations.

Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than we to determine how *Roe III* may have changed the law of Massachusetts and how any changes may affect this case. Accordingly, we think it appropriate for the Court of Appeals to determine in the first instance whether *Roe III* requires revision of its holdings or whether it may call for the certification of potentially dispositive state law questions to the Supreme Judicial Court of Massachusetts, see *Bellotti v. Baird*, 428 U. S. 132, 150-151 (1976).²⁶ The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 813-819 (1976).

The judgment of the Court of Appeals is therefore vacated

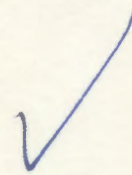
²⁶ A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



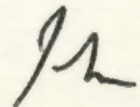
June 2, 1982

Re: 80-1417 - Mills v. Rogers

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

June 4, 1982

Re: No. 80-1417 - Mills v. Rogers

Dear Lewis:

I join.

Regards,

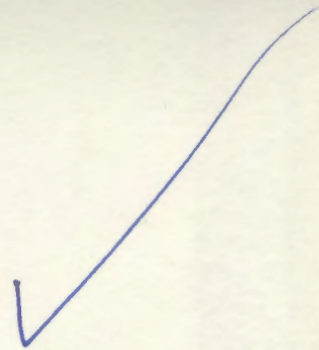
Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1982



RE: No. 80-1417 Mills v. Rogers

Dear Lewis:

I agree.

Sincerely,

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

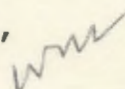
June 9, 1982

Re: No. 80-1417 Mills v. Rogers

Dear Lewis:

Please join me.

Sincerely,

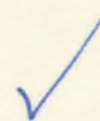


Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



June 9, 1982

Re: No. 80-1417 - Mills v. Rogers

Dear Lewis:

Please join me.

Sincerely,

T.M.
TM.

Justice Powell

cc: The Conference

Dick - Ask HAB's Clerk what
HAB wants
us to add.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 10, 1982

Re: No. 80-1417 - Mills v. Rogers

Dear Lewis:

I am somewhat uneasy about this one. We really are not deciding anything despite the fact that after Roe III there is no controversy, under Massachusetts law, that an involuntarily committed person is not incompetent to make a treatment decision until he is actually adjudged incompetent. On this issue, nothing is to be accomplished by the remand. I do not feel strongly enough, however, to write separately and thus shall give you one of Charlie Whittaker's "graveyard dissents."

Rennie v. Klein, which you cite on page 7, is a hold for this case on a pending cert. I suppose, but of course do not know, that we shall grant it and start all over again. It, at least, is not encumbered by any issue of Massachusetts law.

Sincerely,

Harry

Dick - Don't
~~was~~ include HAB
in line-up
until he joins

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

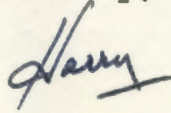
June 15, 1982

Dear Lewis:

Re: No. 80-1417 - Mills v. Rogers

I did not mean to be "funny," but my "graveyard dissent" in my note of June 10 was a reluctant joinder. At least, that is what I have assumed for some years to be the definition.

Sincerely,



Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1982

Memorandum to the Conference

No. 80-1417, Mills v. Rogers

As this case will "come down" on the same date as No. 80-1429, Youngberg v. Romeo, I think it desirable for there to be some cross-citation between the cases. I now propose to cite Youngberg on pages 7 and 12 of my most recent (second) draft in this case. The attached xerox copies have been marked to reflect the added citations.

L. F. P.

Youngberg v. Romeo, ante, at 15 ("[T]here certainly is no reason to think judges or juries are better qualified than appropriate professionals in making [treatment] decisions."), and with

tion of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe III*, *supra*, — Mass., at —, 420 N. E. 2d, at 51 ("We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment. . . .") with *Parham v. J.R.*, *supra*, 442 U. S., at 608 n. 16 (Courts must not "unduly burden[] the legitimate efforts of the States to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.").²³ Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe III*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual's liberty interests, this Court may look to state law. See, e. g., *Roe v. Wade*, 410 U. S. 113, 148 and n. 42, 151 and nn. 48–50 (1973); *Ingraham v. Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe III*.²⁴

²³ Even prior to *Roe III*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, "in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment," *id.*, at 659 (footnote omitted). *Roe III* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent.

²⁴ In *Roe III* the Massachusetts court explicitly considered the implicated state interests, see — Mass., at —, 420 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a "vital" *parens patriae* interest in "seeing that its residents function at the maximum level

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs.¹⁴ This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie v. Klein*, 653 F. 2d 836, 841 (CA3 1980). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.¹⁵ Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. ~~On~~ *Bell v. Wolfish*, 441 U. S. 520, 560 (1979); *Roe v. Wade*, 410 U. S. 113, 147-154 (1973); *Jacobson v. Massachusetts*, 197 U. S. 11, 25-27 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham v. J.R.*, 442 U. S. 584, 606 (1979); *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's

cases, including *Rennie v. Klein*, 653 F. 2d 836 (CA3 1980), and *Davis v. Hubbard*, 506 F. Supp. 915 (D. Ohio 1980). On the issues raised, see generally Plotkin, *supra*; Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237 (1974).

¹⁴ Pet. 1.

¹⁵ In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion, see Brief for Petitioners at 43-47, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54-68.

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80-1417 Mills v. Rogers

We granted certiorari in this case to decide important issues concerning the rights of mental patients to refuse treatment with anti-psychotic drugs.

The federal constitutional questions are intertwined with questions of state law. After we granted certiorari the highest court of ~~the State of~~ Massachusetts--the State in which the parties reside--decided a case involving similar issues. ~~The decision~~

As a result of this intervening decision, it now appears that Massachusetts state law may have changed in ways affecting the claims of the parties in this case.

Under these circumstances, we conclude that ^{this Court} we should not - at this time - undertake to render a constitutional judgment. We therefore vacate the decision of the Court of Appeals and remand the case for reconsideration in light of the intervening decision.

The ^{of the Court} opinion is unanimous.

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