A Digest of Cases

of

THE UNITED STATES SUPREME COURT

as to

JUVENILE AND FAMILY LAW

1962 - July 1988

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES

National Council of Juvenile & Family Court Judges

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Executive Director
Reno, Nevada

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National Council of Juvenile and Family Court Judges
P.O. Box 8970, Reno, NV 89507

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ORGANIZED MAY 22, 1937

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UNIVERSITY OF NEVADA
P.O. BOX 8970
RENO, NEV. 89507
(702) 784-6012

LOUIS W. McHARDY / Executive Director

FOREWORD

The Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272) brought myriad new and volatile issues to the juvenile and family courts of America. This resulted in a dramatic increase in the number of appeals involving those issues and their resolution.

In 1983, the National Council of Juvenile and Family Court Judges, with financial support from the Edna McConnell Clark Foundation, responded to these developments by creation of a series of programs on children's issues in the nation's appellate courts. The theme of these programs was Permanency Planning — Making Reasonable Efforts for Keeping Families Together.

In 1988, with recognition and funding by the State Justice Institute, National College of Juvenile and Family Law (NCJFCJ) was enabled to broaden its training opportunities for appellate judges to include lectures and workshops on Law and Jurisprudence Relating to Children and Families, The Legal Concept of Parenthood in Divorce and Surrogacy Cases, Child Support Awards, Procedural and Evidentiary Issues Related to Children and Families in Abuse and Neglect and Criminal Prosecutions, Child Witnesses and Liability Issues, The Constitutional Right of Children to Treatment, and other topics.

Yet another broadening of the training effort is represented by this complication of synopses of United States Supreme Court decisions specific to children's issues. We hope it will prove useful to you.

Andrew Jackson Higgins
Judge, Supreme Court of Missouri
Chairman. Appellate Training
Advisory Committee

Jeffrey Kuhn
Project Attorney/Director
Appellate Training Project
National College of Juvenile and Family Law

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Table of Cases

INDEX

Detention (Preventive) — An accused juvenile who poses a serious risk of committing a crime if released may be detained if (a) he is given notice, (b) a statement of the facts and reasons for detention, and (c) a probable cause hearing within a short time.

Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984) 291

Due Process (Certification) — The juvenile court has considerable latitude in determining whether a child should be certified to the adult court, but it must provide fairness and basic due process including: a fair though informal hearing, the assistance of counsel, access to social records, and findings by the court as to the reasons for certifying. (An Appendix lists factors for judicial consideration.)

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045 (1966) 117

Due Process (Delinquency) — Juveniles are entitled to the five basic constitutional rights accorded to adults at the adjudicatory phase: notice, counsel, confrontation, self-incrimination, and appeal. The right to appeal necessarily includes the right to a transcript and therefore the right to have a record made of the adjudicatory proceedings. The Court specifically did not pass on pre-judicial or dispositional rights.

Gault, Application of, 387 U.S. 1, 87 S.Ct. 1428 (1967) 69

Fines — Restitution and fines may be required as conditions of probation under the federal juvenile code.

Durst v. United States, 434 U.S. 542, 98 S.Ct. 849 (1978) 57

Foster Parents (Rights) — Foster parents' rights to custody of children who have been in their care for 18 months are adequately protected when they are given notice of removal and an administrative hearing with judicial review.

Smith v. Org. of Foster Fams., 431 U.S. 816, 97 S.Ct. 2093 (1977) 315

Full Faith and Credit Clause (Custody) — A decision as to custody is not binding in another state if it would not be *res judicata* in the first state.

Ford v. Ford, 371 U.S. 187, 83 S.Ct. 273 (1962) 67

Habeas Corpus — A writ of habeas corpus is not available in a federal court to review a state court decision involuntarily terminating the rights of a mother who had placed her children with a county agency because the matter is not criminal, the children were not prisoners, and use of the writ to re-litigate such matters would unnecessarily extend the time of uncertainty for the children.

Lehman v. Lycoming Cty Ch Serv., 458 U.S. 502, 102 S.Ct. 3231 (1982) 147

Immaturity of Children (Pornography) — The immaturity of children requires protections which are not necessary for adults, thus pornography laws may, under the First Amendment, forbid sale of literature to children which is permissible for sale to adults.

Ginsberg v. State of New York, 390 U.S. 629, 88 S.Ct. 1274 (1968) 85

Immaturity of Children (Abortion) — It is unconstitutional for a state statute to require a pregnant girl to obtain parental consent for an abortion if she is not mature enough to make her own decision, or to require judicial consent if she is mature enough, without giving her a hearing as to her maturity to make the decision without anyone else's consent.

Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035 (1979) 21

Insanity Defense — When a person is found not guilty by reason of insanity, the statute cannot require that he be automatically committed to a mental hospital; rather a civil commitment proceeding is required with affirmative proof of insanity rather than merely a reasonable doubt of sanity.

Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063 (1962) 165

Jury Trial (Delinquency) — Trial by jury is not constitutionally required for juveniles charged with delinquency.

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976 (1971) 177

Addington v. Texas

441 U.S. 418, 99 S.Ct. 1804 (1979)

CIVIL COMMITMENT (BURDEN OF PROOF) — ***The burden of proof in civil commitment cases is clear and convincing but a State may impose a higher burden.***

"(p. 1806) Mr. Justice BURGER delivered the opinion of the Court.

"The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under State law to commit an individual involuntarily for an indefinite period to a State mental hospital.

"On seven occasions between 1969 and 1975, appellant was committed temporarily, . . . to various Texas State mental hospitals and was committed for indefinite periods . . . to Austin State Hospital on three different occasions. On December 18, 1975, when appellant was arrested on a misdemeanor charge of 'assault by threat' against his mother, the authorities therefore were well aware of his history of mental and emotional difficulties.

"Appellant's mother filed a petition for his indefinite commitment in accordance with Texas law. The county psychiatric examiner interviewed appellant while in custody and after the interview issued a Certificate of Medical Examination for Mental Illness. In the certificate, the examiner stated his opinion that the appellant was 'mentally ill and require[d] hospitalization in a mental hospital.'

"Appellant retained counsel and a trial was held before a jury to determine in accord with the statute:

'(1) whether the proposed patient is mentally ill, and if so'

'(2) whether he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others, and if so'

'(3) whether he is mentally incompetent . . .'

The trial on these issues extended over six days.

"The State offered evidence that appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that the had been involved in several assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home. From these undisputed facts, two psychiatrists, who qualified as experts, expressed opinions that appellant suffered from psychotic schizophrenia and that he had paranoid tendencies. They also expressed medical opinions that appellant was probably dangerous both to himself and to others. They explained that appellant required hospitalization in a closed area to treat his condition because in the past he had refused to attend outpatient treatment programs and had escaped several times from mental hospitals.

"Appellant did not contest the factual assertions made by the State's witnesses; indeed, he conceded that he suffered from a mental illness. What appellant attempted to show was there was no substantial basis for concluding that he was probably dangerous to himself or others.

"The trial judge submitted the case to the jury with the instructions in the form of two questions:

'1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?'

'2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection of others?'

"Appellant objected to these instructions on several grounds, including the trial court's refusal to employ the 'beyond a reasonable doubt' standard of proof.

"The jury found that appellant was mentally ill and that he required hospitalization for his own or others' welfare. The trial court then entered an order committing appellant as a patient to Austin State Hospital for an indefinite period.

"Appellant appealed that order to the Texas Court of Civil Appeals, arguing, among other things, that the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that required for criminal convictions, i.e., beyond a reasonable doubt, violated his procedural due process rights. The Court of Civil Appeals agreed with appellant on the standard-of-proof issue and reversed the judgment of the trial court. Because of its treatment of the standard of proof that court did not consider any other issues raised in the appeal.

"On the appeal, the Texas Supreme Court reversed the Court of Civil Appeals' decision. 557 S.W.2d 511. In so holding, the Supreme Court relied primarily upon its previous decision in *State v. Turner,* 556 S.W.2d 563 (1977) . . .

"In *Turner,* the Texas Supreme Court held that a 'preponderance of the evidence' standard of proof in a civil commitment proceeding satisfied due process. The Court declined to adopt the criminal law standard of 'beyond a reasonable doubt' primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future. It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others. Finally, the *Turner* court rejected the 'clear and convincing' evidence standard because under Texas rules of procedure juries could be instructed only beyond-a-reasonable-doubt or a preponderance standard of proof.

"Reaffirming *Turner,* the Texas Supreme Court in this case concluded that the trial court's instruction to the jury, although not in conformity with the legal requirements, had benefited appellant, and hence the error was harmless. Accordingly, the court reinstated the judgement of the trial court . . .

"(2) The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, 'is to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship,* 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, . . . (1970) (HARLAN, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

"Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

"In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof design to exclude as nearly as possible the likelihood of an erroneous judgement. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This accomplished by requiring under the Due Process Clause that the State prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

"The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,' is less commonly used, but nonetheless, 'is no stranger to the civil law.' *Woodby v. INS,* 385 U.S. 276, 285, 87 S.Ct. 483, 488, . . . (1966). See, also, McCormick, Evidence sec. 320 (1954); 9 J. Wigmore, Evidence sec. 2498 (3d ed. 1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrong-doing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal, and convincing' standard of proof to protect particularly important individual interests in various civil cases. See, e.g., *Woodby v. INS, supra,* at 285, 87 S.Ct. at 487 (deportation); *Chaunt v. United States,* 364 U.S.

350, 353, 81 S.Ct. 147, 149, . . . (1960) (denaturalization); *Schneiderman v. United States,* 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, . . . (1943) (denaturalization).

"Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decision-making may well be unknowable, given that fact-finding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a 'standard of proof is more than an empty semantic excuse.' *Tippet v. Maryland,* 436 F.2d 1153, 1166 (CA4 1971) (SOBELOFF, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 92 S.Ct. 2091, . . . (1972). In cases involving individual rights, whether criminal or civil,' [t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' 436 F.2d at 1166.

"In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the State's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 983, 903, . . . (1976); *Speiser v. Randall,* 357 U.S. 513, 525-526. 78 S.Ct. 1332, 1341-1342, . . . (1958).

"This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, e.g., *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, . . . (1972); *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, . . . (1972); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967); *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

"The State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the State also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the State's interests are furthered by using a preponderance standard in such commitment proceedings.

"The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many States have enacted statutes designed to protect the rights of the mentally ill. However, only one State by statute permits involuntary commitment by a mere preponderance of the evidence, Miss. Code Ann. sec. 41-21-75 (1978 Supp.), and Texas is the only State where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those States, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their practical effect.

"At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a fact-finder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is

one way to impress the fact-finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

"The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the State. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the State to justify confinement by proof more substantial than a mere preponderance of the evidence.

"Appellant urges the Court to hold that due process requires use of the criminal law's standard of proof — 'beyond a reasonable doubt.' He argues that the rationale of the *Winship* holding that the criminal law standard of proof was required in a delinquency proceeding applies with equal force to a civil commitment proceeding.

"In *Winship,* against the background of a gradual assimilation of juvenile proceedings into traditional; criminal prosecutions, we declined to allow the State's 'civil labels and good intentions' to 'obviate the need for criminal due process safeguards in Juvenile Courts.' 397 U.S. at 365-366. 90 S.Ct. at 1073. The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue — whether the individual in fact committed a criminal act — was the same in both proceedings. There was no meaning distinctions between the two proceedings, we required the State to prove the juvenile's act and intent beyond a reasonable doubt.

"There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment State power is not exercised in a punishment sense. Unlike the delinquency proceeding in *Winship,* a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. *Woodby v. INS,* 385 U.S. at 284-285, 87 S.Ct. at 487-488.

"In addition, the 'beyond a reasonable doubt' standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the 'moral force of the criminal law.' *In re Winship,* 397 U.S. at 364, 90 S.Ct. at 1072, and we should hesitate to apply it too broadly or casually in noncriminal cases. Cf. *ibid.*

"The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson v. New York,* 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, . . . (1977). The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction, 5 J. Wigmore, Evidence sec. 1400 (Chadbourn rev. 1974). However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. See Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 Am. J. Psychiatry, 496, 498 (1976); Schwartz, Myers & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Arch. Gen. Psychiatry, 329, 334 (1974). It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally ill person to be committed.

"Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question — did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a State could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. See *O'Connor v. Donaldson,* 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, . . . (1975) (concurring opinion); *Blocker v. United States,* . . . 288 F.2d 853, 860-861 (1961) (opinion concurring in result). See, also, *Tippett v. Maryland,* 436 F.2d, at 1165 (SOBELOFF, J.,

concurring in part and dissenting in part); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L.Rev. 1288, 1291 (1966); Note, Due Process and the Development of 'Criminal' Safeguards in Civil Commitment Adjudications, 42 Ford. L.Rev. 611, 624 (1974).

"The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for 'fact-finding' is a 'reasonable medical certainty.' If a trained psychiatrist has difficulty with the categorical 'beyond a reasonable doubt' standard, the untrained lay juror — or indeed even a trained judge — who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See *id.* Such 'freedom' for a mentally ill person would be purchased at a high price.

"That practical considerations may limit a constitutionally-based burden of proof is demonstrated by the reasonable doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the State was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Patterson v. New York, supra,* 432 U.S. at 208, 97 S.Ct. at 2326. Nor should the State be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the State and the patient that are served by civil commitments.

"That some States have chosen — either legislatively or judicially — to adopt the criminal law standard gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all States. The essence of federalism is that States must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from State to State, procedures must be allowed to vary so long as the meet the constitutional minimum. See Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 Law & Human Behavior 37, 41-42 (1978); Share, The Standard of Proof in Involuntary Civil Commitment Proceedings, 1977 Detroit College L.Rev. 209, 210. We conclude that it is unnecessary to require States to apply the strict, criminal standard.

"Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the State. We note that 20 States, most by statute, employ the standard of 'clear and convincing' evidence; 3 States use 'clear, *cogent,* and convincing' evidence; and 2 States require 'clear, *unequivocal,* and convincing' evidence.

"In *Woodby v. INS,* 385 U.S. 276, 87 S.Ct. 483, . . . (1966), dealing with deportation, and *Schneiderman v. United States,* 320 U.S. 118, 125, 125, 159, 63 S.Ct. 1333, 1336, 1353, . . . dealing with denaturalization, the Court held that 'clear, unequivocal, and convincing' evidence was the appropriate standard of proof. The term 'unequivocal,' taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases. The issues in *Schneiderman* and *Woodby* were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic — loss of citizenship and expulsion from the United States.

"We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the State cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term 'unequivocal' is not constitutionally required, although the States are free to use that standard. To meet due process demands, the standard has to inform the fact-finder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

"We noted earlier that the trial court employed the standard of 'clear, unequivocal and convincing' evidence in appellant's commitment hearing before a jury. That instruction was

constitutionally adequate. However, determination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of State law which we leave to the Texas Supreme Court. Accordingly, we remand the case for further proceedings not inconsistent with the opinion.

"Vacated and remanded.

"Mr. Justice POWELL took no part in the consideration or decision of this case."

Allen v. Illinois

106 S.Ct. 2988 (1986)

CIVIL COMMITMENT - Self-Incrimination — ***A proceeding to commit a person as sexually dangerous is civil, not criminal, if it is designed to treat the person not punish him and thus the right against self-incrimination does not apply, but if the commitment is designed to punish or merely confine the person, it is criminal in nature and the right applies.***

"(p. 2990) Justice REHNQUIST delivered the opinion of the Court.

"The question presented by this case is whether the proceedings under the Illinois Sexually Dangerous Persons (Act), Ill. Rev. Stat., ch. 38, sec. 105-1.01 *et seq.* (1985), are 'criminal' within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination.

"Petitioner Terry B. Allen was charged by the information in the Circuit Court of Peoria County with committing the crimes of unlawful restraint and deviate sexual assault. Shortly thereafter the State filed a petition to have petitioner declared a sexually dangerous person within the meaning of the Act. After a preliminary hearing on the information, the criminal charges were dismissed for lack of probable cause, and the petition was apparently dismissed as well. Petitioner was then recharged by indictment, and the petition to declare him sexually dangerous was reinstated.

"Pursuant to the Act, with petitioner and counsel present, the trial court ordered petitioner to submit to two psychiatric examinations; the court explained the procedure as well as petitioner's rights under the Act, and petitioner indicated that he understood the nature of the proceedings. At the bench trial on the petition, the State presented the testimony of the two examining psychiatrists, over petitioner's objection that they had elicited information from him in violation of his privilege against self-incrimination. The trial court ruled that petitioner's statements to the psychiatrists were not themselves admissible, but allowed each psychiatrist to give his opinion based upon his interview with petitioner. Both psychiatrists expressed the view that petitioner was mentally ill and had criminal propensities to commit sexual assaults. Petitioner did not testify or offer other evidence at the trial. Based upon the testimony of the psychiatrists, as well as that of the victim of the sexual assault for which the petitioner had been indicted, the trial court found petitioner to be a sexually dangerous person under the Act. Consistent with the requirements of Illinois case law, see *People v. Pembrock,* . . . 342 N.E.2d 28, 29-30 (Ill. 1976), the court made three specific findings: that at the time of trial petitioner had been suffering from a mental disorder for not less than one year; that he had propensities to commit sex offenses; and that he that by his actions he had demonstrated such propensities.

"The Appellate Court of Illinois for the Third District reversed, over one dissent. Relying on *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, . . . (1981), the court held that the trial court had improperly relied upon testimony obtained in violation of petitioner's privilege against self-incrimination . . . 463 N.E.2d 135 (Ill. App.3d 1984).

"The Supreme Court of Illinois unanimously reversed the Appellate Court and reinstated the trial court's finding that petitioner was a sexually dangerous person. It held that the privilege against self-incrimination was not available in sexually dangerous person proceedings because they are 'essentially civil in nature,' the aim of the statute being to provide 'treatment, not punishment.' . . . 481 N.E.2d 690, 694, 695 (Ill. Dec. 1985). The court also found support for its ruling in *Mathews v. Elderidge,* 424 U.S. 319, 96 S.Ct. 893, . . . (1976). Observing that the State's interest in treating, and protecting the public from, sexually dangerous persons would be 'almost totally thwarted' by allowing those persons to refuse to answer questions posed in psychiatric interviews, and that the privilege would be 'of minimal value in assuring reliability,' the court concluded that 'due process does not require the application of the privilege.' . . . 481

N.E.2d at 696. Finally, the court held that 'a defendant's statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings.' *Id.*, at 104, 89 Ill. Dec. at 853, 481 N.E.2d at 696. We granted *certiorari,* 474 U.S. ____, 106 S.Ct. 380, 88 L.Ed.2d 333 (1985), and now affirm.

"The Self-Incrimination Clause of the Fifth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, . . . (1964), provides that no person 'shall be compelled in any criminal case to be a witness against himself.' This court has long held that the privilege against self-incrimination 'not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, . . . (1984) (quoting *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322, . . . (1973)); *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S.Ct. 16, 17, . . . (1924). In this case the Illinois Supreme Court ruled that a person whom the State attempts to commit under the Act is protected from use of his compelled answers in any subsequent criminal case in which he is the defendant. What we have here, then, is not a claim that petitioner's statements to the psychiatrists might be used to incriminate him in some future criminal proceeding, but instead his claim that because the sexually dangerous person proceeding is itself 'criminal,' he was entitled to refuse to answer any questions at all.

"The question whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction. See *United States v. Ward,* 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, . . . (1980); *One Lot Emerald Cut Stones and One Ring v. United States,* 409 U.S. 232, 236-237, 93 S.Ct. 489, 492-493, . . . (1972). Here, Illinois has expressly provided that proceedings under the Act 'shall be civil in nature,' sec. 105-3.01, indicating that when it files a petition against a person under the Act it intends to proceed in a nonpunitive, noncriminal manner, 'without regard to the procedural protections and restrictions available in criminal prosecutions.' *Ward, supra,* at 249, 100 S.Ct. at 2641. As petitioner correctly points out, however, the civil label is not always dispositive. Where a defendant had provided 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied. 448 U.S. at 248-249, 100 S.Ct. at 2641. We think that petitioner has failed to provide such proof in this case.

"The Illinois Supreme Court reviewed the Act and its own case law and concluded that these proceedings, while similar to criminal proceedings in that they are accompanied by strict procedural safeguards, are essentially civil in nature. . . . 481 N.E.2d at 694-695. We are unpersuaded by petitioner's efforts to challenge this conclusion. Under the Act, the State has a statutory obligation to provide 'care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,' sec. 105-8, in a facility set aside to provide psychiatric care, *ibid.* And [i]f the patient is found to be no longer dangerous, the court shall order that he be discharged.' Sec. 105-9. While the committed person has the burden of showing that he is no longer dangerous, he may apply for release at any time. *Ibid.* In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of 'the traditional aims of punishment — retribution and deterrence.' *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 567, . . . (1963). Cf. *Addington v. Texas,* 441 U.S. 418, 428, 99 S.Ct. 1804, 1810, . . . (1979) (in Texas 'civil commitment State power is not exercised in a punitive sense'); *French v. Blackburn,* 428 F.Supp. 1351, 1358-1359 (MDNC (1977)), summarily aff'd, 443 U.S. 901, 99 S.Ct. 3091, . . . (1979) (state need not accord privilege against self-incrimination in civil proceeding).

"Petitioner offers several arguments in support of his claim that despite the apparently nonpunitive purposes of the Act, it should be considered criminal as far as the privilege against self-incrimination is concerned. He first notes that the State cannot file a sexually-dangerous-person petition unless it has already brought criminal charges against the person in question. sec. 105-3. In addition, the State must prove that the person it seeks to commit perpetrated 'at least one act of or attempt at sexual assault or sexual molestation.' . . . 481 N.E.2d at 697. To petitioner, these factors serve to distinguish the Act from other civil commitment, which typically is not tied to any criminal charge and which petitioner apparently concedes is not 'criminal'

under the Self-Incrimination Clause . . . We disagree. That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil [proceeding] into a criminal one. And as the State points out, it must prove more than just the commission of a sexual assault: the Illinois Supreme Court, as we noted above, has construed the Act to require proof of the existence of a mental disorder for more than one year and a propensity to commit sexual assaults, in addition to demonstration of that propensity through sexual assault. See *supra* at ____

"The discussion of civil commitment in *Addington, supra,* in which this court concluded that the Texas involuntary-commitment scheme is not criminal insofar as the requirement of proof beyond a reasonable doubt is concerned, fully supports our conclusion here:

> '[T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straight-forward factual question — did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or to others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.' 441 U.S. at 429, 99 S.Ct. at 1811 (emphasis in original).

"While here the State must prove at least one act of sexual assault, that antecedent conduct is received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior . . . 481 N.E.2d at 697.

"In his attempt to distinguish this case from other civil commitment, petitioner places great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials. In particular, he observes that the Act provides an accused with the right to counsel, sec. 105-5, the right to demand a jury trial, *ibid.,* and the right to confront and cross-examine the witnesses, *People v. Nastasio,* . . . 168 N.E.2d 728, 731, (Ill.2d 1960). At the conclusion of the hearing, the trier of fact must determine whether the prosecution has proved the person's sexual dangerousness beyond a reasonable doubt, sec. 105-3.01; *People v. Pembrock,* . . . 342 N.E.2d 28 (Ill.2d 1976). But as we noted above, the State has indicated quite clearly its intent that these proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there. See *People v. English,* . . . 201 N.E.2d 455, 458 (Ill.2d 1964).

"Relying chiefly on *In re Gault,* 387 U.S. 1 87, S.Ct. 1428, . . . (1967), petitioner also urges that the proceedings in question are 'criminal' because a person adjudged sexually dangerous under the Act is committed for an indeterminate period to the Menard Psychiatric Center, a maximum security institution that is run by the Illinois Department of Corrections and that houses convicts needing psychiatric care as well as sexually dangerous persons. Whatever its label and whatever the State's alleged purpose, petitioner argues, such commitment is the sort punishment — total deprivation of liberty in a criminal setting — that *Gault* teaches cannot be imposed absent application of the privilege against self-incrimination. We believe that *Gault* is readily distinguishable.

"First, *Gault's* sweeping statement that 'our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty,' *id.* at 50, 87 S.Ct. at 1455, is plainly not good law. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies, Addington demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections. Indeed, petitioner apparently concedes that traditional civil commitment does not require application of the privilege. Only two terms ago in *Minnesota v. Murphy,* 465 U.S. at 435, n. 7, 104 S.Ct. at 1147, n. 7, this Court stated that a person may not claim the privilege merely because his answer might result in revocation of his probationary status. Cf. *Middendorf v. Henry,* 425 U.S. 25, 37, 96 S.Ct. 1281, 1288, . . . (1976) ('fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment').

"The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile

offenders, observing that in many States juveniles may be placed in 'adult penal institutions' for conduct that if committed by an adult would be a crime. 387 U.S. at 49-50, 87 S.Ct. at 1455. Here, by contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. Nor does the fact that Menard is apparently a maximum security facility affect our analysis:

> 'The State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the State also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.' *Addington,* 441 U.S. at 426, 99 S.Ct. at 1809.

"Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive.

"Petitioner has not demonstrated, and the record does not suggest, that 'sexually dangerous persons' in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. Indeed, counsel for the State assures us that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to 'punishment' and thus render 'criminal' the proceedings which led to confinement.

"Our conclusion that proceedings under the Act are not 'criminal' within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination does not completely dispose of this case. Petitioner rather obliquely suggests that even if his commitment proceeding was not criminal, the Fourteenth Amendment's guarantee of due process nonetheless required application of the privilege. In particular, petitioners contends that the Illinois Supreme Court 'grossly miscalculated' in weighing the interests set out in *Mathews v. Elderidge,* 424 U.S. 319, 96 S.Ct. 893, . . . (1976). This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today.

"We think that the parties, and to some extent the Supreme Court of Illinois, have in their reliance on *Mathews v. Elderidge* misconceived that the decision. *Mathews* dealt with the procedural safeguards required by the Due Process Clause of the Fifth Amendment before a person might be deprived of property and its focus was on such safeguards as were necessary to guard against the risk of erroneous deprivation. As Supreme Court of Illinois and the State have both pointed out, it is difficult, if not impossible, to see how requiring the privilege against self-incrimination in these proceedings would in any way advance reliability. Indeed, the State takes the quite plausible view that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would *decrease* the reliability of a finding of sexual dangerousness. As in *Addington,* 'to adopt the criminal law standard gives no assurance' that States will reach a 'better' result. 441 U.S. at 430-431, 99 S.Ct. at 1811-1812.

"The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the fact-finding determination; it stands in the Constitution for entirely independent reasons. *Rogers v. Richmond,* 365 U.S. 534, 540-541, 81 S.Ct. 735, 739, . . . (1961) (involuntary confessions excluded 'not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system'). Just as in a 'criminal case' it would be no argument against a claim of the privilege to say that granting the claim would decrease the reliability of the fact-finding process, the privilege has no place among the procedural safeguards discussed in *Mathews v. Elderidge,* which are designed to enhance the reliability of that process.

"For the reasons stated, we conclude that the Illinois proceedings here considered were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege. Here, as in *Addington,* '[t]he essence of federalism is that States must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold' of the sort urged by petitioner. 441 U.S. at 431, 99 S.Ct. at 1812. The judgement of the Supreme Court of Illinois is therefore

"Affirmed.

"Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

"Article 105 of the Illinois Criminal Code authorizes a special procedure for the involuntary commitment of individuals found to be 'sexually dangerous persons.' In many respects, the proceeding is virtually identical to Illinois' proceeding for prosecution of sex-related crimes. When the criminal law casts so long a shadow on a putatively civil proceeding, I think it clear that the procedure must be deemed a 'criminal case' within the meaning of the Fifth Amendment.

"As the Court reaffirms today, the fact that a State attaches a 'civil' label to a proceeding is not dispositive. *Ante,* at 2992. Such a label cannot change the character of a criminal proceeding. *In re Gault,* 387 U.S. 1, 49-50, 87 S.Ct. 1428, 1455, . . . (1967). Moreover, the words 'criminal case' in the Fifth Amendment have been consistently construed to encompass certain proceedings that have both civil and criminal characteristics. And, of course, a State's duty to respect the commands in the Fifth Amendment cannot be avoided by the names it applies to its procedures or to the persons whom it accuses of wrongful conduct. It is the substance of the Illinois procedure, rather than its title, that is relevant to our inquiry. Neither the word 'civil' nor the unsettling term applied by the State — 'sexually dangerous person' — should be permitted to obscure our analysis.

"The impact of an adverse judgment against an individual deemed to be a 'sexually dangerous person' is at least as serious as a guilty verdict in a typical criminal trial. In *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, . . . (1972), we referred to the potentially indefinite commitment to the 'sex deviate facility' located in the Wisconsin State Prison, *id.,* at 506, 92 S.Ct. at 1050, as 'a massive curtailment of liberty.' *Id.,* at 509, 92 S.Ct. at 1052. In a case arising under the Illinois statute we review today, *United States ex rel. Stachulak v. Coughlin,* 520 F.2d 931 (1975), the Court of Appeals for the Seventh Circuit noted that the sexually dangerous person proceeding authorizes far longer imprisonment than a mere finding of guilt on an analogous criminal charge. Moreover, the stigma associated with an adjudication as a 'sexually dangerous person' is at least as great as that associated with most criminal convictions and 'is certainly more damning than a finding of juvenile delinquency.' *Id.,* at 936.

"The distinctive element of Illinois' 'sexually dangerous persons' proceeding, however, is its relationship to Illinois' criminal law. Quite simply, criminal law occupies a central role in the sexually dangerous person proceeding. Like the prosecution for a criminal offense, the procedure may only begin 'when a person is charged with a criminal offense.' Like the prosecution for a criminal offense, the decision whether to initiate the procedure is entrusted 'to the Attorney General or to the State's attorney of the county wherein such person is so charged.' Like the prosecution for a criminal offense, if the prosecutor sustains its burden of proof, 'the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian.'

"Indeed, the Act even defines a 'sexually dangerous person' with respect to criminal law, or rather, with respect to criminal propensities':

> 'All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.'

"According to the Illinois Supreme Court's interpretation of this definition, moreover, the prosecutor must prove that the individual charged with being a sexually dangerous person

committed a criminal offense: 'It is clear . . . that the statute requires that the State prove that the defendant has 'demonstrated' this propensity. This language can only mean that the State must prove at least one act of or attempt at sexual assault or sexual molestation.' *People v. Allen,* . . . 481 N.E.2d 690, 697 (Ill.Dec. 1985).

"Thus, the Illinois 'sexually dangerous person' proceeding may only be triggered by a criminal incident; may only be initiated by the sovereign State's prosecuting authorities; may only be established with the burden of proof applicable to the criminal law; may only proceed if a criminal offense is established; and has the consequence of incarceration in the State's prison system — in this case, Illinois' maximum security prison at Menard. It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system —for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of proof, and for the Director of Corrections as custodian — that the proceeding must be considered 'criminal' for purposes of the Fifth Amendment.

"The principal argument advanced by the State — and accepted by the Court, *ante,* at 2992-2993 is that the statute has a benign purpose. The State points out the statute, in appointing the Director of Corrections as guardian, requires that the Director provide 'care and treatment for the person committed to him for recovery;' requires that the Director place his ward 'in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons;' and requires that the individual be released if 'found to be no longer dangerous.'

"The Illinois Supreme Court has stated unambiguously that 'treatment, not punishment, is the aim of the statute.' *People v. Allen,* . . . 481 N.E.2d at 695. The Illinois court, of course, is the final authority on the meaning and the purpose of Illinois legislation. Nevertheless, the ultimate characterization of the sexually dangerous person proceeding for Fifth Amendment purposes remains a federal constitutional question.

"A goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as 'criminal.' With respect to a conventional criminal statute, if a State declared that its goal was 'treatment' and 'rehabilitation,' it is obvious that the Fifth Amendment would still apply. The sexually dangerous person proceeding similarly may not escape a characterization as 'criminal' simply because a goal is 'treatment.' If this were not the case, moreover, nothing could prevent a State from cheating an entire corpus of 'dangerous person' statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and 'criminal propensities,' and constitutional protections for criminal defendants would be simply inapplicable. The goal would be 'treatment;' the result would be evisceration of criminal law and its accompanying protections.

"The Illinois Attorney General nevertheless argues that the importance of treatment in the Act has a special significance. The State contends that recognizing a right to silence would make it impossible to reach a correct diagnosis concerning the existence of a mental disorder and the need for treatment. However, the Illinois General Assembly has squarely rejected this argument in other civil commitment proceedings. Illinois' civil commitment proceedings expressly protects the civil committee's right to silence. Quoting the Governor's Commission for the revision of the Mental Health Code of Illinois, the Illinois Appellate Court explained the unequivocal State policy:

> 'Experience in the public and private sectors has shown that application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment.' *In re Rizer,* . . . 409 N.E.2d 383, 386 (Ill.Dec. 1980).

"The Attorney General's emphasis on the interference with treatment that the right of silence would create thus has a significance, but not the one he suggests. For, not only would a characterization of the proceeding as 'criminal' lead to a right to silence under the Fifth Amendment, but a characterization of the proceeding as 'civil' would also lead to a right to silence under State law. It is only in the 'sexually dangerous person' proceeding that the individual may be compelled to give evidence that will be used to deprive him of his liberty. The fact that this proceeding is unique — neither wholly criminal nor civil — surely cannot justify the unique deprivation of a constitutional protection.

"It is, of course, true that 'the State has a substantial interest in . . . protecting the public from sexually dangerous persons.' . . . 481 N.E.2d at 696. But the fact that an individual accused of being a 'sexually dangerous person' is also considered a danger to the community cannot justify the denial of the Fifth Amendment privilege; if so, the privilege would never be available for any person accused of a violent crime. The fact that it may be more difficult for the State to obtain evidence that will lead to incarceration similarly cannot prevent the applicability of the Fifth Amendment; if so, the right would never be justified, for it could always be said to have that effect. Nor can the fact that proof of sexual dangerousness requires evidence of noncriminal elements — the continuing requirement that a future criminal 'propensity' be proved, for instance — prevent the applicability of the Fifth Amendment; if anything, that requirement should be subject of greater, rather than lesser, concern.

"In the end, this case requires a consideration of the role and the value of the Fifth Amendment. The privilege sometimes does not serve the interest in making the truth-seeking function of a trial more reliable. Indeed, a review of the psychiatrists' reports in this very case suggests the propriety of that concern. The basic justification for the constitutional protection, however, also rests on the nature of our free society. As a distinguished leader of the Bar stated more than thirty years ago:

> '[T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such, it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the State. It would never be allowed by communists, and thus it may well be regarded as one of the signs which sets us off from communism.' E. Griswald, The Fifth Amendment Today 81 (1955).

"For the Court, these concerns are not implicated today because the prosecution-initiated and prison-destined sexually dangerous person proceeding is not 'criminal' in nature. In my opinion, permitting a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society.

"I respectfully dissent."

Armstrong v. Manzo

380 U.S. 545, 85 S.Ct. 1187 (1965)

ADOPTION - Notice — ***Adoption by the stepfather is invalid if notice of the proceedings was not given to the natural father whose address was known, even though he had not contributed to the support of the child for over two years; the deficiency was not cured by holding a hearing on the father's motion to vacate because at the hearing the burden was on the father, not the petitioners.***

"(p. 1188) Mr. Justice STEWART delivered the opinion of the Court.

"The petitioner, R. Wright Armstrong, Jr., and his wife were divorced by a Texas Court in 1959. Custody of their only child, Molly Page Armstrong, was awarded to Mrs. Armstrong, and the petitioner was granted 'the privilege of visiting with said child at reasonable times, places, and intervals.' The divorce decree ordered the petitioner to pay $50 a month for his daughter's support. In 1960 Mrs. Armstrong married the respondent, Salvatore E. Manzo. Two years later the Manzos filed a petition for adoption in the District Court of El Paso County, Texas, seeking to make Salvatore Manzo the legal father of Molly Page Armstrong.

"Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father, except in certain specified circumstances. One such exceptional circumstance is if the father 'shall have not contributed substantially to the support of such child during (a) period of two (2) years commensurate with his financial ability.' In that event, the written consent of the Judge of the Juvenile Court of the county of the child's residence may be accepted by the adoption court in lieu of the father's consent. "Preliminary to filing the adoption petition, Mrs. Manzo filed an affidavit in the Juvenile Court, alleging in conclusory terms that the petitioner had 'failed to contribute to the support of' Molly Page Armstrong 'for a period in excess of two years preceding this date.' No notice was given to the petitioner of the filing of this affidavit, although the Manzos well knew his precise whereabouts in Fort Worth, Texas. On the basis of the affidavit, and without, so far as the record shows, a hearing of any kind, the juvenile court judge promptly issued his consent to the adoption. In the adoption petition, filed later the same day, the Manzos alleged that 'consent of the natural father, R. W. Armstrong, Jr., to the adoption herein sought is not necessary upon grounds that the said father has not contributed to the support of said minor child commensurate with his ability to do so for a period in excess of two (2) years, and the Judge of a Juvenile Court of El Paso County, Texas *** has consented in writing to said adoption.' No notice of any kind was given to the petitioner of the filing or pendency of this adoption petition.

"An investigator appointed by the court made a detailed written report recommending the adoption, and a few weeks later the adoption decree was entered. . . .

" . . . On the day the decree was entered, however, Salvatore Manzo wrote to the petitioner's father, advising him that 'I have this date completed the court action to adopt Molly Page as my daughter and to change her name to Molly Page Manzo.' The petitioner's father immediately relayed this news to the petitioner, who promptly filed a motion in the District Court of El Paso County, asking that the adoption decree be 'set aside and annulled and a new trial granted,' upon the ground that he had been given no notice of the adoption proceedings.

"The court did not vacate the adoption decree, but set a date for hearing on the motion. At that hearing the petitioner introduced evidence, through witnesses and by depositions, in an effort to show that he had not failed to contribute to his daughter's support 'commensurate with his financial ability.' At the conclusion of the hearing the court entered an order denying the petitioner's motion and providing that the 'adoption decree entered herein is in all things confirmed.' . . .

" . . . The Appellate Court affirmed the trial court's judgement, and the Supreme Court of Texas refused an application for writ of error.

"We granted *certiorari.* 379 U.S. 816, 85 S.Ct. 46. The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

"In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Tr. Co.,* 339 U.S. 306 at 313, 70 S.Ct. 652 at 656, . . . Questions frequently arise as to the adequacy of a particular case . . .

" . . . But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. Cf. *May v. Anderson,* 345 U.S. 528, 533, 73 S.Ct. 840, 843.

. . .

"Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed . . . It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.

"Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved . . . These burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

" . . . The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of the law been accorded to him in the first place. His motion should have been granted.

. . .

"Reversed and remanded."

Baxstrom v. Herold

383 U.S. 545, 85 S.Ct. 1187 (1965)

CIVIL COMMITMENT (Transfer Prison to Hospital) — ***A prisoner cannot be transferred from a prison to a hospital without the same due process protections given to a patient initially being committed to the hospital.***

"(p. 761) Mr. Chief Justice WARREN delivered the opinion of the Court.

"We granted *certiorari* in the case to consider the constitutional validity of the statutory procedure under which petitioner was committed to a mental institution at the expiration of his criminal sentence in a State prison.

"Petitioner, Johnnie K. Baxstrom, was convicted of second degree assault in April 1959 and was sentenced to a term of two and one-half to three years in a New York prison. On June 1, 1961, he was certified as insane by a prison physician. He was then transferred from prison to Dannemora State Hospital, an institution under the jurisdiction and control of the New York Department of Correction and used for the purpose of confining and caring for male prisoners declared mentally ill while serving a criminal sentence. In November 1961, the director of Dannemora filed a petition in the Surrogate's Court of Clinton County stating that Baxstrom's penal sentence was about to terminate and requesting that he be civilly committed pursuant to sec. 384 of the New York Correction Law, McKinney's Consol.Laws, c. 43.

"On December 6, 1961, a proceeding was held in the Surrogate's chambers. Medical certificated were submitted by the State which stated that, in the opinion of two of its examining physicians, Baxstrom was still mentally ill and in need of hospital and institutional care. Respondent, then assistant director at Dannemora, testified that in his opinion Baxstrom was still mentally ill. Baxstrom, appearing alone, was accorded a brief opportunity to ask questions. Respondent and the Surrogate both stated that they had no objection to his being transferred from Dannemora to a civil hospital under the jurisdiction of the Department of Mental Hygiene. But the Surrogate pointed out that he had no jurisdiction to determine the question — that under sec. 384 the decision was entirely up to the Department of Mental Hygiene. The Surrogate then signed a certificate which indicated he was satisfied that Baxstrom 'may require mental care and treatment' in an institution for the mentally ill. The Department of Mental Hygiene had already determined *ex parte* that Baxstrom was not suitable for care in a civil hospital. Thus, on December 18, 1961, the date upon which Baxstrom's penal sentenced expired, custody over him shifted from the Department of Correction to the Department of Mental Hygiene, but he was retained at Dannemora and has remained there to this date.

"Thereafter, Baxstrom sought a writ of habeas corpus in a State court. An examination by an independent psychiatrist was ordered and a hearing was held at which the examining psychiatrist testified that, in his opinion Baxstrom was still mentally ill. The writ was dismissed. In 1963, Baxstrom applied for again for a writ of habeas corpus, alleging that his constitutional rights had been violated and that he was then sane, or if insane, he should be transferred to a civil mental hospital. Due to his indigence and his incarceration in Dannemora, Baxstrom could not produce psychiatric testimony to disprove the testimony adduced at the prior hearing. The writ was therefore dismissed. Baxstrom's alternative request for transfer to a civil mental hospital was again denied as being beyond the power of the court despite a statement by the State's attorney that he wished that Baxstrom would be transferred to a civil mental hospital. On appeal to the Appellate Division, Third Department, the dismissal of the writ was affirmed without opinion . . . 251 N.Y.S.2d 938. A motion for leave to appeal to the Court of Appeals was denied . . . 253 N.Y.S.2d 1028, 202 N.E.2d 159. We granted *certiorari*. . . .

"We hold that petitioner was denied equal protection of the laws by the statutory procedure

under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that he afforded to all so committed except those like Baxstrom, nearing the expiration of a penal sentence.

"Section 384 of the New York Correction Law prescribes the procedure for civil commitment upon the expiration of the prison term of a mentally ill person confined at Dannemora. Similar procedures are prescribed for civil commitment of all other allegedly mentally ill persons. N.Y.Mental Hygiene Law, McKinney's Consol.Laws, c. 27, sec. 70, 72. All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under sec. 74 of the Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.

"The director contends that the State has created a reasonable classification differentiating the civilly insane from the 'criminally insane,' which he defines as those with dangerous or criminal propensities. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. *Walters v. City of St. Louis,* 347 U.S. 231, 237, 74 S.Ct. 505, 509, . . . Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.* For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need if institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

"The statutory procedure provided in sec. 384 of the New York Correction Law denied Baxstrom the equal protection of the laws in another respect as well. Under sec. 384 the judge need only satisfy himself that the person 'may require care and treatment in an institution for the mentally ill.' Having made such a finding, the decision whether to commit that person to a hospital maintained by the Department of Correction or to a civil hospital is completely in the hands of administrative officials. Except for persons committed to Dannemora upon expiration of sentence under sec. 384, all others civilly committed to hospitals maintained by the Department of Correction are committed only after judicial proceedings have been held in which it is determined that the person is so dangerously mentally ill that his presence in a civil hospital is dangerous to the safety of other patients or employees, or to the community.

"This statutory classification cannot be justified by the contention that Dannemora is substantially similar to other mental hospitals in the State and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. The parties have described various characteristics of Dannemora to show its similarities and dissimilarities to civil hospitals in New York. As striking as the dissimilarities are, we need not make any factual determination as to the nature of Dannemora; the New York State Legislature has already made that determination. By statute, the hospital is under the jurisdiction of the Department of Correction and is used for the purpose of confining and caring for insane prisoners and persons, like Baxstrom, committed at the expiration of a penal term. N.Y. Correction Law sec. 375. Civil mental hospitals in New York, on the other hand, are under the jurisdiction and control of the Department of Mental Hygiene. Certain privileges of patients at Dannemora are restricted by statute. N.Y. Correction Law sec. 388. Moreover, as has been noted, specialized statutory procedures are prescribed for commitment to hospitals under the jurisdiction of the Department of Correction. While we may assume that transfer among like mental hospitals is a purely administrative function, where, as here, the State has created functionally distinct institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary.

"The director argues that it is reasonable to classify persons in Baxstrom's class together with those found to be dangerously insane since such persons are not only insane but have proven criminal tendencies as shown by their past criminal records. He points to decisions of the New York Court of Appeals supporting this view. *People ex rel. Kamisaroff v. Johnston,* . . . 242 N.Y.S.2d 38, 192 N.E.2d 11; *People ex rel. Brunson v. Johnston,* . . . 255 N.Y.S.2d 867, 204 N.E.2d 200.

"We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all other civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.

"The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time of the civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

"In order to accord to petitioner the equal protection of the laws, he was and is entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed under sec. 74 of the New York Mental Hygiene Law. He is also entitled to a hearing under the procedure granted all others by sec. 85 of the New York Mental Hygiene Law to determine whether he is so dangerously mentally ill that he must remain in a hospital maintained by the Department of Correction. The judgment of the Appellate Division of the Supreme Court, in the Third Judicial Department of New York is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

"It is so ordered.

"Reversed and remanded.

"Mr. Justice BLACK concurs in the result."

Bellotti v. Baird

443 U.S. 622, 99 S.Ct. 3035 (1979)

ABORTION — ***It is unconstitutional for a State statute to require a pregnant girl to obtain parental consent for an abortion if she is not mature enough to make her own decision or judicial consent if she is without giving her a hearing as to whether she is mature enough to make the decision without anyone else's consent.***

"(p. 3038) Mr. Justice POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST joined.

"These appeals present a challenge to the constitutionality of a State statute regulating the access of minors to abortions. They require us to continue the inquiry we began in the *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, . . . (1976), and *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857, . . . (1976).

"On August 2, 1974, the Legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an Act pertaining to abortions performed within the State. 1974 Mass. Acts, ch 706. According to its title, the statute was intended to regulate abortions 'within present constitutional limits.' Shortly before the Act was to go into effect, the class action from which these appeals arise was commenced in the District Court to enjoin, as unconstitutional, the provision of the Act now codified as Mass. Gen. Laws Ann. 112, sec. 12S (West Supp. 1979).

"Section 12S provides in part:

> 'If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a Judge of the Superior Court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.'

"Physicians performing abortions in the absence of the consent required by sec. 12S are subject to injunctions and criminal penalties. See Mass.Gen.Laws Ann., ch. 112, sec. 12Q, 12T, and 12U (West Supp. 1979).

"A three-judge District Court was convened to hear the case pursuant to 28 U.S.C. sec. 2281 (1970 ed.), repealed by Pub.L. 94-381, sec. 1, 90 Stat. 1119. Plaintiffs in the suit, appellees in both the cases before us now, were William Baird; Parents Aid Society, Inc. (Parents Aid), of which Baird is founder and director; Gerald Zupnick, M.D., who regularly performs abortions at the Parents Aid clinic; and an unmarried minor, identified by the pseudonym 'Mary Moe,' who, at the commencement of the suit, was pregnant, residing at home with her parents, and desirous of obtaining an abortion without informing them.

"Mary Moe was permitted to represent the 'class of unmarried minors in Massachusetts who have adequate capacity to valid and informed consent [to abortion], and who do not wish to involve their parents.' *Baird v. Bellotti,* 393 F.Supp. 847, 850 (Mass. 1975) (Baird I). Initially there was some confusion whether the rights of minors who wish abortions without parental

involvement but who lack 'adequate capacity' to give such consent also could be adjudicated in the suit. The District Court ultimately determined that Dr. Zupnick was entitled to assert the rights of these minors. See *Baird v. Bellotti,* 450 F.Supp. 997, 1001, and n. 6 (Mass. 1978).

"Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, both organizations that provide counseling to pregnant adolescents, and Phillip Stubblefield, M.D. (intervenors), appeared as *amici curae* on behalf of the plaintiffs. The District Court 'accepted [this group] in a status something more than *amici* because of reservations about the adequacy of plaintiffs' representation [of the plaintiff classes in the suit].' *Id.,* at 999 n. 3.

"Defendants in the suit, appellants here in No. 78-329, were the Attorney General of Massachusetts and the District Attorneys of all counties in the State. Jane Hunerwadel was permitted to intervene as a defendant and representative of the class of Massachusetts parents having unmarried minor daughters who then were, or might become, pregnant. She and the class she represents are appellants in No. 78-330.

"Following three days of testimony, the District Court issued an opinion invalidating sec. 12S. *Baird I, supra.* The court rejected appellees' argument that all minors capable of becoming pregnant also are capable of giving informed consent to an abortion, or that it always is in the best interests of a minor who desires an abortion to have one. See 393 F.Supp. at 854. But the court was convinced that 'a substantial number of females under the age of 18 are capable of forming a valid consent,' *id.,* at 855, and 'that a significant number of [these] are unwilling to tell their parents.' *Id.,* at 853.

"In its analysis of the relevant constitutional principles, the court stated that 'there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age.' *Id.,* at 855-856. The court found no justification for the parental consent limitation placed on that right by sec. 12S, since it concluded that the statute was 'cast not in terms of protecting the minor, . . . but in recognizing independent rights of parents.' *Id.,* at 856. The 'independent' parental rights protected by sec. 12S, as the court understood them, were wholly distinct from the best interests of the minor.

"Appellants sought review in this court, and we noted probable jurisdiction . . . After briefing and oral argument, it became apparent that sec. 12S was susceptible of a construction that 'would void or substantially modify the federal constitutional challenge to the statute.' *Bellotti v. Baird,* 428 U.S. 132, 148, 96 S.Ct. 2857, 2866, . . . (1976) *(Bellotti I).* We therefore vacated the judgment of the District Court, concluding that it should have abstained and certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of sec. 12S, pursuant to existing procedure in that State. See Mass.Sup.Jud.Ct. Rule 3:21.

"On remand, the District Court certified nine questions to the Supreme Judicial Court. These were answered in an opinion styled *Baird v. Attorney General,* 371 Mass. 741, 360 N.E.2d 288 (1977) *(Attorney General).* Among the more important aspects of sec. 12S, as authoritatively construed by the Supreme Judicial Court, are the following:

1. In deciding whether to grant consent to their daughter's abortion, parents are required by sec. 12S to consider exclusively what will serve her best interests. See *id.,* at 746-747, 360 N.E.2d at 292-293.

2. The provision in sec. 12S that judicial consent for an abortion shall be granted, parental objections notwithstanding, 'for good cause shown' means that such consent shall be granted if found to be in the minor's best interests. The judge 'must disregard all parental objections, and other considerations, which are not based exclusively' on that standard. *Id.,* at 748, 360 N.E.2d at 293.

3. Even if the judge in a sec. 12S proceeding finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion,' he is entitled to withhold consent 'in circumstances where he determines that the best interests of the minor will not be served by an abortion.' *Id.,* 360 N.E.2d at 293.

4. As a general rule, a minor who desires an abortion may not obtain judicial consent without first seeking both parents' consent. Exceptions to the rule exist when a parent is not available or when the need for the abortion constitutes 'an emergency requiring immediate action.' *Id.,* at 750, 360 N.E.2d at 294. Unless a parent is not available, he

must be notified of any judicial proceedings brought under sec. 12S. *Id.,* at 755-756, 360 N.E.2d at 297.

5. The resolution of sec. 12S cases and any appeals that follow can be expected to be prompt. The name of the minor and her parents may be held in confidence. If need be, the Supreme Judicial Court and the Superior Courts can promulgate rules or issue orders to ensure that such proceedings are handled expeditiously. *Id.,* at 756-758, 360 N.E.2d at 297-298.

6. Massachusetts Gen.Laws Ann., ch. 112, sec. 12F (West Supp. 1979), which provides, *inter alia,* that certain classes of minors may consent to most kinds of medical care without parental approval, does not apply to abortions, except as to minors who are married, widowed, or divorced. See 371 Mass. at 758-762, 360 N.E.2d at 294. See n. 27, *infra.*

"Following the judgment of the Supreme Judicial Court, appellees returned to the District Court and obtained a stay of the enforcement of sec. 12S until its constitutionality could be determined. *Baird v. Bellotti,* 428 F.Supp. 854 (Mass. 1977) *(Baird II).* After permitting discovery by both sides, holding a pretrial conference, and conducting further hearings, the District Court again declared sec. 12S unconstitutional and enjoined its enforcement. *Baird v. Bellotti,* 450 F.Supp. 997 (Mass. 1978) *(Baird III).* The court identified three particular aspects of the statute which, in its view, rendered it unconstitutional.

"First, as construed by the Supreme Judicial Court, sec. 12S requires parental notice in virtually every case where the parent is available. The court believed that the evidence warranted a finding 'that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger.' *Id.,* at 1001. In addition, the court concluded that it would not be in the best interests of some 'immature' minors — those incapable of giving informed consent — even to inform their parents of their intended abortions. Although the court declined to decide whether the burden of requiring a minor to take her parents to court was, *per se,* an impermissible burden on her right to seek an abortion, it concluded that Massachusetts could not constitutionally insist that parental permission be sought or notice given 'in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed . . . ' *Id.,* at 1002.

"Second, the District Court held that sec. 12S was defective in permitting a judge to veto the abortion decision of a minor found to be capable of giving informed consent. The court reasoned that upon a finding of maturity and informed consent, the State no longer was entitled to impose legal restrictions upon this decision. *Id.,* at 1003. Given such a finding, the court could see 'no reasonable basis' for distinguishing between a minor and an adult, and it therefore concluded that sec. 12S was not only 'an undue burden in the due process sense, [but] a discriminatory denial of equal protection [as well].' *Id.,* at 1004.

"Finally, the court decided that sec. 12S suffered from what it termed 'formal overbreadth,' *ibid.,* because the statute failed explicitly to inform parents that the must consider only the minor's best interests in deciding whether to grant consent. The court believed that, despite the Supreme Judicial Court's construction of sec. 12S, parents naturally would infer from the statute that they were entitled to withhold consent for other, impermissible reasons. This was thought to create a 'chilling effect' by enhancing the possibility that parental consent would be denied wrongfully and that the minor would proceed in court.

"Having identified these flaws in sec. 12S, the District Court considered whether it should engage in 'judicial repair.' *Id.,* at 1005. It declined either to sever the statute or to give it a construction different from that set out by the Supreme Judicial Court, as that tribunal arguably had invited it to do. See *Attorney General,* 371 Mass. at 745-746, 360 N.E.2d 292. The District Court therefore adhered to its previous position, declaring sec. 12S unconstitutional and permanently enjoining its enforcement. Appellants sought review in this court a second time, and we noted probable jurisdiction . . .

"A child, merely on account of his minority, is not beyond the protection of the Constitution. As the court said in *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . (1967), 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights

is for adults alone.' This observation, of course, is but the beginning of the analysis. The court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: '[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.' *May v. Anderson,* 345 U.S. 528, 536, 73 S.Ct. 840, 844, . . . (1953) (concurring opinion). The unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' *Moore v. East Cleveland,* 431 U.S. 494, 503-504, 97 S.Ct. 1032, 1938, . . . (1977) (plurality opinion), requires that constitutional principle be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

"The court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. For example, the court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings. *In re Gault, supra.* In particular, minors involved in such proceedings are entitled to adequate notice, the assistance of counsel, and the opportunity to confront their accusers. They can be found guilty only upon proof beyond a reasonable doubt, and they may assert the privilege against compulsory self-incrimination. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . . (1970); *In re Gault, supra.* See, also, *Ingraham v. Wright,* 430 U.S. 651, 674, 97 S.Ct. 1401, 1414, . . . (1977) (corporal punishment of school-children implicates constitutionally protected liberty interest); cf. *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, . . . (1975) (Double Jeopardy Clause prohibits prosecuting juvenile as an adult after an adjudicatory finding in Juvenile Court that he had violated a criminal statute). Similarly, in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975), the court held that children may not be deprived of certain property interests without due process.

"These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of Juvenile Courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults. In order to preserve this separate avenue for dealing with minors, the court has said that hearings in juvenile delinquency cases need not necessarily 'conform with all of the requirements of a criminal trial or even of the usual administrative hearing.' *In re Gault, supra,* 387 U.S. at 1445, quoting *Kent v. United States,* 383 U.S. 541, 562, 86 S.Ct. 1045, 1057, . . . (1966). Thus, juveniles are not constitutionally entitled to trial by jury in delinquency adjudications. *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, . . . (1971). Viewed together, our cases show that although children generally are protected by the same constitutional guarantees as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention." *Id.,* at 550, 91 S.Ct. at 1989 (plurality opinion).

"Second, the court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognized and avoid choices that could be detrimental to them.

"*Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, . . . (1968), illustrates well the Court's concern over the inability of children to make mature choices, as the First Amendment rights involved are clear examples of constitutionally protected freedoms of choice. At issue was a criminal conviction for selling sexually-oriented magazines to a minor under the age of 17 in violation of a New York State law. It was conceded that the conviction could not have stood under the First Amendment if based upon the sale of the same material to an adult. *Id.,* at 634, 88 S.Ct. 1277. Notwithstanding the importance the Court always has attached to First Amendment rights, it concluded that 'even where there is an invasion of protected freedoms 'the power of the State to control the conduct of children reaches beyond the scope of its authority over adults . . . ' *Id.,* at 638, 88 S.Ct. at 1280, quoting *Prince v. Massachusetts,* 321 U.S. 158, 170,

64 S.Ct. 438, 444, . . . (1944). The Court was convinced that the New York Legislature rationally could conclude that the sale to children of the magazines in question presented a danger against which they should be guarded. *Ginsberg, supra,* at 641, 88 S.Ct. at 1281. It therefore rejected the argument that the New York law violated the constitutional rights of minors.

"Third, the guiding role of parents in the upbringing of their children justifies limitations in the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for State deference to parental control over children is that '[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognized and prepare him for additional obligations.' *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573, . . . (1925). 'The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.' *Wisconsin v. Yoder,* 406 U.S. 205, 233, 92 S.Ct. 1526, 1542, . . . (1972). Thus affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature socially responsible citizens.

"We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, '[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the State can neither supply nor hinder.' Prince v. Massachusetts, supra,* 321 U.S. at 166, 64 S.Ct. at 442 (emphasis added).

"Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on the subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.' *Ginsberg v. New York, supra,* 390 U.S. at 639, 88 S.Ct. at 1280.

"Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.' *Ginsberg v. New York,* 390 U.S. at 639, 88 S.Ct. at 1280.

"With these principles in mind, we consider the specific constitutional questions presented by these appeals. In sec. 12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, . . . (1973), and *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, . . . (1973), with the special interest of the State in encouraging an unmarried pregnant minor to seek advice of her parents in making the important decision whether or not to bear a child. As noted above, sec. 12S was before us in *Bellotti I,* 428 U.S. 132, 96 S.Ct. 2857, . . . (1976), where we remanded the case for interpretation of its provisions by the Supreme Judicial Court of Massachusetts. We previously had held in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, . . . (1976), that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. *Id.,* at 74, 96 S.Ct. at 2865, thus 'avoid[ing] or substantially modify[ing] the federal constitutional challenge to the statute.' *Id.,* at 148, 96 S.Ct. at 2866. The question before us — in light of what we have said in prior cases — is whether sec. 12S, as authoritatively interpreted by the Supreme Judicial Court, provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion. See *id.,* at 147, 96 S.Ct. at 2866.

"Appellees and intervenors contend that even as interpreted by the Supreme Judicial Court of Massachusetts, sec. 12S does unduly burden this right. They suggest, for example, that the

mere requirement of parental notice constitutes such a burden. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision — one that for some people raises profound moral and religious concerns. As Mr. Justice STEWART wrote in concurrence in *Planned Parenthood of Central Missouri v. Danforth, supra,* at 91, 96 S.Ct. at 2851:

> 'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.' (Footnote omitted.)

"But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

"The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of the pregnancy.

"Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade,* 410 U.S. at 153, 93 S.Ct. at 726, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

"Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

"For these reasons, as we held in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. at 74, 96 S.Ct. at 2843, 'the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.' Although, as stated in *Part II, supra,* such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.' 428 U.S. at 74, 96 S.Ct. at 2843. We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it must provide an alternative procedure whereby authorization for the abortion can be obtained.

"A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her

physician, independently of her parents' wishes; or (2) that even if she not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth. Ibid.*

"It is against these requirements that sec. 12S must be tested. We observe initially that as authoritatively construed by the highest court of the State, the statute satisfies some of the concerns that require special treatment of a minor's abortion decision. It provides that if parental consent is refused, authorization may be 'obtained by order of a Judge of the Superior Court for good cause shown, after such hearing as he deems necessary.' A Superior Court Judge presiding over a sec. 12S proceeding 'must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests.' *Attorney General,* 371 Mass. at 748, 360 N.E.2d at 293. The Supreme Judicial Court also stated: 'Resolution of a (sec. 12S) proceeding may be expected . . . The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents . . . [W]e believe that an early hearing and decision on appeal from a judgment of a Superior Court Judge may also be achieved.' *Id.,* at 757-758, 360 N.E.2d at 298. The court added that if these expectations were not met, either the Superior Court, in the exercise of its rule-making power, or the Supreme Judicial Court would be willing to eliminate any undue burdens by rule or order. *Ibid.*

"Despite these safeguards, which avoid much of what was objectionable in the statute successfully challenged in *Danforth,* sec. 12S falls short of constitutional standards in certain respects. We now consider these.

"Among the questions certified to the Supreme Judicial Court was whether sec. 12S permits any minors — mature or immature —to obtain judicial consent to an abortion without any parental consultation whatsoever. See n. 9, *supra.* The State Court answered that, in general, it does not. '[T]he consent required by (sec. 12S must) be obtained for every nonemergency abortion where the mother is less than eighteen years of age and unmarried.' *Attorney General, supra,* at 750, 360 N.E.2d at 294. The text of sec. 12S itself states an exception to this rule, making consent unnecessary from any parent who has 'died or has deserted his or her family.' The Supreme Judicial Court construed that the statute as containing an additional exception: Consent need not be obtained 'where no parent (or statutory substitute) is available.' *Ibid.* The court also ruled that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion. *Id.,* at 755-756, 360 N.E.2d at 297.

"We think that, construed in this manner, sec. 12S would impose an undue burden upon the exercise by minors of the right to seek an abortion. As the District Court recognized, 'there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.' *Baird III,* 450 F.Supp. at 1001. There is no reason to believe that this would be so in the majority of the cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in Superior Court provides an effective avenue of relief for some of those who need it the most.

"We conclude, therefore, that under State regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well-enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

"There is, however, an important State interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, as we have observed above, parents

naturally take an interest in the welfare of their children — an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests. If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required. For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by State-imposed conditions upon initial access to court.

"Section 12S requires that both parents consent to a minor's abortion. The District Court found it to be 'custom' to perform other medical and surgical procedures on minors with the consent of only one parent, and it concluded that 'nothing about abortions . . . requires the minor's interest to be treated differently.' *Baird I,* 393 F.Supp. at 852. See *Baird III, supra,* at 1004 n. 9.

"We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest — one normally supportive — in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of the immaturity. In the case of the abortion decision, for reasons we have stated, the focus of the parents' inquiry should be the best interests of their daughter. As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental consent does not unduly burden the constitutional right. Moreover, where the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.

"Another of the questions certified by the District Court to the Supreme Judicial Court was the following: 'If the Superior Court finds that the minor is capable [of making], and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?' *Attorney General,* 371 Mass. at 747 n. 5, 360 N.E.2d at 293 n. 5. To this the court answered:

> '[W]e do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact.' *Id.,* at 748, 360 N.E.2d at 293.

"The Supreme Judicial Court's statement reflects the general rule that a State may require a minor to wait until the age of majority before being permitted to exercise legal rights independently. See n. 23, *supra.* But we are concerned here with the exercise of a constitutional right of unique character. See *supra,* at 3047-3048. As stated above, if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. We therefore agree with the District Court that sec. 12S cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.

"Although it satisfies constitutional standards in large part, sec. 12S falls short of them in two respects: First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the Superior Court to be mature and fully competent to make this decision

independently. Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests. Accordingly, we affirm the judgment of the District Court insofar as it invalidates this statute and enjoins its enforcement.

"Affirmed.

"Mr. Justice REHNQUIST, concurring.

"I join the opinion of Mr. Justice POWELL and the judgment of the Court. At such time as this Court is willing to reconsider its earlier decision in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, . . . (1976), in which I joined the opinion of Mr. Justice WHITE, dissenting in part, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court.

"Mr. Justice STEVENS, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, concurring in the judgment.

"In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, . . . the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 72-75, 96 S.Ct. 2831, 2842-2843, . . . the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute in unconstitutional.

"The Massachusetts statute is, on its face, simple and straightforward. It provides that every woman under 18 who has not married must secure the consent of both her parents before receiving an abortion. 'If one or both of the mother's parents refuse such consent, consent may be obtained by order of a Judge of the Superior Court for good cause shown.' Mass.Gen Laws Ann., ch. 112, sec. 12S (West Supp. 1979).

"Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857, . . . has been eliminated by the authoritative construction of its provisions by the Massachusetts Supreme Judicial Court. See *Baird v. Attorney General,* 371 Mass. 741, 360 N.E.2d 288 (1977). The statute was construed to require that every minor who wishes an abortion must first seek the consent of both parents, unless a parent is not available or unless the need for the abortion constitutes 'an emergency requiring immediate action.' *Id.,* at 750, 360 N.E.2d at 294. Both parents, so long as they are available, must receive notice of judicial proceedings brought under the statute by the minor. In those proceedings, the task of the judge is to determine whether the best interests of the minor will be served by an abortion. The decision is his to make, even if he finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion.' *Id.,* at 748, 360 N.E.2d at 293. Thus no minor in Massachusetts, no matter how mature and capable of informed decision-making, may receive an abortion without the consent of either both her parents or a Superior Court Judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto.

"In *Planned Parenthood of Central Missouri v. Danforth, supra,* this Court invalidated statutory provisions requiring the consent of the husband of a married woman and of one parent of a pregnant minor to an abortion. As to the spousal consent, the Court concluded that 'we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife the wife from terminating her pregnancy, when the State itself lacks that right.' 428 U.S. at 70, 96 S.Ct. at 2841. And as to the parental consent, the Court held that '[j]ust as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.' *Id.,* at 74, 96 S.Ct. at 2843. These holdings, I think, equally apply to the Massachusetts statute. The differences between the two statutes are few. Unlike the Missouri statute, Massachusetts requires the consent of both the woman's parents. It does, of course, provide an alternative in the form of a suit initiated by the woman in Superior Court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests. In Massachusetts, then, as in Missouri, the State has imposed an 'absolute limitation on the minor's right to obtain an abortion,' *Id.,* at 90, 96 S.Ct. at 2851

(STEWART, J., concurring), applicable to every pregnant minor in the State who has not married.

"The provision of an absolute veto to a judge — or, potentially, to an appointed administrator — is to me particularly troubling. The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' *Whalen v. Roe,* 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, . . . (footnotes omitted). It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. In Massachusetts, however, every minor who cannot secure the consent of both her parents — which under *Danforth* cannot be absolute prerequisite to an abortion — is required to secure the consent of the sovereign. As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor — particularly when contrary to her own informed and reasonable decision — is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.

"In short, it seems to me that this litigation is governed by *Danforth;* to the extent this statute differs from that in *Danforth,* it is potentially even more restrictive of the constitutional right to decide whether or not to terminate the pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with Mr. Justice POWELL that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.

"Mr. Justice WHITE, dissenting.

"I was in dissent in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 94-95, 96 S.Ct. 2831, 2853, . . . (1976), on the same issue of the validity of requiring the consent of a parent when an unmarried woman under 18 years of age seeks an abortion. I continue to have the view as I expressed there and also agree with much of what Mr. Justice STEVENS said in dissent in that case. *Id.,* at 101-105, 96 S.Ct. at 2855-2857. I would not, therefore, strike down this Massachusetts law.

"But even if a parental consent requirement of the kind involved in *Danforth* must be deemed invalid, that does not condemn the Massachusetts law, which, when the parents object, authorizes a judge to permit an abortion if he concludes that an abortion is in the best interests of the child. Going beyond *Danforth,* the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interests' of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.

"With all due respect, I dissent."

Breed v. Jones

421 U.S. 519, S.Ct. 1779 (1975)

CERTIFICATION — ***Transfer of a delinquency case to the adult criminal court after the juvenile has admitted the charge or been found guilty of it in the Juvenile Court is double jeopardy.***

"(p. 1781) Mr. Chief Justice BURGER delivered the opinion of the Court.

"We granted *certiorari* to decide whether the prosecution of respondent as an adult, after Juvenile Court proceedings which resulted in a finding that he was unfit for treatment as a juvenile, violated a criminal the Fifth and Fourteenth Amendments to the United States Constitution.

"On February 9, 1971, a petition was filed in the Superior Court of California, County of Los Angeles, Juvenile Court, alleging that respondent, then 17 years of age, was a person described by Cal.Welf. & Inst'ns Code sec. 602 (1966), in that, on or about February 8, while armed with a deadly weapon, he has committed acts which, if committed by an adult, would constitute the crime of robbery in violation of Cal.Penal Code sec. 211 (1970). The following day, a detention hearing was held, at the conclusion of which respondent was ordered detained pending a hearing on the petition.

"The jurisdictional or adjudicatory hearing was conducted on March 1, pursuant to Cal.Welf. & Inst'ns Code sec. 701 (1966). After taking testimony from two prosecution witnesses and respondent, the Juvenile Court found that respondent was a person described by sec. 602, and it sustained the petition. The proceedings were continued for a dispositional hearing, pending which the court ordered that respondent remain detained.

"At a hearing conducted on March 15, the Juvenile Court indicated its intention to find respondent 'not . . . amenable to the care, treatment and training program available through the facilities of the Juvenile Court' under Cal.Welf. & Inst'ns Code sec. 707 (Supp. 1967). Respondent's counsel orally moved 'to continue the matter on the ground of surprise,' contending that respondent 'was not informed that it was going to be a fitness hearing.' The court continued the matter for one week, at which time, having considered the report of the probation officer assigned to the case and having heard her testimony, it declared respondent 'unfit for treatment as a juvenile,' and ordered that he be prosecuted as an adult.

"Thereafter, respondent filed a petition for writ of habeas corpus in Juvenile Court, raising the same double jeopardy claim now presented. Upon the denial of that petition, respondent sought habeas corpus relief in the California Court of Appeals, Second Appellate District. Although it initially stayed the criminal prosecution pending against respondent, that court denied the petition. *In re Gary J.,* 17 Cal.App.3d 704, 95 Cal. Rptr. 185 (1971). The Supreme Court of California denied respondent's petition for hearing.

"After a preliminary hearing respondent was ordered held for trial in Superior Court, where an information was subsequently filed accusing him of having committed robbery, in violation of Cal.Penal Code sec. 211 (1970), while armed with a deadly weapon, on or about February 8, 1971. Respondent entered a plea of not guilty, and he also pleaded that he had 'already been placed once in jeopardy and convicted of the offense charged, by the judgment of the Superior Court of the County of Los Angeles, Juvenile Court, rendered . . . on the 1st day of March, 1971.' App. 47. By stipulation, the case was submitted to the court on the transcript of the preliminary hearing. The court found respondent guilty of robbery in the first degree under Cal.Penal Code sec. 211a (1970) and ordered that he be committed to the California Youth Authority. No appeal was taken from the judgment of conviction.

"On December 10, 1971, respondent, through his mother as guardian ad litem, filed the

instant petition for a writ of habeas corpus in the Central District of California. In his petition he alleged that his transfer to adult court pursuant to Cal.Welf. & Inst'ns Code sec. 707 and subsequent trial there 'placed him in double jeopardy.' App. 13. The District Court denied the petition, rejecting respondent's contention that jeopardy attached at his adjudicatory hearing. It concluded that the 'distinctions between the preliminary procedures and hearings provided by California law for juveniles and a criminal trial are many and apparent and the effort of [respondent] to relate them is unconvincing,' and that 'even assuming jeopardy attached during the preliminary juvenile proceedings . . . it is clear that no new jeopardy arose by the juvenile proceeding sending the case to criminal court.' 343 F.Supp. 690, 692 (1972).

"The Court of Appeals reversed, concluding that applying double jeopardy protection to juvenile proceedings would not 'impede the Juvenile Courts in carrying out their basic goal of rehabilitating the erring youth,' and that the contrary result might do irreparable harm to or destroy their confidence in our judicial system.' The court therefore held that the Double Jeopardy Clause 'is fully applicable to Juvenile Court proceedings.' 497 F.2d 1160, 1165 (CA9 1974).

"Turning to the question whether there had been a constitutional violation in this case, the Court of Appeals pointed to power of the Juvenile Court to 'impose severe restrictions upon the juvenile's liberty,' *id.,* in support of its conclusion that jeopardy attached in respondent's adjudicatory hearing. It rejected petitioner's contention that no new jeopardy attached when respondent was referred to Superior Court and subsequently tried and convicted, finding 'continuing jeopardy' principles advanced by petitioner inapplicable. Finally, the Court of Appeals observed that acceptance of petitioner's position would 'allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged,' a procedure it found offensive to 'our concepts of basic, even-handed fairness.' The court therefore held that once jeopardy attached at the adjudicatory hearing, a minor could not be retried as an adult or a juvenile 'absent some exception to the double jeopardy prohibition,' and that there 'was none here.' *Id.,* at 1168.

"We granted *certiorari* because of a conflict between courts of appeal and the highest courts of a number of States on the issue presented in this case and similar issues and because of the importance of final resolution of the issue to the administration of the Juvenile Court system.

"The parties agree that, following his transfer from Juvenile Court, and as a defendant to a felony information, respondent was entitled to the full protection of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. See *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, . . . (1969). In addition, they agree that respondent was put in jeopardy by the proceedings on that information, which resulted in an adjudication that he was guilty of robbery in the first degree and in a sentence of commitment. Finally, there is no dispute that the petition filed in Juvenile Court and the information filed in Superior Court related to the 'same offence' within the meaning of the constitutional prohibition. The point of disagreement between the parties, and the question for our decision, is whether, by reason of the proceedings in Juvenile Court, respondent was 'twice put in jeopardy.'

"Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. See *Price v. Georgia,* 398 U.S. 323, 326, 329, 90 S.Ct. 1757, 1759, . . . (1970); *Serfass v. United States,* 420 U.S. 377, 387-389, 95 S.Ct. 1055, 1062-1063, . . . (1975). Although the constitutional language, 'jeopardy of life or limb,' suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language. See *Ex parte Lange,* 18 Wall. 163, 170-173, . . . (1874). At the same time, however, we have held that the risk to which the refers is not present in proceedings that are not 'essentially criminal.' *Helvering v. Mitchell,* 303 U.S. 391, 398, 58 S.Ct. 630, 632, . . . (1938). See *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 63 S.Ct. 379, . . . (1943); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 93 S.Ct. 489, . . . 438 (1972). See, also, J. Sigler, Double Jeopardy 60-62 (1969).

"Although the Juvenile Court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, . . . (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with

traditional criminal prosecutions. *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . . (1970). In so doing the Court has evinced awareness of the threat which such a process represents to the efforts of the Juvenile Court system, functioning in a unique manner, to ameliorate the harshness of criminal justice when applied to youthful offenders. That the system has fallen short of the high expectations of its sponsors in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny.

"We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights in juvenile proceedings, requires that courts eschew the 'civil' label of consequence which has been attached to juvenile proceedings,' *In re Gault, supra,* 387 U.S. at 50, 87 S.Ct. at 1455; and that 'the juvenile process . . . be candidly appraised.' 387 U.S. at 21, 87 S.Ct. at 1440. See *In re Winship, supra,* 397 U.S. at 365-366, 90 S.Ct. at 1073.

"As we have observed, the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.' *United States ex rel. Marcus v. Hess, supra,* 317 U.S. at 548-549, 63 S.Ct. at 388. Because of its purpose and potential consequences, and the nature and resources of the State, such proceeding imposes heavy pressures and burdens — psychological, physical, and financial — on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once 'for the same offence.' See *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, . . . (1957); *Price v. Georgia,* 398 U.S. at 331, 90 S.Ct. at 1762; *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 554, . . . (1971) (opinion of HARLAN, J.).

"In *In re Gault, supra,* 387 U.S. at 36, 87 S.Ct. at 1448, this Court concluded that, for purposes of the right to counsel, a 'proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.' See *In re Winship, supra,* 397 U.S. at 366, 90 S.Ct. at 1073. The Court stated that the term 'delinquent' had 'come to involve only slightly less stigma than the term 'criminal' applied to adults,' *In re Gault, supra,* 387 U.S. at 24, 87 S.Ct. at 1441; see *In re Winship, supra,* 397 U.S. at 367, 90 S.Ct. at 1074, and that, for purposes of the privilege against self-incrimination, 'commitment' is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' *In re Gault, supra,* 387 U.S. at 50, 87 S.Ct. at 1455. See 387 U.S. at 27, 87 S.Ct. at 1443; *In re Winship, supra,* 397 U.S. at 367, 90 S.Ct. at 1074.

"Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of 'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.' See *Green v. United States, supra,* 355 U.S. at 187, 78 S.Ct. at 223; *United States v. Jorn, supra,* 400 U.S. at 479, 91 S.Ct. at 554; Synder, The Impact of the Juvenile Court Hearing on the Child, 17 *Crime & Delinquency,* 180 (1971). And we can expect that, since our decisions implementing fundamental fairness in the Juvenile Court system, hearings have been prolonged, and some of the burdens incident to a juvenile's defense increased, as the system has assimilated the process thereby imposed. See Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan.L.Rev., 874, 902 n. 138 (1972). Cf. Canon & Kolson, Rural Compliance with Gault; Kentucky, A Cases Study, 10 J. Fam.L., 300, 320-326 (1971).

"We deal here, not with 'the formalities of the criminal adjudicative process,' *McKeiver v. Pennsylvania,* 403 U.S. at 551, 91 S.Ct. at 1989 (opinion of BLACKMUN, J.), but with an analysis of an aspect of the Juvenile Court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case pursuant to Cal.Welf. & Inst'ns Code sec. 701 (1966) and a criminal prosecution, each of which is designed 'to vindicate [the] very vital interest in enforcement of criminal laws.' *United States v. Jorn, supra,* 400 U.S. at 479, 91 S.Ct. at 554. We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was 'put to trial before the trier of the facts,' 400 U.S. at 479, 91 S.Ct. at 554, that is, when the Juvenile Court, as the trier of the facts, began to hear evidence. See *Serfass v. United States,* 420 U.S. at 388, 95 S.Ct. at 1062.

"Petitioner argues that, even assuming jeopardy attached at respondent's adjudicatory hearing, the procedure by which he was transferred from Juvenile Court and tried on a felony information in Superior Court did not violate the Double Jeopardy Clause. The argument is supported by two distinct, but in this case overlapping, lines of analysis. First, petitioner reasons that the procedure violated none of the policies of the Double Jeopardy Clause or that, alternatively, it should be upheld by analogy to those cases which permit retrial of an accused who has obtained reversal of a conviction on appeal. Second, pointing to this Court's concern for 'the juveniles court's assumed ability to function in a unique manner,' *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547, 91 S.Ct. at 1987, petitioner urges that, should we conclude traditional principles 'would otherwise bar a tto adult court after a delinquency adjudication,' we should avoid that result here because it 'would diminish the flexibility and informality of Juvenile Court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts.'

"We cannot agree with petitioner that the trial of respondent in Superior Court on an information charging the same offense as that for which he had been tried in Juvenile Court violated none of the policies of the Double Jeopardy Clause. For, even accepting petitioner's premise that respondent 'never faced the risk of more than one punishment,' we have pointed out that 'the Double Jeopardy Clause . . . is written in terms of potential or risk of *trial* and conviction, not punishment.' *Price v. Georgia,* 398 U.S. at 329, 90 S.Ct. at 1761. (Emphasis added.) And we have recently noted:

> 'The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant . . . It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the government enjoyed no similar right . . . Following the same policy, the court has granted the government the right to retry a defendant after a mistrial only where 'there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.' *United States v. Perez,* 9 Wheat 579, 580, . . . (1824); *United States v. Wilson,* 420 U.S. 332, 343, 344, 95 S.Ct. 1013, 1022, . . . (1975). (Footnote omitted.)

"Respondent was subjected to the burden of two trials for the same offense; he was twice put to the task of marshalling his resources against those of the State, twice subjected to the 'heavy personal strain' which such an experience represents. *United States v. Jorn,* 400 U.S. at 479, 91 S.Ct. at 554. We turn, therefore, to inquire whether either traditional principles or 'the Juvenile Court's assumed ability to function in a unique manner,' *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547, 91 S.Ct. at 1987, supports an exception to the 'constitutional policy of finality' to which respondent would otherwise be entitled. *United States v. Jorn, supra,* at 479, 91 S.Ct. at 554.

"In denying respondent's petitions for writs of habeas corpus, the California Court of Appeal first, and the United States District Court later, concluded that no new jeopardy arose as a result of his transfer from Juvenile Court and trial in Superior Court . . . In the view of those courts, the jeopardy that attaches at an adjudicatory hearing continues until there is a final disposition of the case under the adult charge. See, also, *In re Juvenile,* 364 Mass. 531, 306 N.E.2d 822 (1974). Cf. *Bryan v. Superior Court,* 7 Cal.3d 575, 102 Cal. Rptr. 831, 498 P.2d 1079 (1972), cert. denied, 410 U.S. 944, 93 S.Ct. 1380, . . . (1973).

"The phrase 'continuing jeopardy' describes both a concept and a conclusion. As originally articulated by Mr. Justice HOLMES in his dissent in *Kepner v. United States,* 195 U.S. 100, 134-137, 24 S.Ct. 797, 806, . . . (1904), the concept has proved an interesting model for comparison with the system of constitutional protection which the court has in fact derived from the rather ambiguous language and history of the Double Jeopardy Clause. See *United States v. Wilson, supra,* at 351-352, 95 S.Ct. 1013. Holmes' view has 'never been adopted by a majority of this Court.' *United States v. Jenkins,* 420 U.S. 358, 369, 95 S.Ct. 1006, 1013, . . . (1875).

"The conclusion, 'continuing jeopardy,' as distinguished from the concept, has occasionally been used to explain why an accused who has secured the reversal of a conviction on appeal may be retried for the same offense. See *Green v. United States,* 355 U.S. at 189, 78 S.Ct. at 224; *Price v. Georgia,* 398 U.S. at 326, 90 S.Ct. at 1759; *United States v. Wilson, supra,* at 343-344 n. 11, 95

S.Ct. at 1022. Probably a more satisfactory explanation lies in analysis of the respective interests involved. See *United States v. Tateo,* 377 U.S. 463, 465-466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964); *Price v. Georgia, supra,* 398 U.S. at 329 n. 4, 90 S.Ct. at 1761; *United States v. Wilson, supra.* Similarly, the fact that the proceedings against respondent had not 'run their full course,' *Price v. Georgia, supra,* 398 U.S. at 326, 90 S.Ct. at 1759, within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection a second trial. If there is to be an exception to the protection in the context of the Juvenile Court system, it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens, noted earlier, which the exception will entail in individual cases.

"The possibility of transfer from Juvenile Court to a court of general criminal jurisdiction is a matter of great significance to the juvenile. See *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045, . . . (1966). At the same time, there appears to be widely shared agreement that not all juveniles can benefit from the special features and programs of the Juvenile Court system and a procedure for transfer to an adult court should be available. See, *e.g.,* National Advisory Commission on Criminal Justice Standards and Goals, Courts, Commentary to Standard 14.3, p. 300-301 (1973). This general agreement is reflected in the fact that an overwhelming majority of jurisdictions permits transfer in certain circumstances. As might be expected, the statutory provisions differ in numerous details. Whatever their differences, however, such transfer provisions represent an attempt to impart to the Juvenile Court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system.

"We do not agree with petitioner that giving respondent the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the Juvenile Court system. We agree that such a holding will require, in most cases, that the transfer decision be made prior to an adjudicatory hearing. To the extent that evidence concerning the alleged offense is considered relevant, it may be that, in those cases where transfer is considered and rejected, some added burden will be imposed on the Juvenile Courts by reason of duplicative proceedings. Finally, the nature of the evidence considered at a transfer hearing may in some States require that, if transfer is rejected, a different judge preside at the adjudicatory hearing.

"We recognize that Juvenile Courts, perhaps even more than most courts, suffer from the problems created by spiraling caseloads unaccompanied by enlarged resources and manpower. See "President's Commission on Law Enforcement and Administration of Justice, Task Force Report," *Juvenile Delinquency and Youth Crime,* 7-8 (1967). And courts should be reluctant to impose on the Juvenile Court system any additional requirements which could so strain its resources as to endanger its unique functions. However, the burdens that petitioner envisions appear to us neither qualitatively nor quantitatively sufficient to justify a departure in this context from the fundamental prohibition against double jeopardy.

"A requirement that transfer hearings be held prior to adjudicatory hearings affects not at all the nature of the latter proceedings. More significantly, such a requirement need not affect the quality of decision-making at transfer hearings themselves. In *Kent v. United States,* 383 U.S. at 562, 86 S.Ct. at 1057, the Court held that hearings under the statute there involved 'must measure up to the essentials of due process and fair treatment.' However, the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the demanded, a State determine whether it wants to treat a juvenile within the Juvenile Court system before entering upona proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.

"Moreover, we are not persuaded that the burdens petitioner envisions would pose a significant problem for the administration of the Juvenile Court system. The large number of jurisdictions that presently require that the transfer decision be made prior to an adjudicatory hearing, and the absence of any indication that the Juvenile Courts in those jurisdictions have not been able to perform their task within that framework, suggest the contrary. The likelihood that in many cases the lack of need or basis for a transfer hearing can be recognized promptly

reduces the number of cases in which a commitment or resources is necessary. In addition, we have no reason to believe that the resources available to those who recommend transfer or participate in the process leading to transfer decisions are inadequate to enable them to gather the information relevant to informed decision prior to an adjudicatory hearing. See, generally, *State v. Halverson,* 192 N.W.2d 765, 769 (Iowa 1971); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. & Mary L.Rev. 266, 305-306 (1972); Note, 24 Stan.L.Rev. at 897-899.

"To the extent that transfer hearings held prior to adjudication result in some duplication of evidence if transfer is rejected, the burden on Juvenile Courts will tend to be offset somewhat by the cases in which, because of transfer, no further proceedings in Juvenile Court are required. Moreover, when transfer has previously been rejected, juveniles may well be more likely to admit the commission of the offense charged, thereby obviating the need for adjudicatory hearings, than if transfer remains a possibility. Finally, we note that those States which presently require a different judge to preside at an adjudicatory hearing if transfer is rejected also permit waiver of that requirement. Where the requirement is not waived, it is difficult to see a substantial strain on judicial resources. See Note, 24 Stan.L.Rev. at 900-901.

"Quite apart from our conclusions with respect to the burdens in the Juvenile Court system envisions by petitioner, we are persuaded that transfer hearings prior to adjudication will aid the objectives of that system. What concerns us here is the dilemma that the possibility of transfer after an adjudicatory hearing presents for a juvenile; a dilemma to which the Court of Appeals alluded. See *supra,* at 1784. Because of that possibility, a juvenile, thought to be the beneficiary of special consideration, may in fact suffer substantial disadvantages. If he appears uncooperative, he runs the risk of an adverse adjudication, as well as of an unfavorable dispositional recommendation. If, on the other hand, he is cooperative, he runs the risk of prejudicing his chances in adult court if transfer is ordered. We regard a procedure that results in such a dilemma as at odds with the goal that, to the extent fundamental fairness permits, adjudicatory hearings be informal and nonadversary. See *In re Gault,* 387 U.S. at 25-27, 87 S.Ct. at 1442; *In re Winship,* 397 U.S. at 366-367, 90 S.Ct. at 1074; *McKeiver v. Pennsylvania,* 403 U.S. at 534, 550, 91 S.Ct. at 1981. Knowledge of the risk of transfer after an adjudicatory hearing can only undermine the potential for informality and cooperation which was intended to be the hallmark of the Juvenile Court system. Rather than concerning themselves with the matter at hand, establishing innocence or seeking a disposition best suited to individual correctional needs, the juvenile and his attorney are presses into a posture of adversary wariness that is conducive to neither. Cf. Kay & Segal, The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach, 61 Geo.L.J. 1401 (1973); Carr, The Effect of Double Jeopardy Clause on Juvenile Proceedings, 6 U. Tol.L.Rev. 1, 52-54 (1974).

"We hold that the prosecution of respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. The mandate of the Court of Appeals, which was stayed by that court pending our decision, directs the District Court 'to issue a writ of habeas corpus directing the State court, within 60 days, to vacated the adult conviction of Jones and either set him free or remand him to the Juvenile Court for disposition.' Since respondent is no longer subject to the jurisdiction of the California Juvenile Court, we vacated the judgment and remand the case to the Court of Appeals for such further proceedings consistent with this opinion as may be appropriate in the circumstances.

"So ordered.

"Judgment vacated and case remanded."

Caban v. Mohammed

441 U.S. 519, 95 S.Ct. 1779 (1975)

UNWED FATHERS (Adoption Consent) — ***Unwed fathers have the same rights to the child as unwed mothers, there being no important State purpose in distinguishing between them.***

"(p. 1763) Mr. Justice POWELL delivered the opinion of the Court.

"The appellant, Abdiel Caban, challenges the constitutionality of sec. 111 of the New York Domestic Relations Law (McKinney 1977), under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important State interest.

"Abdiel Caban and appellee Maria Mohammed lived together in New York City from September 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman, from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father until the end of 1973. Together with Mohammed, he contributed to the support of the family.

"In December 1973, Mohammed took the two children and left the appellant to take up residence with appellee Kazim Mohammed, whom she married on January 30, 1974. For the next nine months, she took David and Denise each weekend to visit her mother Delores Gonzales, who lived one floor above Caban. Because of his friendship with Gonzales, Caban was able to see the children each week when they came to visit their grandmother.

"In September 1974, Gonzales left New York to take up residence in her native Puerto Rico. At the Mohammeds' request, the grandmother took David and Denise with her. According to appellees, they planned to join the children in Puerto Rico as soon as they had saved enough money to start a business there. During the children's stay with their grandmother, Mrs. Mohammed kept in touch with David and Denise by mail; Caban communicated with the children through his parents, who also resided in Puerto Rico. In November 1975, he went to Puerto Rico, where Gonzales willingly surrendered the children to Caban with the understanding that they would be returned after a few days. Caban, however, returned to New York with the children. When Mrs. Mohammed learned that the children were in Caban's custody, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appellees instituted custody proceedings in the New York Family Court, which placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife, Nina, visiting rights.

"In January 1976, appellees filed a petition under sec. 110 of the New York Domestic Relations Law to adopt David and Denise. In March, the Cabans cross-petitioned for adoption. After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a law assistant to a New York Surrogate in Kings County, N.Y. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

"The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of the appellant's parental rights and obligations. In his opinion, the Surrogate noted the limited right under New York law of unwed fathers in adoption proceedings: 'Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption.' Moreover, the court

stated that the appellant was foreclosed from adopting David and Denise, as the natural mother held her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well-qualified and granted their adoption petition.

"The New York Supreme Court, Appellate Division, affirmed. It stated that appellant's constitutional challenge to sec. 111 was foreclosed by the New York Court of Appeals' decision in *In re Malpica-Orsini,* . . . 331 N.E.2d 486 (N.Y. 1975), . . . The New York Court of Appeals dismissed the appeal in a memorandum decision based on the *In re Malpica-Orsini, supra.* . . .

"On appeal to this Court, appellant presses two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violated the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in *Quilloin v. Wallcott,* 434 U.S. 246, 98 S.Ct. 549, . . . (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit parents.

"Section 111 of the N. Y. Dom. Rel. Law (McKinney 1977) provides in part

'consent to adoption shall be required as follows:

. . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and]

(c) Of the mother, whether adult or infant, of a child born out-of-wedlock. . . .

"The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompetent to care for the child. Absent one of these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial — as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

"Despite the plain wording of the statute, appellees argue that unwed fathers are not treated differently under sec. 111 from other parents. According to appellees, the consent requirement of sec. 111 is merely a formal requirement, lacking in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed fathers, are subject to the same standard.

"Appellees' interpretation of sec. 111 finds no support in New York case law. On the contrary, the New York Court of Appeals has stated unequivocally that the question whether consent is required is entirely separate from that of the best interests of the child. Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children. Adoption by Abdiel was held impermissible in the absence if Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests. Accordingly, it is clear that sec. 111 treats unmarried parents differently according to their sex.

"Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause. *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 457, . . . (1976). See, also, *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, . . . (1971). The question before us, therefore, is whether the distinction in sec. 111 between unmarried mothers and unmarried fathers bears a substantial relation to some important State interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations — that 'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.' . . .

"Contrary to appellees' argument and to the apparent presumption underlying sec. 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as

a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their children lived together as a natural family for several years. As members of the family, both mother and father participated in the care and support of their children. There is no reason to believe that the Caban children — aged 4 and 6 at the time of the adoption proceedings — had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of sec. 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

"As an alternative justification for sec, 111, appellees argue that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children. Although the legislative history of sec. 111 is sparse, in *In re Malpica-Orsini,* . . . 331 N.E.2d 486 (N.Y. 1975), the New York Court of Appeals identified as the legislature's purpose in enacting sec. 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course. The court concluded:

> 'requiring the consent of fathers of children born out-of-wedlock . . . or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded.' 36 N.Y.2d at 572, 370 N.Y.S.2d at 516, 331 N.E.2d at 489.

"The Court reasoned that people wishing to adopt a child born out-of-wedlock would be discouraged if the natural father could prevent the adoption by mere withholding of his consent. Indeed, the court went so far as to suggest that '[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring.' . . . 331 N.E.2d at 490. Finally, the court held that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the unavailability of the natural father.

"The State's interest in providing for the well-being of the illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of sec. 111. Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structures reasonably to further these ends. As we repeated in *Reed v. Reed,* 404 U.S. at 76, 92 S.Ct. at 254, such a statutory classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guana Co. v. Virginia,* 253 U.S. 412, 415, (40 S.Ct. 560, 561, . . .) (1920).

"We find that the distinction in sec. 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class there would be.

"The New York Court of Appeals in *In re Malpica-Orsini, supra,* suggested that the requiring of unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special

difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in sec. 111. In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child. See, e.g., *In re Orlando F.,* . . . 351 N.E.2d 711 (N.Y. 1976). But in cases such as this, where the father has established a relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out-of-wedlock. Thus, no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under sec. 111 bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.

"In sum, we believe that sec. 111 is another example of 'over-broad generalizations' in gender-based classifications. See *Califano v. Goldfarb,* . . . 97 S.Ct. 1021, 1029, . . . (1977); *Stanton v. Stanton,* 421 U.S. 7, 14-15, 95 S.Ct. 1373, 1377-1378, . . . (1975). The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.

"The judgment of the New York Court of Appeals is

"Reversed.

"Mr. Justice STEWART, dissenting.

"For reasons similar to those expressed in the dissenting opinion of Mr. Justice STEVENS, I agree that sec. 111(1)(c) of the New York Domestic Relations Law (McKinney, 1977) is not constitutionally infirm. The State's interest in promoting the welfare of illegitimate children is of far greater importance than the opinion of the Court would suggest. Unlike children of married parents, illegitimate children begin life with formidable handicaps. They typically depend upon the care and support of one parent — usually the mother. And, even in the era of changing mores, they still may face substantial obstacles simply because they are illegitimate. Adoption provides perhaps the most generally available way of removing these handicaps. See H. Clark, "Law of Domestic Relations," 177 (1968). Most significantly, it provides a means by which an illegitimate child can become legitimate — a fact that the Court's opinion today barely acknowledges.

"The New York statute reflects the judgment that, to facilitate this ameliorative change in the child's status, the consent of only one parent should ordinarily be required for adoption of a child born out-of-wedlock. The mother has been chosen as the parent whose consent is indispensable. A different choice would defy common sense. But the unwed father, if he is the lawful custodian of the child, must under the statute also consent. And, even when he does not have custody, the unwed father who has an established relationship with his illegitimate child is not denied the opportunity to participate in the adoption proceeding. His relationship with the child will be terminated through adoption only if a court determines that adoption will serve the child's best interest. These distinctions represent, I think, a careful accommodation of the competing interests at stake and bear a close and substantial relationship to the State's goal of promoting the welfare of its children. In my view, the Constitution requires no more.

"The appellant has argued that the statute, in granting rights to an unwed mother that it does not grant to an unwed father, violates the Equal Protection Clause by discriminating on the basis of gender. And he also has made the argument that the statute, because it withholds from the unwed father substantive rights granted to all other classes of parents, violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. I find the

latter contention less troublesome than my Brother STEVENS, and see no ultimate merit in the former.

"The appellant relies primarily on *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, . . . in advancing the second argument identified above. But it is obvious that the principle established in that case is not offended by the New York law. The Illinois statute invalidated in *Stanley* employed a stark and absolute presumption that the unwed father was not a fit parent. Upon the death of the unwed mother, the children were declared wards of the State and in Stanley's case were removed from his custody without any hearing or demonstration that he was not a fit parent. Custody having been taken from the father by a stranger — the State — the children were then transferred to other strangers. Stanley, who had lived with his three children over a period of 18 years, was given no opportunity to object. And, although the statute purported to promote the welfare of illegitimate children, the State's termination of Stanley's family relationship was made without any finding that the interests of his children would thereby be served.

"Here, in sharp contrast, the unwed mother is alive, has married, and has voluntarily initiated the adoption proceeding. The appellant has been given the opportunity to participate and to present evidence on the question whether adoption would be in the best interests of the children. Thus, New York has accorded to the appellant all the process that Illinois unconstitutionally denied to Stanley.

"The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that the absence of a legal tie with the mother provides a constitutionally valid ground for distinction. The decision to withhold from the unwed father the power to veto an adoption by the natural mother and her husband may well reflect a judgment that the putative father should not be able arbitrarily to withhold the benefit of legitimacy from his children.

"Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, . . . (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father. Cf. *Stanley v. Illinois, supra.* But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.

"The appellant's equal protection challenge to the distinction drawn between the unwed father and mother seems to me more substantial. Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination. Although the analogy to race is not perfect and the constitutional inquiry therefore somewhat different, gender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereo-typed assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes. Cf. *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, . . . Sex-based classifications are in many settings invidious because they regulate a person to the place set aside for the group on the basis of an attribute that the person cannot change. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, . . . ; *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, . . . ; *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, . . . ; *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, . . . ; *Orr v. Orr, supra.* Such law cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class, for a gender-based classification need

not ring false to work a discrimination that in the individual case might be invidious. Nonetheless, gender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated. See, e.g., *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, . . . Cf. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 59, 93 S.Ct. 1278, 1310, . . . (concurring opinion).

"In my view, the gender-based distinction drawn by New York falls in this latter category. With respect to a large group of adoptions — those of newborn children and infants — unwed mothers and unwed fathers are simply not similarly situated, as my Brother STEVENS has demonstrated. Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. See H. Clark, Law of Domestic Relations, 176-177 (1968); H. Krause, Illegitimacy: Law and Social Policy, 29-32 (1971). This custodial preference has carried with it a correlative power in the mother to place her child for adoption or not to do so.

"The majority of the States have incorporated these basic common-law rules in their statutes identifying the persons whose participation or consent is requisite to a valid adoption. See generally Note, 59 Va.L.Rev. 517 (1973); Comment, 70 Mich.L.Rev. 1581 (1972). These common-law and statutory rules of law reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child — until or unless the State intervenes. The biological father, unless he has established a familial tie with the child by marrying the mother, is often a total stranger from the State's point of view. I do not understand the Court to question these pragmatic differences. See *ante,* at 1768. An unwed father who has not come forward and who has established no relationship with the child is plainly not in a situation similar to the mother's. New York's consent distinctions have clearly been made on this basis, and in my view they do not violate the Equal Protection Clause of the Fourteenth Amendment. See *Schlesinger v. Ballard, supra.*

"In the case, of course, we are concerned not with an unwilling or unidentified father but instead with an unwed father who has established a paternal relationship with his children. He is thus similarly situated to the mother, and his claim is that he thus has parental interests no less deserving of protection than those of the mother. His intention that the New York law on question consequently discriminates against him in the basis of gender cannot be lightly dismissed. For substantially the reasons expressed by Mr. Justice STEVENS in his dissenting opinion, *post,* at 1779, I believe, however, that this gender-based distinction does not violate the Equal Protection Clause as applied in the circumstances of the present case.

"It must be remembered that here there are not two, but three interests at stake: the mother's, the father's, and the children's. Concerns humane as well as practical abundantly support New York's provision that only one parent need consent to adoption of one already legitimate. If the consent of both unwed parents were required, and one withheld the consent, the illegitimate child would remain illegitimate. Viewed in these terms that statute does not in any sense discriminate on the basis of sex. The questions, then, is whether the decision to select the unwed mother as the parent entitled to give or withhold consent and to apply that rule even when the unwed father in fact has a paternal relationship with his children constitutes invidious sex-based discrimination.

"The appellant's argument would be a powerful one were this an instance in which it had been found that adoption by the father would serve the best interests of the children, and in the face of that finding the mother had been permitted to block the adoption. But this is not such a case. As my Brother STEVENS has observed, under a sex-neutral rule — assuming that New York is free to require the consent of but one parent for the adoption of an illegitimate child — the outcome in this case would have been the same. The appellant has been given the opportunity to show that an adoption would not be in his children's best interests. Implicit in the finding made by the New York courts is the judgment that termination of his relationship with the children will in fact promote their well-being — a judgment we are obligated to accept.

"That the statute might permit — in a different context —the unwed mother arbitrarily to thwart the wishes of the caring father as well as the best interests of the child is not a sufficient reason to invalidate it as applied in the present case. For here the legislative goal of the statute —

to facilitate adoptions that are in the best interests of illegitimate children after consideration of all other interests involved — has indeed been fully and fairly served by this gender-based classification. Unless the decision to require the consent of only one parent is in itself constitutionally defective, which nobody has argued, the same interests that support that decision are sufficiently profound to overcome the appellant's claim that he has been invidiously discriminated against because he is male.

"I agree that retroactive application of the Court's decision today would work untold harm, and I fully subscribe to Part III of Mr. Justice STEVENS' dissent.

"Mr. Justice STEVENS, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

"Under sec. 111(1)(c) of the New York Domestic Relations Law (McKinney 1977), the adoption of a child born out-of-wedlock usually requires the consent of the natural mother; it does not require that of the natural father unless he has 'lawful custody.' See *ante,* at 1765 n. 4. Appellant, the natural but noncustodial father of two school-aged children born out-of-wedlock, challenges that provision insofar as it allows the adoption of his natural children of the husband of the natural mother without his consent. Appellant's primary objection is that this in consented-to termination of his parental rights without proof of unfitness on his part violates the substantive component if the Due Process Clause of the Fourteenth Amendment. Secondarily, he attacks sec. 111(1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

"This case concerns the validity of rules affecting the status of the thousands of children who are born out-of-wedlock every day. All of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake. The State interest in facilitating adoption in appropriate cases is strong — perhaps even 'compelling.'

"Nevertheless, it is also true that sec. 111(1)(c) gives rights to natural mothers that it withholds from natural fathers. Because it draws this gender-based distinction between two classes of citizens who have equal right to fair and impartial treatment by their government, it is necessary to determine whether there are differences between the members of the two classes that provide a justification for treating them differently. That determination requires more than merely recognizing that society has traditionally treated the two classes differently. But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions.

"Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out-of-wedlock. Because most adoptions involve newborn infants or very young children, it is appropriate at the outset to focus on the significance of the difference in such cases.

"Both parents are equally responsible for the conception of the child born out-of-wedlock. But from that point on through the pregnancy and infancy, the difference between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during the pregnancy the mother should marry a different partner, the child will be legitimate when born, and the natural father may never even know that his 'rights' have been affected. On the other hand, only if the natural mother agrees to marry the natural father during that period can the latter's actions have a positive impact on the status of the child; if he instead should marry a different partner during that time, the only effect on the child is negative, for the likelihood of legitimacy will be lessened.

"These differences continue at birth and immediately thereafter. During that period, the mother and child are together; the mother's identity is known with certainty. The father, on the other hand, may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother. These natural differences between unmarried fathers and mothers make it probable that the mother and not the father or both parents, will have custody of the newborn infant.

"In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision. But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out-of-wedlock, differences between men and women justify some differential treatment of the mother and the father in the adoption process.

"Most particularly, these differences justify a rule that gives the mother of a new born infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible. Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed.

"This conclusion is borne out by considering the alternative rule proposed by appellant. If the State were to require the consent of both parents, or some kind of hearing to explain why either's consent is unnecessary or unobtainable, it would unquestionably delay the adoption process. Most importantly, such a rule would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of the unshakable responsibility for the care of the child. Furthermore, questions relating to the adequacy of notice to absent fathers could invade the mother's privacy, cause the adopting parents to doubt there liability of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process. While it might not be irrational for a State to conclude that these costs should be incurred to protect the interest of natural fathers, it is nevertheless plain that those costs, which are largely the result of differences between the mother and the father, establish an imposing justification for some differential treatment of the two sexes in this type of situation.

"With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an *older* child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity. *Ante,* at 1768-1769. The Court does conclude, however, that the gender basis for the classification drawn by sec. 111(1)(c) makes differential treatment so suspect that the State has the burden of showing not only that the rule is generally justified but also that the justification holds equally true for *all* persons disadvantaged by the rule. In its view, since the justification is not as strong for some indeterminately small part of the disadvantaged class as it is for the class as a whole, see *ante,* at 1769, the rule is invalid under the Equal Protection Clause insofar as it applies to that subclass. With this conclusion I disagree.

"If we assume, as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment of mothers and fathers of children born out-of-wedlock, the mere fact that the statute draws a 'gender-based distinction,' see *ante,* at 1767, should not, in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated. Indeed, if we make the further undisputed assumption that the discrimination is justified in those cases in which the rule has its most frequent application — cases involving newborn infants and very young children in the custody of their natural mothers, see n. 7 and 12, *supra* — we should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid.

"In this case, appellant made no such showing; his demonstration of unfairness, assuming he has made one, extends only to himself and by implication to the unknown number of fathers just like him. Further, while appellant did nothing to inform the New York courts about the size of his subclass and the overall degree of its disadvantage is insignificant by comparison to the benefits of the rule as it now stands.

"The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason

for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles. We cannot test the conformance of rules to the principle of equality simply by preference to exceptional cases.

"Moreover, I am not at all sure that sec. 111(1)(c) is arbitrary even if viewed solely in the light of the exceptional circumstances presently before the Court. This case involves a dispute between natural parents over which of the two may adopt the children. If both are given a veto, as the Court requires, neither may adopt and the children will remain illegitimate. If, instead of a gender-based distinction, the veto were given to the parent having custody of the child, the mother would prevail just as she did in the State court. Whether or not it is wise to devise a special rule to protect the natural father who (a) has a substantial relationship with his child, and (b) wants to veto an adoption that a court has been found to be in the best interests of the child, the record in this case does not demonstrate that the Equal Protection Clause requires such a rule.

"I have no way of knowing how often disputes between natural parents over the adoption of their children arise after the father 'has established a substantial relationship with the child and [is willing to admit] his paternity,' *ante,* at 1769, but has previously been unwilling to take steps to legitimate his relationship. I am inclined to believe that such cases are relatively rare. But whether or not this assumption is valid, the far surer assumption is that in more common adoption situations, the mother will be more, and often the only, responsible parent, and that a paternal consent requirement will constitute a hindrance to the adoption process. Because this general rule is amply justified in its normal application, I would therefore require the party challenging its constitutionality to make some demonstration of unfairness in a significant number of situations before concluding that it violates the Equal Protection Clause. That the Court has found a violation without requiring such a showing can only be attributed to its own 'stereo-typed reaction' to what is unquestionably, but in this case justifiably, a gender-based distinction.

"Although the substantive due process issue is more troublesome, I can briefly state the reason why I reject it.

"I assume that, if and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary State action as a matter of due process. See *Stanley v. Illinois,* 405 U.S. 645,651, 92 S.Ct. 1208, 1212, . . . Although the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice, it has indicated that an adoption decree that terminates the relationship is constitutionally justified by a finding that the father has abandoned or mistreated the child. See *id.,* at 652, 92 S.Ct. at 1213. In my view, such a decree may also be justified by a finding that the adoption will serve the best interests of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate the child, and a further requirement such as showing of unfitness would entirely deprive the child — and the State — of the benefits of adoption and legitimation. As a matter of legislative policy, it can be argued that the latter reason standing alone is insufficient to sever the bonds that have developed between father and child. But that reason surely avoids the conclusion that the order is arbitrary, and is also sufficient to overcome any further protection of those bonds that may exist in the recesses of the Due Process Clause. Although the constitutional principle at least requires a legitimate and relevant reason and, in these circumstances, perhaps even a substantial reason, it does not require the reason to be one that a judge would accept if he were a legislator.

"There is often the risk that the arguments one advances in dissent may give rise to a broader reading of the Court's opinion than is appropriate. That risk is especially grave when the Court is embarking on a new course that threatens to interfere with social arrangements that have come into use over long periods of time. Because I consider the course on which the Court is currently embarked to be potentially most serious, I shall explain why I regard its holding in this case as quite narrow.

"The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107, 92

S.Ct. 349, 355-356, 30 L.Ed.2d 296. Families that include adopted children need have no concern about the probable impact of this case on their natural family security.

"Nor is there any reason why the decision should affect the processing of most future adoptions. The fact that an unusual application of a State statute has been held unconstitutional on equal protection grounds does not necessarily eliminate the entire statute as a basis for future legitimate State action. The procedure to be followed in cases involving infants who are in the custody of their mothers — whether solely or jointly with the father — or of agencies with authority to consent to adoption, is entirely unaffected by the Court's holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless 'the adoption of an older child is sought,' *ante,* at 1768, and 'the father has established a substantial relationship with the child and [is willing to admit] his paternity.' *Ante,* at 1769. State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case, but as long as State courts are prepared to construe their existing statutes to contain a requirement of paternal consent 'in cases such as this,' *ibid.,* I see no reason why they may not continue to enter valid adoption decrees in the countless routine cases that will arise before the statutes can be amended.

"In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect that it will affect only a tiny fraction of the cases covered by the statutes that must now be rewritten. Accordingly, although my disagreement with the Court is as profound as that fraction is small, I am confident that the wisdom of judges will forestall any widespread harm.

"I respectfully dissent."

Coy v. Iowa

_____ U.S. _____, 108 S.Ct. 2798 (1988)

CONFRONTATION — The right to confrontation at the adjudicatory stage of a criminal proceeding entitles the defendant to see the witness and to have the witness be able to see him without any intervening screening device.

"(p. 862) Justice SCALIA delivered the opinion of the Court.

"Appellant was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight. Appellant contends that this procedure, authorized by State statute, violated his Sixth Amendment right to confront the witnesses against him.

"The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.' This language 'comes to us on faded parchment,' *California v. Green,* 399 U.S. 149, 174, 90 S.Ct. 1930 (1970) with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges.' Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Politt, The Right of Confrontation: Its History and Modern Dress, 8 J Pub L 381, 384-387 (1959).

"We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky v. Stincer,* 107 S.Ct. 2658 . . . (1987) (MARSHALL, J., dissenting). For example, in *Kirby v. United States,* 174 U.S. 47, 55, 19 S.Ct. 574 . . . (1899), which concerned the admissibility of prior convictions of co-defendants to prove an element of the offense of receiving stolen government property, we described the operation of the Clause as follows. '[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.' Similarly, in *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590 . . . (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face-to-face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. More recently, we have described the 'literal right to confront the witness at the time of trial' as forming 'the core of the values furthered by the Confrontation Clause.' *California v. Green, supra,* at 157, 90 S.Ct. 1930. Last Term, the plurality opinion in *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989 . . . (1987), stated that '[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.'

"The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.' Z. Chafee, The Blessings of Liberty, 35 (1956), quoted in *Jay v. Boyd,* 76 S.Ct. 919 . . . (1956) (DOUGLAS, J., dissenting). It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former

context, even if the lie is told, it will often be told less convincingly. The confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss — the right to cross-examine the accuser; both 'ensur[e] the integrity of the fact-finding process.' *Kentucky v. Stincer, supra.* The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential 'trauma' that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

"The remaining question is whether the right to confrontation was in fact violated in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicated that it was successful in this objective. App. 10-11. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

"The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit — namely, the right to cross-examine and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself.

"Justice O'CONNOR, with whom Justice WHITE joins, concurring.

"I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

"Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that '[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim.' *Pennsylvania v. Ritchie,* . . . 107 S.Ct. 989 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only state authorizing the type of screen used in this case. A full half of the States, however, have authorized the use of one- or two-way closed-circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 31 States (including 19 of the 25 authorizing closed-circuit television) permit the use of video-taped testimony which typically is taken in the defendant's presence. See generally *id,* at 9a-18a (collecting statutes).

"While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by State legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant.

"I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a

number of State statutes, . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling State interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

"Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

"Appellant was convicted by an Iowa jury on two counts of engaging in lascivious acts with a child. Because, in my view, the procedures employed at appellant's trial did not offend either the Confrontation Clause or the Due Process Clause, I would affirm his conviction. Accordingly, I respectfully dissent.

"I find it necessary to discuss my disagreement with the Court as to the place of this 'preference' (for the witness to be seen by the defendant) in the constellation of rights provided by the Confrontation Clause for two reasons. First, the minimal extent of the infringement on appellant's Confrontation Clause interests is relevant in considering whether competing public policies justify the procedures employed in this case. Second, I fear that the court's apparent fascination with the witness' ability to see the defendant will lead the States that are attempting to adopt innovations to facilitate the testimony of child-victims of sex abuse to sacrifice other, more central, confrontation interests, such as the right to cross-examination or to have the trier of fact observe the testifying witness.

"The weakness of the Court's support for its characterization of appellant's claim as involving 'the irreducible literal meaning of the Clause' is reflected in its reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join. The majority cites only one opinion of the Court that, in my view, possibly could be understood as ascribing substantial weight to a defendant's right to ensure that witnesses against him are able to see him while they are testifying: 'Our own decisions seem to have recognized at an early date that it is this literal right to *confront* the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.' *California v. Green,* 90 S.Ct. 1930. Even that characterization, however, was immediately explained in *Green* by the quotation from *Mattox v. United States*, 15 S.Ct. 337, set forth above in this opinion to the effect that the Confrontation Clause was designed to prevent the use of *ex parte* affidavits, to provide the opportunity for cross-examination, and to compel the defendant 'to stand face-to-face *with the jury,' California v. Green*, 90 S.Ct. 1930 (emphasis added).

"Whether or not 'there is something deep in human nature,' that considers critical the ability of a witness to see the defendant while the witness is testifying, that was not a part of the common law's view of the confrontation requirement. 'There never was at common law any recongized right to an indispensable thing called confrontation *as distinguished from cross-examination'* (emphasis in original). 5 J. Wigmore, Evidence sec. 1397, p. 158 (J. Chadbourn rev. 1974). In fact, Wigmore considered it clear 'from the beginning of the hearsay rule [in the early 1700s] to the present day' that the right of confrontation is provided 'not for the idle purpose of gazing upon the witness or *of being gazed upon* by him, but rather, to allow for cross-examination (emphasis added). 90 S.Ct. 1930. See *Davis v. Alaska,* 94 S. Ct. 1105 . . . (1974).

"Similarly, in discussing the constitutional requirement, Wigmore notes that, in addition to cross-examination — 'the essential purpose of confrontation' — there is a 'secondary and dispensable' element [of the right:] . . .the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom. . . .[This principle] is satisfied if the *witness,* throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed' (emphasis in original). 5 J. Wigmore, Evidence sec. 1399, p. 199 (J. Chadbourn rev. 1974). The 'right' to have the witness view the defendant did not warrant mention even as part of the 'secondary and dispensable' part of the confrontation Clause protection.

"That the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause is also demonstrated by the exceptions to the rule against hearsay which allow the admission of out-of-court statements against a defendant.

"While I therefore strongly disagree with the Court's insinuation that the Confrontation Clause difficulties presented by this case are more severe than others this Court has examined, I do find that the use of the screening device at issue here implicates 'a preference for face-to-face confrontation at trial,' embodied in the Confrontation Clause. *Ohio v. Roberts,* 100 S.Ct. 2531. This 'preference,' however, like all Confrontation Clause rights, 'must occasionally give way to

considerations of public policy and the necessities of the case.' *Id.*, 100 S.Ct. 2531. The limited departure in this case from the type of 'confrontation' that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant State interest.

"Indisputably, the State interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from .67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse. See American Association for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting 1985, p. 3, 18 (1987). The prosecution of these child sex abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered. '[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming.' D. Whitcomb, E. Shapiro, & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors 17-18 (1985). Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is 'associated with increased behavioral disturbance in children.' Goodman, et al., The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Proceedings from the International Conference on Child Witnesses: Do the Courts Abuse Children?, (British Psychological Association, in press). See, also, Avery, The Child Abuse Witness: Potential for Secondary Victimization, 7 Crim. Just. J 1, 3-4 (1983); S. Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse 133-134 (1982).

"Thus, the fear and trauma associated with a child's testimony in front of the defendant has two serious identifiable consequences. It may cause psychological injury to the child, and it may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself. Because of these effects, I agree with the concurring opinion, that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here — the 'preference' for having the defendant within the witness' sight while the witness testifies."

Davis v. Alaska

415 U.S. 308, 94 S.Ct. 1105 (1974)

CONFIDENTIALITY - Confrontation — ***A witness in an adult criminal trial may be cross-examined as to his juvenile record.***

"(p. 1107) Mr. Chief Justice BURGER delivered the opinion of the Court.

"We granted *certiorari* in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

"When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970 well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square and weighing several hundred pounds, had been removed from the premises.

"Later that afternoon the Alaska State Troopers received word that a safe has been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he has seen and spoken with two Negro men standing alongside a late-modeled metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute, Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February 18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

"At trial, evidence was introduce to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe. Further, the trunk of the car contained particles which were identified as safe insulation characteristic of that found in Mosler safes. The insulation found in the trunk matched that of the stolen safe.

"Richard Green was crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offered was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had the conversation standing at the rear of the car with 'something like a crowbar' in his hands. Green identified petitioner at the trial as the man with the 'crowbar.' The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

"Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in the course of cross-examination. At the time of the trial and at the time of the events Green testified to, Green was on probation by order of a Juvenile Court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at the time of the Polar Bar burglary but had turned 17 prior to the trial.

"In opposing the protective order, petitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show — or at least argue — that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

"The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23, and Alaska Stat. sec. 47.10.080(g) (1971).

"Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for the petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about suspicions the police might have against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

"Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a Juvenile Court adjudication, Green's protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and categorical denial of ever having been subject of any similar law-enforcement interrogation went unchallenged. The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer (denying ever being questioned) can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold 'No' answer would have been given by Green absent a belief that he was shielded from the additional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of his February 16 confrontation with the two men on the road.

"The Alaska Supreme Court affirmed petitioner's conviction, concluding that it did not have to resolve the potential conflict in this case between a defendant's right to a meaningful confrontation with adverse witnesses and the State's interest in protecting the anonymity of a juvenile offender since 'our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive.' 499 P.2d 1025, 1036 (1972). Although the court admitted that Green's denials of any sense of anxiety or apprehension upon the safe's being found close to his home were possibly self-serving, 'the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the youth and pass on his credibility.' *Ibid.* The court concluded that, in light of the direct references permitted, there was no error.

"Since we granted *certiorari* limited to the question of whether petitioner was denied his right under the Confrontation Clause to adequately cross-examine Green, 410 U.S. 925, 93 S.Ct. 1392, . . . (1973), the essential question turns on the correctness of the Alaska court's evaluation of the 'adequacy' of the scope of cross-examination permitted. We disagree with that court's interpretation of the Confrontation Clause and we reverse.

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witness against him.' This right is secured for defendants in State as well as federal criminal proceedings under *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, . . . (1965). Confrontation means more than being allowed to confront the witness physically.' Our cases construing the [confrontation] clause hold that a primary interest secured

by it is the right of cross-examination.' *Douglass v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, . . . (1965). Professor Wigmore stated:

> 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon by him, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' (Emphasis in original.) 5 J. Wigmore, Evidence sec. 1395, p. 123 (3d ed. 1940).

"Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a Trial Judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence sec. 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Green v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, . . . (1959).

"In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.

"We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning has counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act,' *Douglas v. Alabama,* 380 U.S. at 419, 85 S.Ct. at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford v. United States,* 282 U.S. 687, 51 S.Ct. 218, . . . (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

"We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis,* 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, . . . ; *Smith v. Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 750, . . . (1968).

"The claim has been made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues

that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

"We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U.S. 1, 25, 87 S.Ct. 1428, 1442, . . . (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State' case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of juvenile record — if the prosecution insisted on using him to make its case — is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

"In *Alford v. United States, supra,* we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States.' 282 U.S. at 693, 51 S.Ct. at 220. In response to the argument that the witness had a right to be protect from exposure of his criminal record, the Court stated:

> '[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him.' *Id.,* at 694, 51 S.Ct. at 220.

"As in *Alford,* we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

"The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

"It is so ordered.

"Reversed and remanded.

"Mr. Justice STEWART, concurring.

"The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case in order 'to show the existence of possible bias and prejudice . . . ' *Ante,* at 1111. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

"Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

"As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a State Appellate Court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to

the defense. Yet the Court insists on second-guessing the State courts and in effect inviting federal review of every ruling of a State Trial Judge who believes cross-examination has gone far enough. I would not undertake this task, if for no other reason than that I have little faith in our ability, in fact-bound cases and on a cold record, to improve on the judgment of Trial Judges and of the State Appellate Courts who agree with them. I would affirm the judgment."

Durst v. United States

434 U.S. 542, 98 S.Ct. 849, (1978)

RESTITUTION - Fines - Probation — ***Restitution and fines may be required as conditions of probation under the federal juvenile code.***

"(p. 850) Mr. Justice BRENNAN delivered the opinion of the Court.

"We granted *certiorari,* . . . to decide whether a Trial Judge (or designated United States Magistrate) who suspends a sentence of commitment and places a youth offender on probation . . . may impose a fine, or require restitution, or both, as conditions of probation.

"Each of the five petitioners pleaded guilty in a separate proceeding before a United States Magistrate to an offense for which penalties of fine or imprisonment or both are provided. Petitioners Durst and Rice pleaded guilty to obstruction of the mails . . . Petitioners Blystone and Pinninck pleaded guilty to stealing property with a value less than $100 from a government reservation . . . Petitioner Flakes pleaded guilty to theft of property belonging to the United States with a value less than $100 . . . Each petitioner was sentenced by a magistrate, . . . to probation and a suspended sentence of imprisonment. Petitioner Flakes was order to pay a fine of $50 as a condition of probation and each of the other $100. Petitioner Durst was also ordered to make restitution, in the amount of $160, as a condition of probation.

"Each petitioner appealed his sentence to the Untied States District Court for the District of Maryland, which consolidated and affirmed the appeals . . . The United States Court of Appeals for the Fourth Circuit affirmed . . . We agree that, when placing a youth offender on probation under sec. 5010(a), the sentencing judge may require restitution, and, when the otherwise applicable penalty provision permits, impose a fine as a condition of probation, and therefore affirm the judgment of the Court of Appeals.

"The YCA is primarily an outgrowth of recommendations of the Judicial Conference of the United States, see *Dorszynski v. United States,* 418 U.S. 424, 432, 94 S.Ct. 3042, 3048, . . . (1974), designed to reduce criminality among youth. Congress found that between the ages of 16 and 22, 'special factors operated to produce habitual criminals. [Moreover,] then-existing methods of treating criminally inclined youths were found inadequate in avoiding recidivism.' *Id.,* at 432-433, 94 S.Ct. at 3048 (citation omitted).

"The core concept of the YCA, like that of England's Borstal System upon which it is modeled, is that rehabilitative treatment should be substituted for retribution as a sentencing goal. Both the Borstal System and the YCA incorporate three features thought to be essential to the operation of a successful rehabilitative treatment program: flexibility in choosing among a variety of treatment settings and programs tailored to individual needs; separation of youth offenders from hardened criminals; and careful and flexible control of the duration of commitment and of supervised released. The YCA established the framework for creation of a treatment program incorporating these features, and, as an alternative to existing sentencing options, authorized a sentence of commitment to the attorney general for treatment under the Act. *Dorszynski, supra,* 418 U.S. at 437-440, 4 S.Ct. at 3049-3051.

"The Act contains four provisions regarding sentencing. Section 5010(a) provides that '[i]f the court is of the opinion that the youth offender does not need commitment,' imposition or execution of sentence might be suspended and the youth offender placed on probation. Sections 5010(b) and (c) provide that, if the youth is to be committed, the court might 'in lieu of the penalty of imprisonment otherwise provided by law,' sentence the youth offender to the custody of the attorney general for treatment and supervision. Section 5010(d) provides that '[i]f the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c),' the court may sentence the youth offender 'under any other applicable penalty provision.'

"A particularly valuable benefit for the offender sentenced under the YCA is the prospect of obtaining a certificate setting aside his conviction. A certificate automatically issues when a youth committed to the custody of the attorney general under sec. 5010(b) or 5010(c) is unconditionally released prior to expiration of the maximum sentence imposed. 18 U.S. C. sec. 5021(a) (1976 ed.). In 1961, the YCA was amended to extend the benefit of a certificate to youths sentenced to probation under sec. 5010(a) when the court unconditionally discharges the youth prior to expiration of the sentence of probation imposed.

"Petitioners make two arguments in support of their submission that sentencing judges choosing the option under sec. 5010(a) of suspending sentence and placing the youth offender on probation may not impose a fine as a condition of probation. First, they argue that the sentencing provisions of the YCA are alternatives to other sentencing provisions and therefore a substitute for the penalties provided in the statute for violation of which the youth offender was convicted; since sec. 5010(a) does not explicitly authorize the imposition of fines, sentencing judges have no authority to impose them when sentencing under that provision. Second,they argue that fines are necessarily punitive and their imposition therefore inconsistent with the rehabilitative goals of the YCA. Neither of these arguments has merit.

"The language of sec. 5010(a) neither grants nor withholds the authority to impose fines or orders of restitution. Another provision of the YCA, however, sec. 5023(a) incorporates by reference the authority conferred under the general probation statute to permit such exactions. Section 5023(a) provides: 'Nothing in [the Act] shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any way to amend, repeal, or affect the provisions of 18 U.S. C. 3651 which . . . expressly provides, *inter alia:*

'While on probation and among the conditions there of, the defendant —
'May be required to pay a fine in one or several sums; and
'May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was . . . '

. . .

"(p. 855) We conclude that Congress' purpose . . . was to assure that a sentence under sec. 5010(a) would not displace the authority conferred by sec. 3651 to impose fines and orders of restitution as conditions of probation.

"With respect to petitioners' second argument, that fines are punitive and their imposition therefore inconsistent with the rehabilitative goals of the YCA, it is sufficient answer that Congress expressed its judgment to the contrary in preserving the authority of sentencing judges to impose them as a condition of probation. Moreover, we are not persuaded that fines should necessarily be regarded as other than rehabilitative when imposed as a condition of probation. There is much force in the observation of the District Court:

'[A] fine could be consistent . . . with the rehabilitative intent of the Act. By employing this alternative [a fine and probation], the sentencing judge could assure that the youth offender would not receive the harsh treatment of incarceration, while assuring that the offender accepts responsibility for his transgression. The net result of such treatment would be an increased respect for the law and would, in many cases, stimulate the young person to mature into a good law-abiding citizen.' App. 36-37.

"Affirmed.

"Mr. Justice BLACKMUN took no part in the consideration or decision of this case."

Eddings v. Oklahoma

455 U.S. 104, 102 S.Ct. 869 (1982)

SOCIAL HISTORY —***The death sentence of a juvenile tried as an adult for murder is unconstitutional because the court did not consider social factors such as his unhappy upbringing and his emotional disturbance as possible mitigating factors.***

"(p. 872) Justice POWELL delivered the opinion of the Court.

"Petitioner Monty Lee Eddings was convicted of first-degree murder and sentenced to death. Because this sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases,' *Lockett v. Ohio,* 438 U.S. 586, 606, 98 S.Ct. 2954, 2965, . . . (1978) (opinion of BURGER, C. J.), we reverse.

"On April 4, 1977, Eddings, a 16-year-old youth, and several younger companions ran away from their Missouri homes. They traveled in a car owned by Eddings' brother, and drove without destination or purpose in a southwesterly direction eventually reaching the Oklahoma Turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the officer approached the car, Eddings stuck a loaded shotgun out the window and fired, killing the officer.

"Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the Juvenile Court system, the trial court granted the motion. The ruling was affirmed on appeal. *In re M.E.,* 584 P.2d 1340 (Okla. Crim. App.), cert. denied *sub nom. Eddings v. Oklahoma,* 436 U.S. 921, 98 S.Ct. 2271, . . . (1978). Eddings was then charged with murder in the first degree, and the District Court of Creek County found him guilty upon his plea of *nolo contendere.*

"The Oklahoma death penalty statute provides in pertinent part:

> 'Upon conviction . . . of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . . In the sentencing proceeding, evidence may be presented as to *any mitigating circumstances* or as to any of the aggravating circumstances enumerated in this act.' Okla.Stat., Tit. 21, sec. 701. 10 (1980) (emphasis added).

"Section 701.12 lists seven separate aggravating circumstances; the statute nowhere defines what is meant by 'any mitigating circumstances.'

"At the sentencing hearing, the State alleged three of the aggravating circumstances enumerated in the statute: that the murder was especially heinous, atrocious, or cruel; that the crime was committed for the purpose of avoiding or preventing lawful arrest; and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Sec. 701.12(4), (5), and (7).

"In mitigation, Eddings presented substantial evidence at the hearing of his troubled youth. The testimony of his supervising juvenile officer indicated that Eddings had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. App. 109. There is the suggestion that Eddings' mother was an alcoholic and possibly a prostitute. *Id.,* at 110-111. By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical

punishment. The juvenile officer testified that Eddings was frightened and bitter, that his father over-reacted and used excessive physical punishment: 'Mr. Eddings found the only thing that he thought was effective with the boy was actual punishment, or physical violence — hitting with a strap or something like this.' *Id.,* at 121.

"Testimony from other witnesses indicated that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. *Id.,* at 134, 149, and 173. A State psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged. *Id.,* at 137 and 139. A sociologist specializing in juvenile offenders testified that Eddings was treatable. *Id.,* at 149. A psychiatrist testified that Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period. *Id.,* at 181. He testified further that Eddings 'did pull the trigger, he did kill someone, but I didn't even think he knew he was doing it.' The psychiatrist suggested that, if treated, Eddings would no longer pose a serious threat to society. *Id.,* at 180-181.

"At the conclusion of all the evidence, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: 'I have given very serious consideration to the youth of the defendant when this particular crime was committed. Should I fail to do this, I think I would not be carrying out my duty.' *Id.,* at 188-189. But he would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance: '[T]he court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the court in following the law, in my opinion, consider the fact of this young man's violent background.' Id.,* at 189 (emphasis added). Finding that the only mitigating circumstance was Eddings' youth and finding further that this circumstance could not outweigh the aggravating circumstances present, the judge sentenced Eddings to death.

"The Court of Criminal Appeals affirmed the sentence of death. 616 P.2d 1159 (1980). It found that each of the aggravating circumstances alleged by the State had been presented. It recited the mitigating evidence presented by Eddings in some detail, but in the end it agreed with the trial court that only the fact of Eddings' youth was properly considered as a mitigating circumstance:

> '[Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.' *Id.,* at 1170 (citation omitted).

"In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, . . . (1978), Chief Justice BURGER, writing for the plurality, stated the rule that we apply today:

> '[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any circumstances if the offense that the defendant proffers as a basis for a sentence less than death.' *Id.,* at 604, 98 S.Ct. at 2964 (emphasis in original).

"Recognizing 'that the imposition of death by public authority is . . . profoundly different from all other penalties,' the plurality held that the sentencer must be free to give 'independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . . ' *Id.,* at 605, 98 S.Ct. at 2965. Because the Ohio death penalty statute only permitted consideration of three mitigating circumstances, the court found the statute to be invalid.

"As THE CHIEF JUSTICE explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent

and principled but also humane and sensible to the uniqueness of the individual. Since the early days of the common-law, the legal system has struggled to accommodate these twin objectives. Thus, the common-law began by treating all criminal homicides as capital offenses, with a mandatory sentence of death. Later it allowed exceptions, first through an exclusion for those entitled to claim benefit of clergy and then by limiting capital punishment to murders upon 'malice prepensed.' In this country we attempted to.

"We now apply the rule in *Lockett* to the circumstances of this case. The trial judge stated that 'in following the law,' he could not 'consider the fact of this young man's violent background.' App. 189. There is no dispute that by 'violent background,' the trial judge was referring to the mitigating evidence of Eddings' family history. From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence.

"The Court of Criminal Appeals took the same approach. It found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. Thus the court conceded that Eddings had a 'personality disorder,' but cast this evidence aside on the basis that 'he knew the difference between right and wrong . . . and that is the test of criminal responsibility.' 616 P.2d at 1170. Similarly, the evidence of Eddings' family history was 'useful in explaining' his behavior, but it did not 'excuse' the behavior. From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.

"We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

"Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See *McGautha v. California,* 402 U.S. 183, 187-188, 193, 91 S.Ct. 1454, 1457, 1460, . . . (1971). In some cases, such evidence properly may be given little weight. But when the defendant was 16-years-old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

"The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti v. Baird,* 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, . . . (1979).

"Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

"We are not aware of the extent to which minors engage increasingly in violent crime. Nor do we suggest an absence of legal responsibility where crime is committed by a minor. We are concerned here only with the manner of the imposition of the ultimate penalty: the death sentence imposed for the crime of murder upon a youth with a disturbed child's immaturity.'

"On remand, the State Courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence from them. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings not inconsistent with this opinion.

"So ordered.

"Justice BRENNAN, concurring.

"I join the Court's opinion without, however, departing from my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg v. Georgia,* 428 U.S. 153, 227, 96 S.Ct. 2909, 2950, . . . (1976) (dissenting opinion).

"Justice O'CONNOR, concurring.

"I write separately to address more fully the reasons why this case must be remanded in light of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, . . . (1978), which requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.

"Because sentences of death are 'qualitatively different' from prison sentences, *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, . . . (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor. One example of the measures taken is in *Lockett v. Ohio, supra,* where a plurality of this Court wrote:

> 'There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentences in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' *Id.,* at 605, 98 S.Ct. at 2965 (opinion of BURGER, C.J.).

"In order to ensure that the death penalty was not erroneously imposed, the *Lockett* plurality concluded that 'the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' *Id.,* at 604, 98 S.Ct. at 2964 (emphasis in original) (footnote omitted).

"In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla.Stat., Tit. 21, sec. 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before *Lockett* was decided), the judge remarked that he could not 'in following the law . . . consider the fact of this young man's violent background.' App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in *Lockett* compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' 438 U.S. at 605, 98 S.Ct. at 2965.

"I disagree with the suggestion in the dissent that this case may serve no useful purpose. Even though the petitioner had opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

"THE CHIEF JUSTICE may be correct in concluding that the Court's opinion reflects a decision by some Justices that they would not have imposed the death penalty in this case had they sat as the trial judge. See *post,* at 883. I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16. Rather, by listing in detail some of the circumstances surrounding the petitioner's life, the Court has sought to emphasize the variety of mitigating information that may not have been considered by the trial court in deciding whether to impose the death penalty or some lesser sentence.

"Chief Justice BURGER, with whom Justice WHITE, Justice BLACKMUN, and Justice REHNQUIST join, dissenting.

"It is important at the outset to remember — as the Court does not — the narrow question on which we granted *certiorari.* We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense; review of all other questions raised in the petition for *certiorari* was denied. 450 U.S. 1040, 101 S.Ct. 1756, . . . (1981). Yet the Court today goes beyond the issue on which review was sought — and granted — to decide the case on a point raised for the first time in petitioner's brief to this Court. This claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for *certiorari.* Relying on this '11th-hour' claim, the Court strains to construct a plausible legal theory to support its mandate for the relief granted.

"In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, . . . (1978), we considered whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Lockett to death under a statute that 'narrowly limit[ed] the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.' *Id.,* at 589, 98 S.Ct. at 2956. The statute at issue, Ohio Rev. Code Sec. 2929.03-2929.04(B) (1975), required the trial court to impose the death penalty upon Lockett's conviction for 'aggravated murder with specifications,' unless it found 'that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she 'was under duress, coercion, or strong provocation,' or (3) the offense was 'primarily the product of [Lockett's] psychosis or mental deficiency.' 438 U.S. 593-594, 98 S.Ct. at 2958-59. It was plain that although guilty of felony homicide under Ohio law, Lockett had played a relatively minor role in a robbery which resulted in a homicide actually perpetrated by the hand of another. Lockett had previously committed no major offenses; in addition, a psychological report described her 'prognosis for rehabilitation' as 'favorable.' *Id.,* at 594, 98 S.Ct. at 2959. However, since she was not found to have acted under duress, did not suffer from 'psychosis,' and was not 'mentally deficient,' the sentencing judge concluded that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty.' *Ibid.*

"We held in *Lockett* that the 'Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' *Id.,* at 604, 98 S.Ct. at 2964 (emphasis in original). We therefore found the Ohio statute flawed, because it did not permit individualized consideration of mitigating circumstances — such as the defendant's comparatively minor role in the offense, lack of intent to kill the victim, or age. *Id.,* at 606-608, 98 S.Ct. at 2965-66. We did not, however, undertake to dictate the weight that a sentencing court must ascribe to the various factors that might be categorized as 'mitigating,' nor did we in any was suggest that this Court may substitute its sentencing judgment for that of State courts in capital cases.

"In contrast to the Ohio statute at issue in *Lockett,* the Oklahoma death penalty statute provides:

> 'In sentencing proceeding, evidence may be presented as to *any* mitigating circumstances or as to any aggravating circumstances enumerated in this act.' Okla.Stat., Tit. 21, sec. 701.10 (1980) (emphasis added).

"The statute further provides that

'[u]nless at least one of the statutory aggravating circumstances enumerated in this act is

[found to exist beyond a reasonable doubt] or if it is found that any such aggravating circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.' sec. 701.11.

"This provision, of course, instructs the sentencer to weigh the mitigating evidence introduced by a defendant against the aggravating circumstances proved by the State.

"The Oklahoma statute thus contains provisions virtually identical to those cited with approval in *Lockett,* as examples if proper legislation which highlighted the Ohio statute's 'constitutional infirmities.' 438 U.S. at 606-607, 98 S.Ct. at 2965-2966. Indeed, the Court does not contend that the Oklahoma sentencing provisions are inconsistent with *Lockett.* Moreover, the Court recognizes that, as mandated by the Oklahoma statute, Eddings was permitted to present 'substantial evidence at the [sentencing] hearing of his troubled youth.' *Ante,* at 872.

"In its attempt to make out a violation of *Lockett,* the Court relies entirely on a single sentence of the trial court's opinion delivered from the bench at the close of the sentencing hearing. After discussing the aggravated nature of petitioner's offense, and noting that he has 'given very serious consideration to the youth of the Defendant when this particular crime was committed,' the trial judge said that he could not

'be persuaded entirely by the . . . fact that youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.' App. 189.

"From this statement, the Court concludes 'it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence.' *Ante,* at 875. This is simply not a correct characterization of the sentencing judge's action.

"In its passing of the trial court's oral statement, the Court ignores the fact that the judge was delivering his opinion extemporaneously from the bench, and could not be expected to frame each utterance with the specificity and precision that might be expected of a written opinion or statute. Extemporaneous courtroom statements are not often models of clarity. Nor does the Court give any weight to the fact that the trial court had spent considerable time listening to the testimony of a probation officer and various mental health professionals who described Eddings' personality and family history — an obviously meaningless exercise if, as the Court asserts, the judge believed he was barred 'as a matter of law' from 'considering' their testimony. Yet even examined in isolation, the trial court's statement is at best ambiguous; it can just as easily be read to say that, while the court had taken account of Eddings' unfortunate childhood, it did not consider that either his youth of his family background was sufficient to offset the aggravating circumstances that the evidence revealed. Certainly nothing in *Lockett* would preclude the court from making such a determination.

"The Oklahoma Court of Criminal Appeals independently examined the evidence of 'aggravating' and 'mitigating' factors presented at Eddings' sentencing hearing. 616 P.2d 1159 (1980). After reviewing the testimony concerning Eddings' personality and family background, and after referring to the trial court's discussion of mitigating circumstances, it stated that while Eddings' 'family history is useful in explaining why he behaved the way he did, . . . *it does not excuse his behavior.' Id.,* at 1170 (emphasis added). From this the Court concludes that 'the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.' *Ante,* at 875. However, there is no reason to read that court's statements as reflecting anything more than a conclusion that Eddings' background was not a sufficiently mitigating factor to tip the scales, given the aggravating circumstances, including Eddings' statements immediately before the killing. The Court of Criminal Appeals most assuredly did *not,* as the Court's opinion suggests, hold that this 'evidence in mitigation was not relevant,' see *ibid.* Indeed, had the Court of Criminal Appeals thought the evidence irrelevant, it is unlikely that it would have spent several paragraphs summarizing it. The court's opinion offers no reasonable explanation for its assumption that the Court of Criminal Appeals considered itself bound by some unstated legal principle not to 'consider' Eddings' background.

"To be sure, neither the Court of Criminal Appeals nor the trial court labeled Eddings' family background and personality disturbance as 'mitigating factors.' It is plain to me, however, that this was purely a matter of semantics associated with the rational belief that 'evidence in mitigation' must rise to a certain level of persuasiveness before it can be said to constitute a 'mitigating circumstance.' In contrast, the court seems to require that any potential mitigating evidence be described as a 'mitigating factor' — regardless of its weight; the insubstantiality of the evidence is simply to be a factor in the process of weighing the evidence against aggravating circumstances. Yet if this is all the court's opinion stands for, it provides scant support for the result reached. For it is clearly the choice of the Oklahoma courts — a choice not inconsistent with *Lockett* or any other decision of the court — to accord relatively little weight to Eddings' family background and emotional problems as balanced against the circumstances of his crime and his potential for future dangerousness.

"It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one. However, there comes a time in every case when a court must 'bite the bullet.'

"Whether the Court's remand will serve any useful purpose remains to be seen, for petitioner has already been given an opportunity to introduce whatever evidence he considered relevant to the sentencing determination. Two Oklahoma courts have weighed that evidence and found it insufficient to offset the aggravating circumstances shown by the State. The Court's opinion makes clear that some Justices who join it would not have imposed the death penalty had they sat as the sentencing authority, see, e.g., *ante,* at 876-877. Indeed, I am not sure I would have done so. But the Constitution does not authorize us to determine whether sentences imposed by State courts are sentences we considered 'appropriate;' our only authority is to decide whether they are constitutional under the Eighth Amendment. The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed. In the last analysis, the Court is forced to conclude that it is 'the State courts [which] must consider [petitioner's mitigating evidence] and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them.' *Ante,* at 877.

"Because the sentencing proceedings in this case were in no sense inconsistent with *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, . . . (1978), I would decide the sole issue in which we granted *certiorari,* and affirm the judgment."

Ford v. Ford

371 U.S. 187, 83 S.Ct. 273 (1962)

CUSTODY - Full Faith and Credit Clause — *A decision as to custody is not binding in another State if it would not be res judicata in the first State.*

"(p. 274) Mr. Justice BLACK delivered the opinion of the Court.

"This is a controversy between a husband and wife over the custody of their three young children which raises questions under the Full Faith and Credit Clause of the United States Constitutions. Their first litigation was in 1959 when the husband filed in the Richmond Virginia Law and Equity Court a petition for habeas corpus alleging that the wife had the children but was not a suitable person to keep them and asking that they be produced before the court and custody be awarded to him. The wife promptly answered, alleging that she was the proper person to have custody of the children and asking that the writ be dismissed. Thereafter negotiations took place between the parents, both being represented by counsel, and they agreed that the husband was, with minor exceptions, to have custody of the children during the school year and the wife was to have custody during summer vacation and other holidays. When notified of this agreement, the Richmond court entered the following order:

> 'It being represented to the court by counsel that the parties hereto have agreed concerning the custody of infant children, it is ordered that this cases be dismissed.'

"Some nine months later, August 10, 1960, while the three children were with their mother in Greenville, South Carolina, she began suit for full custody in the Greenville County Juvenile and Domestic Relations Court, again alleging that she was the proper person to have custody and that the husband was not. Service was had upon the husband, who answered, . . . After hearing testimony from 11 witnesses including the husband and wife, the trial judge found as a fact that while both the father and mother were fit persons to have the children, it was 'to the best interest of the children that the mother have custody and control.' The judge also rejected the husband's argument that the order of dismissal in the Virginia court should be treated as *res judicata* of the issue of fitness before the South Carolina court.

"On appeal the Court of Common Pleas, (affirmed) . . . On appeal the Supreme Court of South Carolina reversed . . . 123 S.E.2d 33 (1961). That court, after a review of certain Virginia cases, said:

> 'If the respondent [the wife] here had instituted in the courts of Virginia the action commenced by her in the courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia court by agreement or consent is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the Untied States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or usage' the courts of Virginia would give to such order or judgment.' . . . 123 S.E.2d at 39.

"We granted *certiorari* to consider this question of full faith and credit upon which the South Carolina Supreme Court's judgment rests. 369 U.S. 801, 82 S.Ct. 643, 71 L.Ed.2d 549 (1962).

. . .

"(p. 276) The Full Faith and Credit Clause, if applicable to a custody decreed, would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it. Recognizing this, the South Carolina Supreme Court's opinion was largely

devoted to a review of Virginia cases to determine the effect in Virginia of the order of dismissal. . . . Whatever the effect given such dismissals where only private interests of parties are involved, cases involving custody of children raise very different considerations. We are of the opinion that Virginia law, which does not treat a contract between the parents as a bar to the court's jurisdiction in custody cases, would similarly not treat as *res judicata* the dismissal in this case.

. . .

"(p. 277) Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice. In Virginia, the parents cannot make agreements which will bind courts to decide a custody case one way or the other. The Virginia Supreme Court of Appeals has emphasized this deep-rooted Virginia policy by declaring: 'The custody and welfare of children are not the subject of barter.' *Buchanan v. Buchanan,* 197 S.E. 426, 434, 116 A.L.R. 688 (1938).

"Whatever a Virginia court might do in a case where another court had exercised its considered judgment before awarding custody, we do not believe that, in view of Virginia's strong policy of safeguarding the welfare of the child, a court of that State would consider itself bound by mere order of dismissal where, as here, the trial judge never even saw, much less passed upon, the parents' private agreement for custody and heard no testimony whatever upon which to base a judgment as to what would be best for the children.

"We hold that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining the best interest of these children and entering a decree accordingly. In holding otherwise, the South Carolina Supreme Court was in error. The case is reversed and remanded to that court for further proceedings not inconsistent with this opinion.

"Reversed and remanded."

Gault, Application of

371 U.S. 187, 83 S.Ct. 1428 (1967)

NOTICE - Counsel - Confrontation - Self-Incrimination - Appeal — *Juveniles are entitled to the five basic constitutional rights accorded to adults at the adjudicatory phase. The right to appeal necessarily includes the right to a transcript and therefore the right to have a record made of the adjudicatory proceedings. The court specifically did not pass on prejudicial or dispositional rights.*

"Mr. Justice FORTAS delivered the opinion of the Court.

"This is an appeal . . . from a judgment of the Supreme Court of Arizona affirming the dismissal of a petition for a writ of habeas corpus . . . (which) sought the release of Gerald Francis Gault, appellants' 15-year-old son, who had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona. . . .

"On Monday, June 8, 1964, at about 10 a.m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County. Gerald was then still subject to a six months' probation order which had been entered on February 25, 1964, as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. The police action on June 8 was taken as a result of a verbal complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd or indecent remarks. It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.

"At the time Gerald was picked up, his mother and father were both at work. No notice that Gerald was being taken into custody was left at the home. No other steps were taken to advise them that their son had, in effect, been arrested. Gerald was taken to the Children's Detention Home. When his mother arrived home at about 6 o'clock, Gerald was not there. Gerald's older brother was sent to look for him at the trailer home of the Lewis family. He apparently learned then that Gerald was in custody. He so informed his mother. The two of them went to the detention home. The deputy probation officer, Flagg, who was also superintendent of the detention home, told Mrs. Gault 'why Jerry was there' and said that a hearing would be held in Juvenile Court at 3 o'clock the following day, June 9.

"Officer Flagg filed a petition with the court on the hearing day, June 9, 1964. It was not served on the Gaults. Indeed none of them saw this petition until the habeas corpus hearing on August 17, 1964. The petition was entirely formal. It made no reference to any factual basis for the judicial action which was initiated. It recited only that 'said minor is under the age of eighteen years, and in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor.' It prayed for a hearing and an order regarding 'the care and custody of said minor.' Officer Flagg executed a formal affidavit in support of the petition.

"On June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at the hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceedings and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge, Mr. and Mrs. Gault, and Officer Flagg at the habeas corpus proceeding conducted two months later. From this, it appears that at the June 9 hearing Gerald was questioned by the judge about the telephone call. There was conflict as to what he said. His mother recalled that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend Ronald. Officer Flagg recalled that Gerald had admitted making the lewd remarks. Judge McGhee testified that Gerald

'admitted making one of these [lewd] statements.' At the conclusion of the hearing, the judge said he would 'think about it.' Gerald was taken back to the detention home. He was not sent to his own home with his parents. On June 11 or 12, after having been detained since June 8, Gerald was released and driven home. There is no explanation in the record as to why he was released. At 5 p.m. on the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg. It was on plain paper, not letterhead. Its entire text was as follows:

'Mrs. Gault:

'Judge McGhee has set Monday June 15, 1964 at 11:00 a.m. as the date and time for further hearings on Gerald's delinquency.

/s/ Flagg'

"At the appointed time on Monday, June 15, Gerald, his father and mother, Ronald Lewis and his father, and Officers Flagg and Henderson were present before Judge McGhee. Witnesses at the habeas corpus proceeding differed on their recollections of Gerald's testimony that he had only dialed the number and that the other boy had made the remarks. Officer Flagg agreed that at this hearing Gerald did not admit making the lewd remarks. But Judge McGhee recalled that 'there was some admission again of some of the lewd statements. He didn't admit any of the more serious lewd statements.' Again, the complainant, Mrs. Cook, was not present. Mrs. Gault asked that Mrs. Cook be present 'so she could see which boy had done the talking, the dirty talking over the phone.' The Juvenile judge said 'she didn't have to be present at that hearing.' The judge did not speak to Mrs. Cook or communicated with her at any time. Probation Officer Flagg had talked to her once — over the telephone on June 9.

"At this June 15 hearing a 'referral report' made by the probation officers was filed with the court, although not disclosed to Gerald or his parents. This listed the charge as 'Lewd Phone Calls.' At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School 'for a period of his minority [that is, until 21], unless sooner discharged by due process of law.' An order to that effect was entered. It recites that 'after a full hearing and due deliberation the court finds that said minor is a delinquent child, and that said minor is of the age 15 years.'

"No appeal is permitted by Arizona law in juvenile cases. On August 3, 1964, a petition for a writ of habeas corpus was filed with the Supreme Court of Arizona and referred by it to the Superior Court for hearing.

"At the habeas corpus hearing on August 17, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. He was asked 'under what section of *** the code you found the boy delinquent?'

"His answer is set forth in the margin. In substance, he concluded that Gerald came within ARS Sec. 8-201, sub sec. 6(a), which specifies that a 'delinquent child' includes one 'who has violated a law of the State or and ordinance or regulation of a political subdivision there of.' The law which Gerald was found to have violated is ARS Sec. 13-377. This section of the Arizona Criminal Code provides that a person who 'in the presence or hearing of any woman or child *** uses vulgar, abusive, or obscene language, is guilty of a misdemeanor ***.' The penalty specified in the Criminal Code, which would apply to an adult, is $5 to $50, or imprisonment for not more than two months. The judge also testified that he acted under ARS Sec. 8-201, sub. sec. 6(d) which includes in the definition of a 'delinquent child' one who, as the judge phrased it, is habitually involved in immoral matters.'

"Asked about the basis for his conclusion that Gerald was 'habitually involved in immoral matters,' the judge testified, somewhat vaguely, that two years earlier, on July 2, 1962, a 'referral' was made concerning Gerald, 'where the boy had stolen a baseball glove from another and lied to the police department about it.' The judge said there was 'no hearing,' and 'no accusation' relating to the incident, 'because of lack of material foundation.' But it seems to have remained in his mind as a relevant factor. The judge also testified that Gerald had admitted making other nuisance phone calls in the past which, as the judge recalled the boy's testimony, were 'silly calls, or funny calls, or something like that.'

. . .

"(p. 1434) Appellants . . . urge that we hold the Juvenile Code of Arizona invalid on its face or as applied in the case because, contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile is taken from the custody of his parents and committed to a State institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and in which the following basic rights are denied:

1. Notice of the charges;
2. Right to counsel;
3. Right to confrontation and cross-examination;
4. Privilege against self-incrimination;
5. Right to a transcript of the proceedings; and
6. Right to appellate review.

. . .

"(p. 1436) We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the State. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the prejudicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with consequence that he may be committed to a State institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings.

"From the inception of the Juvenile Court system, wide differences have been tolerated —indeed insisted upon — between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial, or to a trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.

"The history and theory underlying those development are well-known, but a recapitulation is necessary for purposes of the opinion. The Juvenile Court movement began in this country at the end of the last century. From the Juvenile Court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico. . . .

"The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jail with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had next be done in his interest and in the interest of the State to save him from a downward career.' The child — essentially good, as they saw it — was to be made 'to feel that he is the object of [the State's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

"These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the State was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where,

however, it was used to describe the power of the State to act in *loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common-law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory, to punishment like adult offenders. In these old days, the State was not deemed to have authority to accord them fewer procedural rights than adults.

"The right of the State, as *parens patriae,* to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorney to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions — that is, if the child is 'delinquent' — the State may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the State when it seeks to deprive a person of his liberty.

"Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is — to say the least — debatable. And in practice, as we remarked in *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045 (1966), the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our Juvenile Courts ***.' The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed: 'Unfortunately, loose procedures, high-handed methods, and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'

"Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure. But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'

"It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings as that reported in an exceptionally reliable study of repeaters or recidivism conducted by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia. This Commission's Report states:

> 'In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before.' *Id.,* at 773.

"Certainly, these figures and the high crime rates among juveniles to which we have referred . . . could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. We do not mean by this to denigrate the Juvenile Court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special Juvenile Court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment. There is no reason why the application of the due process requirements should interfere with such provisions.

"Beyond this, it is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies.

"In any event, there is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court actions relating to juveniles. It is interesting to note, however, that the Arizona Supreme Court used the confidentiality argument as a justification for the type of notice which is here attacked as inadequate for due process purposes. The parents were given merely general 'notice' that their child was charged with 'delinquency.' No facts were specified. The Arizona court held, however, as we shall discuss, that in addition to the general 'notice,' the child and his parents must be advised 'of the facts involved in the case' no later than the initial hearing by the judge. Obviously, this does not 'bury' the word about the child's transgressions. It merely defers the time of disclosure to a point when it is of limited use to the child or his parents in preparing his defense or explanation.

"Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions if the State provided guidance and help 'to save him from a downward career.' Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of the gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality, and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologists Wheeler and Cotrell observe that when procedural laxness of the *'parens patriae'* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: 'Unless appropriate due process of law is followed, even the

juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.' Of course, it is not suggested that Juvenile Court Judges should fail appropriately to take account, their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly Juvenile Judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

"Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routing, and institutional hours ***.' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, State employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it — was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his 'wanting to go *** Grand Canyon with his father,' the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of 18.

"If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search, seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide. As Wheeler and Cotrell have put it, 'The rhetoric of the Juvenile Court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.' *Juvenile Delinquency — Its Prevention and Control,* (Russell Sage Foundation, 1966), p. 35.

"In *Kent v. United States, supra,* we stated that the Juvenile Court Judge's exercise of the power of the State as *parens patriae* was not unlimited. We said that 'the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.' With respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth, we said that 'there is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons.' We announced with respect to such waiver proceedings that while 'We do not mean *** to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in connection with a Juvenile Court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.

"We now turn to the specific issues which are presented to us in the present case.

Notice of Charges

"Appellants allege that the Arizona Juvenile Code is unconstitutional or alternatively that the proceedings before the Juvenile Court were constitutionally defective because of failure to provide adequate notice of the hearings. No notice was given to Gerald's parents when he was taken into custody on Monday, June 8. On that night, when Mrs. Gault went to the detention home, she was orally informed that there would be a hearing the next afternoon and was told the reason why Gerald was in custody. The only written notice Gerald's parents received at any time was a note on plain paper from Officer Flagg delivered on Thursday or Friday, June 11 or 12, to the effect that the judge had set Monday, June 15, 'for further hearings on Gerald's delinquency.'

"A petition was filed with the court on June 9 by Officer Flagg, reciting only that he was informed and believed that said minor is a delinquent minor and that it is necessary that some order be made by the Honorable Court for said minor's welfare.' The applicable Arizona statute provides for a petition to be files in Juvenile Court, alleging in general terms that the child is 'neglected, dependent, or delinquent.' The statute explicitly states that such a general allegation is sufficient, 'without alleging the facts.' There is no requirement that the petition be served upon, given to, or shown to Gerald or his parents.

"The Supreme Court of Arizona rejected appellants' claim that due process was denied because of inadequate notice. It stated that 'Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.' The court also pointed out that the Gaults appeared at the two hearings 'without objection.' The court held that because 'the policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past,' advance notice of the specific charges or basis for taking the juvenile into custody and for hearing is not necessary. It held that the appropriate rule is that 'the infant and his parents or guardian will receive a petition only reciting a conclusion of delinquency. But no later than the initial hearing by the judge, they must be advised of the facts involved in the case. If the charges are denied, they must be given a reasonable period of time to prepare.'

"We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' It is obvious, as we have discussed above, that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the procedure approved by the court below. The 'initial hearing' in the present case was a hearing on the merits. Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practical time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described — that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom

and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case, can it reasonably be said that the requirement of notice was waived.

Right to Counsel

"Appellants charge that the Juvenile Court proceedings were fatally defective because the court did not advise Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency and the order of commitment in the absence of counsel for the child and his parents or an express waiver of the right thereto. The Supreme Court of Arizona pointed out that '[t]here is disagreement [among the various jurisdictions] as to whether the court must advise the infant that he has a right to counsel.' It noted its own decision in *Arizona State Dept. of Public Welfare v. Barlow,* . . . 296 P.2d 298 (Ariz. 1956), to the effect 'that *the parents* of an infant in a juvenile proceeding cannot be denied representation by counsel of their choosing.' (Emphasis added.) It referred to a provision of the Juvenile Code which characterized as requiring 'that the probation officer shall look after the interest of neglected, delinquent, and dependent children,' including representing their interests in court. The court argued that 'The parent and the probation officer may be relied upon to protect the infant's interests.' Accordingly it rejected the proposition that 'due process requires that an infant have a right to counsel.' It said that Juvenile Courts have the discretion, but not the duty, to allow such representation; it referred specifically to the situation in which the Juvenile Court discerns conflict between the child and his parents as an instance in which this discretion might be exercised. We do not agree. Probation officers, in the Arizona scheme, are also arresting officers. They initiate proceedings and file petitions which they verify, as here, alleging the delinquency of the child; and they testify, as here, against the child. And here the probation officer was also superintendent of the detention home. The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' Just as in *Kent v. United States, supra,* 383 U.S. at 561-562, 86 S.Ct. at 1057-1058, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a State institution until the juvenile reaches the age of 21.

"During the last decade, court decisions, experts, and legislatures have demonstrated increasing recognition of this view. In at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions.

"The President's Crime Commission has recently recommended that in order to assure 'procedural justice for the child,' it is necessary that 'Counsel *** be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.' As stated by the authoritative *Standards for Juvenile and Family Courts,* published by the Children's Bureau of the United State Department of Health, Education, and Welfare:

> 'As a component part of a fair hearing required by due process guaranteed under the 14th Amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel.' *Standards,* p. 57.

"This statement was 'reviewed' by the National Council of Juvenile Court Judges at its 1965 Convention and they 'found no fault' with it. . . .

"We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

"At the habeas corpus proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully-known right.

Confrontation, Self-Incrimination, Cross-Examination

"Appellants urge that the writ of habeas corpus should have been granted because of the denial of the right of confrontation and cross-examination in the Juvenile Court hearings, and because the privilege against self-incrimination was not observed. The Juvenile Court Judge testified at the habeas corpus hearing that he had proceeded on the basis of Gerald's admissions at the two hearings. Appellants attack this on the ground that the admissions were obtained in disregard of the privilege against self-incrimination. If the confession is disregarded, appellants argue that the delinquency conclusion, since it was fundamentally based on a finding that Gerald had made lewd remarks during the phone call to Mrs. Cook, is fatally defective for failure to accord the rights of confrontation and cross-examination which the Due Process Clause of the Fourteenth Amendment of the Federal Constitution guaranteed in State proceedings generally.

"Our question, then, is whether Gerald's admission was improperly obtained and relied on as the basis of decision, in conflict with the Federal Constitution. . . .

. . .

". . . Neither Gerald nor his parents were advised that he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a 'delinquent.'

"The Arizona Supreme Court rejected appellants' contention that Gerald had a right to be advised that he need not incriminate himself. It said: 'We think the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination.'

"In reviewing this conclusion of Arizona's Supreme Court, we emphasize again that we are here concerned only with a proceeding to determine whether a minor is 'delinquent' and which may result in commitment to a State institution. Specifically, the question is whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obligated to speak and would not be penalized for remaining silent. In light of *Miranda v. State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602, . . . (1966), we must consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived.

"It has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny. Dean Wigmore states:

> 'The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported *** but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially on of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time more promising of two alternatives between which he is obliged to choose; that is, he chooses

any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.

***

'The principle, then, upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy ***. [T]he essential feature is that the principle of exclusion is a testimonial one, analogous to the other principle which exclude narrations as untrustworthy ***.'

"This Court has emphasized that admissions and confessions of juveniles require special caution. In *Haley v. State of Ohio,* 332 U.S. 596, 68 S.Ct. 302 . . . where this Court reversed the conviction of a 15-year-old boy for murder, Mr. Justice DOUGLAS said:

'What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used.

'Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight to dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became a victim of coercion. No counsel or friend was called during the critical hours of questioning.'

"In *Haley,* as we have discussed, the boy was convicted in an adult court, and not a Juvenile Court. In notable decisions, the New York Court of Appeals and the Supreme Court of New Jersey have recently considered decisions of Juvenile Courts in which boys have been adjudged 'delinquent' on the basis of confessions obtained in circumstances comparable to those in *Haley.* In both instances, the State contended before its highest tribunal that constitutional requirements governing inculpatory statements applicable in adult courts do not apply to the juvenile proceedings. In each case, the State's contention was rejected and the Juvenile Court's determination of delinquency was set aside on the grounds of inadmissibility of the confession. In *Matters of W. and S.,* . . . 224 N.E.2d 102 (N.Y. 1966) . . . and *In Interests of Carlo and Stasilowicz,* . . . 225 A.2d 110 (N.J. 1966) . . . the privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions of confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the State and — in a philosophical sense — insists upon the equality of the individual and the State. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the State, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the State in securing his conviction.

"It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As Mr. Justice WHITE, concurring, stated in *Murphy v. Waterfront Commission,* 378 U.S. 52, 94, 84 S.Ct. 1594, 1611, . . . (1964):

'The privilege can be claimed in *any proceeding,* be it criminal or civil, administrative or judicial, investigatory or adjudicatory. *** it protects *any disclosures* which the witness may

reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.'* (Emphasis added.)

"With respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' to which Dean Wigmore referred in the passage quoted *supra,* at 1453, is imperative in the case of children from an early age through adolescence. In New York, for example, the recently enacted Family Court Act provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent. The New York statute also provides that the police must attempt to communicate with the juvenile's parents before questioning him, and that absent 'special circumstances' a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court. In *In Matters of W. and S.,* referred to above, the New York Court of Appeals held that the privilege against self-incrimination applies in juvenile delinquency cases and requires the exclusion of involuntary confessions, and that *People v. Lewis,* . . . 183 N.E. 353, 86 A.L.R. 1001 (N.Y. 1932), holding the contrary, had been specifically overruled by statute.

"The authoritative *Standards for Juvenile and Family Courts,* concludes that, 'Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed [by the police], the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted if he should so decide.'

"Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any *criminal case* to be a witness against himself.' However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

"It would be entirely unrealistic to carve out the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency,' which may lead to commitment to a State institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a Juvenile Court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty — a command which this Court has broadly applied and generously implemented in accordance with the teaching of history of the privilege and its great office in mankind's battle for freedom.

"In addition, apart from the equivalence for this purpose of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender, the fact of the matter is that there is little or no assurance in Arizona, as in most if not all of the States, that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish or waive jurisdiction to the ordinary criminal courts. In the present case, when Gerald Gault was interrogated concerning violation of a section of the Arizona Criminal Code, it could not be certain that the Juvenile Court Judge would decide to 'suspend' criminal prosecution in a court for adults by proceeding to an adjudication in Juvenile Court.

"It is also urged, as the Supreme Court of Arizona here asserted, that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy process, and he should be

encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders.

"In fact, evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment,' as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observation of Wheeler and Cotrell, and others, it seems probable that where children are induced to confess be 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse — the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

"(p. 1458) We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We may appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts, and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not a product of ignorance of rights or of adolescent fantasy, fright, or despair. The 'confession' of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears. The judgment of the Juvenile Court was stated by the judge to be based on Gerald's admissions in court. Neither 'admission' was reduced to writing, and, to say the least, the process by which the 'admissions' were obtained and received must be characterized as lacking the certainty and order which are required of proceedings of such formidable consequences. Apart from the 'admission,' there was nothing upon which a judgment or finding might be based. There was no sworn testimony. Mrs. Cook, the complainant, was not present. The Arizona Supreme Court held that 'sworn testimony must be required of all witnesses including police officers, probation officers, and others who are part of or officially related to the Juvenile Court structure.' We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in Juvenile Courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a State institution for a maximum of six years.

"The recommendations in the Children's Bureau's *Standards for Juvenile and Family Courts* are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable to civil cases should be admitted in evidence. . . .

"As we said in *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045, 1053, . . . (1966), with respect to waiver proceedings, 'there is no place in our system of law for reaching a result of such tremendous consequences without ceremony ***.' We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a State institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

Appellate Review and Transcript of Proceedings

"Appellants urge that the Arizona statute is unconstitutional under the Due Process Clause because, as construed by its Supreme Court, 'there is no right of appeal from a Juvenile Court order ***.' The court held that there is no right to a transcript because the proceedings are confidential and any record must be destroyed after a prescribed period of time. Whether a transcript or other recording is made, it held, is a matter for the discretion of the Juvenile Court.

"This Court has not held that a State is required by the Federal Constitution 'to provide Appellate Courts or a right to appellate review at all.' In view of the fact that we must reverse the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus for other

reasons, we need not rule on this question in the present case or upon the failure to provide a transcript or recording if the hearings — or, indeed, the failure of the Juvenile Judge to state the grounds for his conclusion. Cf. *Kent v. United States, supra,* 383 U.S. at 561, 86 S.Ct. at 1057, where we said, in the context of a decision of the Juvenile Court, which by local law, was permissible: '*** it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefore.' As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the Juvenile Court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.

"For reasons stated, the judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

"Judgment reversed and cause remanded with directions.

"Mr. Justice BLACK, concurring.

. . .

"(p. 1461) The Juvenile Court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal has failed achievement since the beginning of the system. Indeed, the State laws from the first one on contained provisions, written in emphatic terms, for arresting and charging juveniles with violations of State criminal laws, as well as for taking juveniles by force of law away from their parents and turning them over to different individuals or groups or for confinement within some State school or institution for a number of years. The latter occurred in this case. Young Gault was arrested and detained on a charge of violating an Arizona penal law by using vile and offensive language to a lady on the telephone. If an adult, he could only have been fined or imprisoned for two months for his conduct. As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or more realistically, 'sentenced,' to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punishment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.

"Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a State criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws — an invidious discrimination — to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards. I consequently agree with the Court that the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young Gault. Appellants are entitled to these rights, not because 'fairness, impartiality and orderliness — in short, the essentials of due process' — require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

. . .

"(p. 1462) Mr. Justice WHITE, concurring.

" . . . I also agree that the privilege against self-incrimination applies at the adjudicatory stage of Juvenile Court proceedings. I do not, however, find an adequate basis in the record for determining whether that privilege was violated in this case.

. . .

"(p. 1462) Mr. Justice HARLAN, concurring in part and dissenting in part.

. . .

"(p. 1465) The central issue here, and the principal one upon which I am divided from the Court, is the method by which the procedural requirements of due process should be measured. It must at the outset be emphasized that the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil, whether made by

the State or by this Court. Both formulae are simply too imprecise to permit reasoned analysis of these difficult constitutional issues. The Court should instead measure the requirements of due process be reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. . . .

. . .

"(p. 1467) The foregoing considerations, which I believe to be fair distillations of relevant judicial history, suggest three criteria by which the procedural requirements of due process should be measured here: first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.

"Measured by these criteria, only three procedural requirements should, in my opinion, now be deemed required of State Juvenile Courts by the Due Process Clause of the Fourteenth Amendment: first, timely notice must be provided to parents and children of the nature and terms of any Juvenile Court proceeding in which a determination affecting their rights or interests may be made; second, unequivocal and timely notice must be given that counsel may appear in any such proceeding in behalf of the child and its parents, and that in cases in which the child may be confined in an institution, counsel may, in circumstances of indigency, be appointed for them; and third, the court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings. These requirements would guarantee to juveniles the tools with which their rights could be fully vindicated, and yet permit the States to pursue without unnecessary hindrance the purposes which they believe imperative in this field. Further, their imposition now would later permit more intelligent assessment of the necessity under the Fourteenth Amendment of additional requirements, by creating suitable records from which the character and deficiencies of juvenile proceedings could be accurately judged. . . .

. . .

"(p. 1468) The Court has, even under its own premises, asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.

"In my view, the Court should approach this question in terms of the criteria, described above, which emerge from the history of due process adjudication. Measured by them, there are compelling reasons at least to defer imposition of these additional requirements. First, quite unlike notice, counsel, and a record, these requirements might radically alter the character of Juvenile Court proceedings. The evidence from which the Court reasons that they would not is inconclusive, and other available evidence suggests that they very likely would. At the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts. Further, these are restrictions intended to conform to the demands of an intensely adversary system of criminal justice; the broad purposes which they represent might be served in Juvenile Courts with equal effectiveness by procedural devices more consistent with the premises of proceedings in those courts. As the Court apparently acknowledges, the hazards of self-accusation, for example, might be avoided in juvenile proceedings without the imposition of all the requirements and limitations which surround the privilege against self-incrimination. The guarantee of adequate notice, counsel, and a record would create conditions in which suitable alternative procedures could be devised; but unfortunately, the Court's haste to impose restrictions taken intact from criminal procedure may well seriously hamper the development of such alternatives. Surely this illustrates that prudence and the principles of the Fourteenth Amendment alike require that the Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness, and that the States should instead be permitted additional opportunities to develop without unnecessary hindrance their systems of Juvenile Courts.

"I find confirmation for these views in two ancillary considerations. First, it is clear that an uncertain, but very substantial number of the cases brought to Juvenile Courts involve children who are not in any sense guilty of criminal misconduct. Many of these children have simply the misfortune to be in some manner distressed; others have engaged in conduct, such as truancy, which is plainly not criminal. Efforts are now being made to develop effective, and entirely noncriminal, methods of treatment for these children. In such cases, the State authorities are in the most literal sense acting *in loco parentis;* they are, by any standard, concerned with the child's protection, and not with his punishment. I do not question that the methods employed in such cases must be consistent with the constitutional obligation to act in accordance with due process, but certainly the Fourteenth Amendment does not demand that they be constricted by the procedural guarantees devised for ordinary criminal prosecutions. Cf. *State of Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 60 S.Ct. 523, . . . It must be remembered that the various classifications of Juvenile Court proceedings are, as the vagaries of the available statistics illustrate, often arbitrary or ambiguous; it would therefore be imprudent, at least, to build upon these classifications rigid systems of procedural requirements which would be applicable, or not, in accordance with the descriptive label given to the particular proceeding. It is better, it seems to me, to begin by now requiring the essential elements of fundamental fairness in Juvenile Courts, whatever the label given be the State to the proceeding; in this way the Court could avoid imposing unnecessary rigid restrictions, and yet escape dependence upon classifications which may often prove to be illusory. Further, the provision of notice, counsel, and a record would permit orderly efforts to determine later whether more satisfactory classifications can be devised, and if they can, whether additional procedural requirements are necessary for them under the Fourteenth Amendment.

"Second, it should not be forgotten that juvenile crime and Juvenile Courts are both now under earnest study throughout the country. I very much fear that this Court, by imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for problems of juvenile crime, and may thus now hamper enlightened development of the systems of Juvenile Courts. . . .

. . .

"Mr. Justice STEWART, dissenting.

"The Court today uses an obscure Arizona case as a vehicle to impose upon thousands of Juvenile Courts throughout the nation restrictions that the Constitution made applicable to adversary criminal trials. I believe the Court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy.

"Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is convictions and punishment for a criminal act.

"In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and Family Courts in each of the 50 States. There can be no denying that in many areas the performance of these agencies has fallen disappointingly short if the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons, the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of the public juvenile and family agencies — in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.

"I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution.

"The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or Family Courts. And to impose the Court's long catalog of requirements upon

juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century. In that era there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catherine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentenced was executed. It was all very constitutional.

"A State in all its dealings must, of course, accord every person due process of law. And due process may require that some of the same restriction which the Constitution has placed upon criminal trials must be imposed upon juvenile proceedings. For example, I suppose that all would agree that a brutally coerced confession could not constitutionally be considered in a Juvenile Court hearing. But it surely does not follow that the testimonial privilege against self-incrimination is applicable in all juvenile proceedings. Similarly, due process clearly requires timely notice of the purpose and scope of any proceedings affecting the relationship of parent and child. *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, . . . But it certainly does not follow that notice of a juvenile hearing must be framed with all the technical niceties of a criminal indictment. See *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, . . .

"In any event, there is no reason to deal with issues such as these in the present case. The Supreme Court of Arizona found that the parents of Gerald Gault 'knew of their right to counsel, to subpoena and cross-examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency.' 407 P.2d 760, 763. It further found that 'Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.' 407 P.2d at 768. And, as Mr. Justice WHITE correctly points out, p. 1463, *ante,* no issue of compulsory self-incrimination is presented by this case.

"I would dismiss the appeal."

Ginsberg v. State of New York

390 U.S. 629, 88 S.Ct. 1274 (1968)

IMMATURITY OF CHILDREN - Pornography — ***The immaturity of children requires protections which are not necessary for adults, thus pornography laws may, under the First Amendment, forbid the sale of literature to children which is permissible for sale to adults.***

"(p. 1275) Mr. Justice BRENNAN delivered the opinion of the Court.

"This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

"Appellant and his wife operate 'Sam's Stationery and Luncheonette' in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including so-called 'girlie' magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two 'girlie' magazines on each of two dates in October 1965, in violation of sec. 484-h of the New York Penal Laws, . . . He was tried before a judge without jury in Nassau County District Court and was found guilty on both counts. The judge found that the magazines contained pictures which depicted female 'nudity' in a manner defined in subsection 1(b), that is 'the showing of *** female *** buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple ***,' and (2) that the pictures were 'harmful to minors' in that they had, within the meaning of subsection 1(f) 'that quality of *** representation *** nudity *** [which] *** (i) predominantly appeals to the prudent, shameful, or morbid interest of minor, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.' He held that both sales to the 16-year-old boy therefore constituted the violation under sec. 484-h 'knowingly to sell *** to a minor' under 17 of '(a) any picture *** which depicts nudity *** and which is harmful to minors,' and '(b) any *** magazine *** which contains *** [such pictures] *** and which, taken as a whole, is harmful to minors.' The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court. We noted probable jurisdiction. . . . . We affirm.

"The 'girlie' picture magazines involved in the sales here are not obscene for adults, *Redrup v. State of New York,* 386 U.S. 767, 87 S.Ct. 1414 . . . But sec. 484-h does not bar the appellant from stocking the magazines and selling them to persons over 17 years of age or older. . . .

"Obscenity is not within the area of protected speech or press. *Roth v. United States,* 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, . . . The three-pronged test of subsection 1(f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in plurality opinion in A Book Named *'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts,* 383 U.S. 413, 418, 86 S.Ct. 975, 977, . . . Appellant's primary attack upon sec. 484-h is leveled at the power of the State to adapt this *Memoirs* formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not 'harmful to minors' within the definition in subsection 1(f). Thus '[n]o issue is presented *** concerning the obscenity of the material involved.' *Roth,* 354 U.S. at 481, 77 S.Ct. at 1307, n. 8. . . .

"We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault,* 387

U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as sec. 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invaded the area of freedom of expression constitutionally secured to minors.

"Appellant argues that there is an invasion of protected rights under sec. 484-h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in *Meyer v. State of Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 45 S.Ct. 571, . . . and the statute compelling children against their religious scruples to give the flag salute, which was struck down in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, ... We reject that argument. We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather sec. 484-h simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests ***' of such minors. *Mishkin v. State of New York,* 383 U.S. 502, 509, 86 S.Ct. 958, . . . ' *Bookcase, Inc. v. Broderick, supra,* 18 N.Y. 2d at 75, . . . 218 N.E. 2d at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the State to control the conduct reaches beyond the scope of its authority over adults ***.' *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 170, 64 S.Ct. 438, 444, ... In *Price* we sustained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

"The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in sec. 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.' *Prince v. Commonwealth of Massachusetts, supra,* at 166, 64 S.Ct. at 442. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1(f) (ii) of sec 484-h expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

"The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Bookcase, Inc. v. Broderick, supra,* 18 N.Y.2d at 75, . . . 218 N.E.2d at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of *People v. Kahan,* 15 N.Y.2d 311, . . . 206 N.E.2d 333, which had struck down the first version of sec. 484-h on the grounds of vagueness. In his concurring opinion, 15 N.Y.2d at 312, . . . 206 N.E.2d at 334, he said:

> 'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards, broader that those embodied in legislation aimed at controlling dissemination of such material to adults.'

"In *Prince v. Commonwealth of Massachusetts, supra,* 321 U.S. at 165, 64 S.Ct. at 441, the court, too, recognized that the State has an interest 'to protect the welfare of children' and to see

that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' . . .

. . .

"(p. 1285) Mr. Justice STEWART, concurring in the result.

"A doctrine, knee-jerk application of First Amendment would, of course, dictate the nullification of this New York statute. But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

"The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

"When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others 'by way of sound trucks with loud and raucous noises on city streets.' And so it was that my brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.

"I think a State may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees. It is only upon such a premise, I should suppose that a State may deprive children of their rights — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults.

"I cannot hold that this State law, on its face, violates the First and Fourteenth Amendments. "Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

"While I would be willing to reserve the judgement on the basis of *Redrup v. State of New York,* 386 U.S. 767, 87 S.Ct. 1414, . . . for the reasons stated by my brother FORTAS, my objections strike deeper.

"If we were in the field of substantive due process and seeking to measure the propriety of State law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called 'obscene' book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of 'sin.'

"That, however, was the view of our preceptor in this field, Anthony Comstock, who waged his war against 'obscenity' from the year 1872 until his death in 1915. Some of his views are set forth in his book *Traps for the Young,* first published in 1883. . . .

"The title of the book refers to 'traps' created by Satan 'for boys and girls especially.' Comstock, of course, operated on the theory that every human has an 'inborn tendency toward wrong-doing which is restrained mainly by fear of the final judgment.' In his view any book which tended to remove that fear is a part of the 'trap' which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do.

"It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873. 17 Stat. 598. It was he who was also responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act in incorporation was granted one-half of the fines levied on people successfully prosecuted by Society or its agents.

"I would conclude from Comstock and his *Traps for the Young* and from other authorities that a legislature could not be said to be wholly irrational *(Ferguson v. Skrupa,* 372 U.S. 726, 83 S.Ct. 1928), . . . if it decided that sale of 'obscene' material to the young should be banned.

"The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law

'abridging the freedom of speech, or of the press.' I appreciate that there are those who think that 'obscenity' is implied excluded; but I have indicated on prior occasion why I have been unable to reach that conclusion. See *Ginzberg v. United States,* 383 U.S. 463, 482, 86 S.Ct. 942, 953, . . . (dissenting opinion); *Jacobellis v. State of Ohio,* 378 U.S. 184, 196, 84 S.Ct. 1676, 1682, . . . (concurring opinion of Mr. Justice BLACK); *Roth v. United States,* 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, . . . (dissenting opinion). And the corollary of that view, as I expressed it in the *Public Utilities Comm'n of District of Columbia v. Pollak,* 343 U.S. 451, 467, 468, 72 S.Ct. 813, 823, . . . (dissenting opinion), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

"This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the book stalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of State and federal regulation of 'obscenity' is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The 'juvenile delinquents' I have known are mostly over 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstock could make out a case for 'protecting' many groups in our society, not merely children.

"While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should done to stop the flow. It is one thing for parents and the religious organizations to be active and involved. It is quite a different matter for the State to become implicated as a censor. As I read the First Amendment, it was designed to keep the State and the hands of all State officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

"I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are, of course, propelled by their neuroses. That is why a universally accepted definition is indeed highly subjective, turning on the neurosis of the censor. Those who have deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it. That, of course, is the danger of letting any group of citizens be the judge of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

"Today this Court sits as the Nation's board of censors. With all respect I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.

"I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell. . . .

"(p. 1297) Mr. Justice FORTAS, dissenting.

"This is a criminal prosecution. Sam Ginsberg and his wife operate a luncheonette at which magazines are offered for sale. A 16-year-old boy was enlisted by his mother to go to the luncheonette and buy some 'girlie' magazines so that Ginsberg could be prosecuted. He went there, picked two magazines from the display case, paid for them, and walked out. Ginsberg's offense was duly reported to the authorities. The power of the State of New York was invoked. Ginsberg was prosecuted and convicted. The court imposed only a suspended sentence. But as the majority here points out, under New York law this conviction may mean that Ginsberg will lose the license necessary to operate his luncheonette.

"The two magazines that the 16-year-old boy selected are vulgar 'girlie' periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that

magazines indistinguishable from them in content and offensiveness are not 'obscene' within the constitutional standards heretofore applied. See, e.g., *Redrup v. State of New York (Gent v. State of Arkansas)* 386 U.S. 767, 87 S.Ct. 1414, . . . (1967). These rulings have been in cases involving adults.

"The Court avoids facing the problem whether the magazines in the present case are 'obscene' when viewed by a 16-year-old boy, although not 'obscene' when viewed by someone 17 years of age or older. It says that Ginsberg's lawyer did not choose to challenge the conviction on the ground that the magazines are not 'obscene.' He chose only to attack the statute on its face. Therefore, the Court reasons, we need not look at the magazines and determine whether they may be excluded from the ambit of the First Amendment as 'obscene' for purposes of this case. But this Court has made strong and comprehensive statements about its duty in First Amendment cases — statements with which I agree. See, e.g., *Jacobellis v. State of Ohio,* 378 U.S. 184, 187-190, 84 S.Ct. 1676, 1677-1679, . . . (1964) (opinion of BRENNAN, J.).

"In my judgment, the Court cannot properly avoid its fundamental duty to define 'obscenity' for purposes of censorship of material sold to youths, merely because of counsel's position. By so doing the Court avoids the essence of the problem; for if the State's power to censor freed from prohibitions of the First Amendment depends upon obscenity, and if obscenity turns on the specific content of the publication, how can we sustain the conviction here without deciding whether the particular magazines in question are obscene?

"The Court certainly cannot mean that the States and cities and counties and villages have unlimited power to withhold anything and everything that is written or pictorial from younger people. But it here justifies the conviction of Sam Ginsberg because the impact of the Constitution, it says, is variable, and what is not obscene for an adult may be obscene for a child. This it calls 'variable obscenity.' I do not disagree with this, but I insist that to assess the principal — certainly to apply it — the Court must define it. We must know the extent to which literature or pictures may be less offensive than *Roth* requires in order to be 'obscene' for purposes of a statute confined to youth. See *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, . . . (1957).

"I agree that the State in the exercise of its police power — even in the First Amendment domain — may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis. This is not a case where, on any standard enunciated by the Court, the magazines are obscene, nor one where the seller is at fault. Petitioner is being prosecuted for the sale of magazines which he had a right under the decisions of this Court to offer for sale, and he is being prosecuted without proof of 'fault' —without even a claim that he deliberately, calculatedly sought to induce children to buy 'obscene' material. Book-selling could be a hazardous profession.

"The conviction of Ginsberg on the present facts is a serious invasion of freedom. To sustain the conviction without inquiry as to whether the material is 'obscene' and without any evidence of pushing or pandering, in face of this Court's asserted solicitude for First Amendment values, is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility. Cf. *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967). It begs the question to present this undefined, unlimited censorship as an aid to parents in the rearing of their children. This decision does not merely protect children from activities which all sensible parents would condemn. Rather, its undefined and unlimited approval of State censorship in this area denies to children free access to books and works of art to which many parents may wish their children to have uninhibited access. For denial of access to these magazines, without any standard or definition of their allegedly distinguishing characteristics, is also denial of access to great works of art and literature.

"If this statute were confined to the punishment of pushers or panderers of vulgar literature I would not be so concerned by the Court's failure to circumscribe State power by defining its limits in terms of the meaning of 'obscenity' in this field. The State's police power may, within very broad limits, protect the parents and their children from public aggression of panderers and pushers. This is defensible on the theory that they cannot protect themselves from such assaults. But it does not follow that the State may convict a passive luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably *not* obscene.

"I would therefore reverse the conviction on the basis of *Redrup v. State of New York,* 386 U.S. 767, 87 S.Ct. 1414 . . . (1967) and *Ginzberg v. United States,* 383 U.S. 463, 86 S.Ct. 942, . . . (1962)."

Gomez v. Perez

409 U.S. 535, 93 S.Ct. 872 (1973)

SUPPORT - Unwed Fathers — ***An illegitimate child has the same right as a legitimate child to support from its father.***

"(p. 873) PER CURIAM.

"The issue presented by this appeal is whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children.

"In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her minor child. After a hearing, the State trial judge found that appellee is 'the biological father' of the child, and that the child 'needs the support and maintenance of her father, 'but concluded that because the child was illegitimate 'there is no legal obligation to support the child and the plaintiff takes nothing.' The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of the law. 466 S.W.2d 41. The Texas Supreme Court refused application for writ of error, finding no 'reversible error.' We noted probable jurisdiction. . . .

"In Texas, both at common-law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See *Lane v. Phillips,* . . . 6 S.W. 610, 611 (1887); . . . That duty extends even beyond dissolution of the marriage, . . . *Hooten v. Hooten,* 15 S.W.2d 141 (Tex.Civ.App. 1929), and is enforceable on the child's behalf in civil proceedings and, further, is the subject of criminal sanctions. . . . The duty to support exists despite the fact that the father may not have custody of the child. *Hooten v. Hooten, supra.*The Court of Civil Appeals has held in this case that nowhere on this elaborate statutory scheme does the State recognize any enforceable father to support his illegitimate children, unlike legitimate children and that, absent a statutory duty to support, the controlling law is the Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers. See, also, *Home of the Holy Infancy v. Kaska,* 397 S.W.2d 208 (Tex. 1965); *Lane v. Phillips, supra,* at 243, 6 S.W. at 611; *Bjorgo v. Bjorgo,* 391 S.W.2d 528 (Tex.Civ.App. 1965). It is also true that fathers may set up illegitimacy as a defense to prosecutions for criminal nonsupport of their children. See *Curtin v. State,* . . . 238 S.W.2d 187 (1950); *Beaver v. State,* . . . 256 S.W. 929 (1923).

"In this context appellant's claim, on behalf of her daughter that the child has been denied equal protection of the law is unmistakably presented. Indeed, at argument here, the attorney for the State of Texas, appearing as *amicus curiae,* conceded that but for the fact that this child is illegitimate she would be entitled to support from appellee under the laws of Texas.

"We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509 . . . (1968). Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400 . . . (1872). Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State

to do so is 'illogical and unjust.' *Id.,* at 175, 92 S.Ct. at 1406. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois,* 405 U.S. 645, 656-657, 92 S.Ct. 1208, 1215-1216, . . . (1972); *Carrington v. Rash,* 380 U.S. 89, 85 S.Ct. 775, . . . (1965).

"The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

"It is so ordered.

"Reversed and remanded.

"Mr. Justice STEWART, with who Mr. Justice REHNQUIST joins, dissenting.

"This case came here as an appeal, on the representation that the Texas court has sustained the constitutionality of sec. 4.02 of the Texas Family Code and Articles 602 and 602-A of the Texas Penal Code, over a challenge to those statutes under the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction, 408 U.S. 920, 92 S.Ct. 2479, . . . to consider whether the alleged discrimination between legitimate and illegitimate children, in terms of the support obligations of their biological fathers, denied equal protection to illegitimate children, in terms of the support obligations of their biological fathers, denied equal protection to illegitimate children under the principles of *Weber v. Aetna Casualty & Surety Co.,* 406 U.S.164, 92 S.Ct. 1400, . . .

"Upon the submission of briefs and oral argument, it became clear that neither statute had been the actual subject of litigation in the courts of Texas. Hence, this is not properly an appeal under 28 U.S.C. sec. 1257(2). I would, therefore, dismiss the appeal for want of jurisdiction, and treat 'the papers whereon the appeal was taken' as a petition for writ of *certiorari.* 28 U.S.C. sec. 2103.

"The parties were not prepared to submit this case as one challenging the common-law treatment of illegitimates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common-law marriage, and the effect of a Texas statute, sec. 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discrimination so imprecise, I would dismiss the writ of *certiorari* as improvidently granted."

Hicks on Behalf of Feiock v. Feiock

108 S.Ct. 1423 (1988)

SUPPORT - Contempt — ***If a procedure in contempt for nonsupport is for civil contempt, the defendant can constitutionally be required to carry the burden of proving his inability to pay; if the procedure is for criminal contempt, the burden of proving ability must be on the petitioner.***

"(p. 1427) Justice WHITE delivered the opinion of the Court.

"A parent failed to comply with a valid court order to make child support payments, and defended against subsequent contempt charges by claiming that he was financially unable to make the required payments. The trial court ruled that under State law he is presumed to remain able to comply with the terms of the prior order, and judged him to be in contempt. The State Appellate Court held that the legislative presumptions applied by the trial court violate the Due Process Clause of the Fourteenth Amendment, which forbids a court from employing certain presumptions that affect the determination of guilt or innocence in criminal proceedings. We must decide whether the Due Process Clause was properly applied in this case.

"On January 19, 1976, a California State Court entered an order requiring respondent, Phillip Feiock, to begin making monthly payments to his ex-wife for the support of their three children. Over the next six years, respondent only sporadically complied with the order, and by December, 1982 he had discontinued paying child support altogether. His ex-wife sought to enforce the support orders. On June 22, 1984, a hearing was held in California State Court on her petition for ongoing support payments and for payment of the arrearage due her. The court examined respondent's financial situation and ordered him to begin paying $150 per month commencing on July 1, 1984. The court reserved jurisdiction over the matter for the purpose of determining the arrearages and reviewing respondent's financial condition.

"Respondent apparently made two monthly payments but paid nothing for the next nine months. He was then served with an order to show cause why he should not be held in contempt on the nine counts of failure to make monthly payments ordered by the court. At a hearing on August 9, 1985, petitioner made out a *prima facie* case of contempt against respondent by establishing the existence of a valid court order, and respondent's knowledge of the order, and respondent's failure to comply with the order. Respondent defended by arguing that he was unable to pay support during the months in question. This argument was partially successful, but respondent was adjudged to be in contempt on five of the nine counts. He was sentenced to five days in jail on each count, to be served consecutively, for a total of 25 days. This sentence was suspended, however, and respondent was placed on probation for three years. As one of the conditions of his probation, he was ordered once again to make support payments of $150 per month. As another condition of his probation, he was ordered, starting the following month, to begin repaying $50 per month on his accumulated arrearage, which was determined to total $1650.

"At the hearing, respondent had objected to the application of Cal.Civ.Proc.Code Ann., sec. 1209.5 (1982) against him, claiming that it was unconstitutional under the Due Process Clause of the Federal Constitution because it shifts to the defendant the burden of proving inability to comply with the order, which is an element of the crime of contempt. This objection was rejected, and he renewed it on appeal. The intermediate State Appellate Court agreed with respondent and annulled the contempt order, ruling that the State statute purports to impose 'a mandatory presumption compelling a conclusion of guilt without independent proof of an ability to pay,' and is therefore unconstitutional because 'the mandatory nature of the presumption lessens the prosecution's burden of proof.' 180 Cal.App.3d 649, 654, . . . (1986). In light of its holding that the statute as previously interpreted was unconstitutional, the court went on to

adopt a different interpretation of that statute to govern future proceedings: 'For future guidance, however, we determine the statute in question should be construed as authorizing a permissive inference, but not a mandatory presumption.' *Id.,* at 655, 225 Cal.Rptr. at 751. The court explicitly considered this reinterpretation of the statute to be an exercise of its 'obligation to interpret the statute to preserve its constitutionality whenever possible.' *Ibid.* . . .

"Three issues must be decided to resolve this case. First is whether the ability to comply with a court constitutes an element of the offense of contempt or, instead, inability to comply with the order is an affirmative defense to that charge. Second is whether sec. 1209.5 requires the alleged contemnor to shoulder the burden of persuasion of merely the burden of production in attempting to comply with the order. Third is whether this contempt proceeding is a civil proceeding, *i.e.,* whether the relief imposed upon respondent was criminal or civil in nature.

"Petitioner argues that the State Appellate Court erred in its determinations on the first two points of State law. The court ruled that whether the individual is able to comply with a court order is an element of the offense of contempt rather than an affirmative defense to the charge, and that sec. 1209.5 shifts to the alleged contemnor the burden of persuasion rather than simply the burden of production in showing inability to comply. We are not at liberty to depart from the State Appellate Court's resolution of these issues of State law. Although petitioner marshals a number of sources in support of the contention that the State Appellate Court misapplied State law on these two points, the California Supreme Court denied reviewed of this case and we are not free in this situation to overturn the State Court's conclusions of State law.

"The third issue, however, is a different matter: the argument is not merely that the State Court misapplied State law, but that the characterization of this proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than State law. This proposition is correct as stated. *In re Winship,* 397 U.S. 358, 365-366, 90 S.Ct. 1068, 1073-1074, . . . (1970); *In re Gault,* 387 U.S. 1, 49-50, 87 S.Ct. 1428, 1455-1456, . . . (1967); *Shillitani v. United States,* 384 U.S. 364, 368-369, 86 S.Ct. 1531, 1534-1535, . . . (1966). The fact that this proceeding and the resultant relief were judged to be criminal in nature as a matter of State law is thus not determinative of this issue, and the State Appellate Court erred insofar as it sustained respondent's challenge to the statute under the Due Process Clause simply because it concluded that this contempt proceeding is 'quasi-criminal' as a matter of California law. 180 Cal.App.3d at 653, . . .

"The question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature for the purposes of applying the Due Process Clause and other provisions of the Constitution, is one of long-standing, and its principles have been settled at least in their broad outlines for many decades. When a State's proceeding are involved, State law provides strong guidance about whether or not the State is exercising its authority 'in a nonpunitive, noncriminal manner,' and one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of federal law. *Allen v. Illinois,* 478 U.S. 364, 368-369, 106 S.Ct. 2988, 2992, . . . (1986). Nonetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under State law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law. *Ibid.* This is particularly so in the codified laws of contempt, where the 'civil' and 'criminal' labels of the law have become increasingly blurred.

"Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. 'If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' *Gompers v. Bucks Stove and Range Co.,* 221 U.S. 418, 441, 31 S.Ct. 492, 498, . . . (1911). The character of the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.' *Id.,* at 442, 31 S.Ct. at 498. If relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not

been afforded the protections that the Constitution requires of such proceedings, including the requirement that the offense be proved beyond a doubt. See, e.g., *Gompers, supra,* at 444, 31 S.Ct. at 499; *Michaelson v. United States ex rel. Chicago, St. P., M. & O.R. Co.,* 266 U.S. 42, 66, 45 S.Ct. 18, 20, . . . (1924).

"The Court has consistently applied these principles. In *Gompers,* decided early in this century, three men were found guilty of contempt and were sentenced to serve 6, 9, and 12 months respectively. The Court found this relief to be criminal in nature because the sentence was determinate and unconditional. 'The distinction between refusing to do an act commanded, — remedied by imprisonment until the party performs the required act; and doing an act forbidden, — punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.' *Gompers,* 221 U.S. at 443, 31 S.Ct. at 449. In the former instance, the conditional nature of the punishment renders the relief civil in nature because the contemnor 'can end the sentence and discharge himself at any moment by doing what he had previously refused to do.' *Id.,* at 442, 31 S.Ct. at 498. In the latter instance, the unconditional nature of the punishment renders the relief criminal in nature because the relief 'cannot undo or remedy what has been done nor afford any compensation' and the contemnor 'cannot shorten the term by promising not to repeat the offense.' *Ibid.*

"The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character.' *Penfield Co. v. SEC,* 330 U.S. 585, 593, 67 S.Ct. 918, 922, . . . (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. 'One who is fined, unless by a day certain he [does the act ordered,] has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.' *Id.,* at 590, 67 S.Ct. at 921, quoting *In re Nevitt,* 117 F. 448, 461 (CA8 1902). In *Penfield,* a man was found guilty of contempt for refusing to obey a court order to produce documents. This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment but could not be made to pay 'a flat, unconditional fine of $50.00.' *Penfield, supra,* 330 U.S. at 588, 67 S.Ct. at 920. See, also, *United States v. Rylander,* 460 U.S. 752, 103 S.Ct. 1548, . . . (1983); *Nye v. United States,* 313 U.S. 33, 61 S.Ct. 810, . . . (1941); *Fox v. Capital Co.,* 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed. 419 (1929); *Ex parte Grossman,* 267 U.S. 87, 45 S.Ct. 332, . . . (1925); *Doyle v. London Guarantee Co.,* 204 U.S. 599, 27 S.Ct. 313, . . . (1907); *In re Christensen Engineering Co.,* 194 U.S. 458, 24 S.Ct.729, . . . (1904); *Bessette v. W.B. Conkey Co.,* 194 U.S. 324, 24 S.Ct. 665, . . . (1904).

"Shillitani v. Untied States, 384 U.S. 364, 86 S.Ct. 1531, . . . (1966), adheres to these same principles. There two men were adjudged guilty of contempt for refusing to obey a court order to testify under a grant of immunity. Both were sentenced to two years of imprisonment, with the provision that if either answered the questions before his sentence ended, he would be released. The penalties were upheld because of their 'conditional nature,' even though the underlying proceeding lacked certain constitutional protections that are essential in criminal proceedings. *Id.,* at 365, 86 S.Ct. at 1533. Any sentence 'must be viewed as remedial,' and hence civil in nature, 'if the court conditions release upon the contemnor's willingness to [comply with the order].' *Id.,* at 370, 86 S.Ct. at 1535. By the same token, in a civil proceeding the court 'may also impose a determinate sentence *which includes a purge clause.' Id.,* at 370, n. 6, 86 S.Ct. at 1536, n. 6 (emphasis added). 'On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence.' *Id.,* at 370, n. 5, 86 S.Ct. at 1535, n. 5.

"In repeatedly stating and following the rules set out above, the Court has eschewed any alternative formulation that would make the classification of the relief imposed in a State's proceedings turn simply on what their underlying purposes are perceived to be. Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided. In contempt cases, both civil and criminal relief have aspects that can be as either remedial or punitive or both: when a court imposes fines and punishment on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to

give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order. As was noted in *Gompers:*

> 'It is true that either form of [punishment] has also an incidental effect. For is the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the [punishment] is solely punitive, to vindicate theauthority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change [punishment] which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa.*' 221 U.S. at 443, 31 S.Ct. at 498.

"For these reasons, this Court has judged that conclusions about purposes for which relief is imposed are properly drawn from an examination of the character of the relief itself.

"There is yet another reason why the overlapping purposes of civil and criminal contempt proceedings have prevented this Court from hinging the classification on this point. If the definition of these proceedings and the irresultant relief as civil or criminal is made to depend on the federal courts' views about their underlying purposes, which indeed often are not clearly articulated in any event, then the States will be unable to ascertain with any degree of assurance how their proceedings will be understood as a matter of federal law. The consequences of any such shift in direction would be both serious and unfortunate. Of primary practical importance to the decision in this case is that the States should be given intelligible guidance about how, as a matter of federal constitutional law, they may lawfully employ presumptions and other procedures in their contempt proceedings. It is of great importance to the States that they be able to understand clearly and in advance the tools that are available to them in ensuring swift and certain compliance with valid court orders — not only orders commanding payment of child support, as in this case, but orders that command compliance in the more general area of domestic relations law, and in all other areas of the law as well.

"The States have long been able to plan their own procedures around the traditional distinctioiding line in favor of a general assessment of the manifold and complex purposes that lie The abandonment of this clear divbehind a court's action would create novel problems that could infect many different areas of the law. And certainly the fact that a contemnor has his sentence suspended and is placed on probation cannot be decisive in defining the civil or criminal nature of the relief, for many convicted criminals are treated in exactly this manner for the purpose (among others) of influencing their behavior. What is true of the respondent in this case is also true of any such convicted criminal: as long as he meets the conditions of his informal probation, he will never enter jail. Nonetheless, if the sentence is a determinate one, it may not be imposed unless federal constitutional protections are applied in the contempt proceeding.

"The proper classification of the relief imposed in respondent's contempt proceeding is dispositive of this case. As interpreted by the State Court here, sec. 1209.5 requires respondent to carry the burden of persuasion as an element of the offense, by showing his inability to comply with court's order to make the requires payments. If applied in a criminal proceeding, such a statute would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt. See, e.g., *Mullaney v. Wilbur,* 421 U.S. 684, 701-702, 95 S.Ct. 1881, 1890-1891, . . . (1975). If applied in a civil proceeding, however, this particular statute would be constitutionally valid, *Maggio v. Zeitz,* 333 U.S. 56, 75-76, 68 S.Ct. 401, 411-412, . . . (1948); *Oriel,* 278 U.S. at 364-365, 49 S.Ct. at 174-175, and respondent conceded as much at the argument. Tr. of Oral Arg. 37.

"The State Court found the contempt proceeding to be 'quasi-criminal' in nature without discussing the point. 180 Cal.App.3d at 653, ... There were strong indications that the proceeding was intended to be criminal in nature, such as the notice sent to respondent, which clearly labeled the proceeding as 'criminal in nature,' Order to Show Cause and Declaration for Contempt (June 12, 1985), App. 21, and the participation of the district attorney in the case. Though significant, these facts are not dispositive of the issue before us, for if the trial court had imposed only civil coercive remedies, as surely it was authorized to do, then it would be improper to invalidate that result merely because in *criminal* proceedings, it was not satisfied. It also bears emphasis that the purposes underlying this proceeding were wholly ambiguous. Respondent was

charged with violating nine discrete prior court orders, and the proceeding may have been intended primarily to vindicate the court's authority in the face of his defiance. On the other hand, as often is true when court orders are violated, these charges were part of an ongoing battle to force respondent to conform his conduct to the terms of those orders, and of future orders as well.

"Applying the traditional rules for classifying the relief imposed in a given proceeding requires the further resolution of one factual question about the nature of the relief in this case. Respondent was charged with nine separate counts of contempt, and was convicted on five of those counts, all of which arose from his failure to comply with orders to make payments in past months. He was sentenced to five days in jail on each of the five counts, for a total of 25 days, but his jail sentence was suspended and he was placed on probation for three years. If this were all, then the relief afforded would be criminal in nature. But this is not all. One of the conditions of respondent's probation was that he begin making payments on his accumulated arrearage, and that he continue making these payments at the rate of $50 per month. At that rate, all of the arrearages would be paid before respondent completed his probation period. Not only did the order therefore contemplate that respondent would be requires to purge himself of past violations, but it expressly states that '[i]f any two payments are missed, whether consecutive or not, the entire balance shall become due and payable.' Order of the California Superior Court for Orange County (Aug. 9, 1985), App. 39. What is unclear is whether the ultimate satisfaction of these accumulated prior payments would have purged the determinate sentence imposed on respondent. Since this aspect of the proceeding will vary as a factual matter from one case to another, depending on the precise disposition entered by the trial court, and since the trial court did not specify this aspect of its disposition in this case, it is not surprising that neither party was able to offer a satisfactory explanation of this point at argument. Tr. of Oral Arg. 42-47. If the relief imposed here is in fact a determinate sentence with a purge clause, then it is civil in nature, *Shillitani,* 384 U.S. at 370, n. 6, 86 S.Ct. at 58, 59; *Gompers,* 221 U.S. at 442, 31 S.Ct. at 498.

"The State Court did not pass on this issue because of its erroneous view that it was enough simply to aver that this proceeding is considered 'quasi-criminal' as a matter of State law. And, as noted earlier, the court's view in this point, coupled with its view of the Federal Constitution, also led it to reinterpret the State statute, thus softening the impact of the presumption, in order to save its constitutionality. Yet the Due Process Clause does not necessarily prohibit the State from employing this presumption as it was construed by the State Court, *if* respondent would purge his contempt judgment by paying off arrearage. In these circumstances, the proper course for this Court is to vacated the judgment below and remand for further consideration of sec. 1209.5 free from the compulsion of an erroneous view of federal law. See, e.g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 152, 104 S.Ct. 2267, 2276, . . . (1984). If on remand it is found that respondent would purge his sentence by paying his arrearage, then this proceeding is civil in nature and there was no need for the State Court to reinterpret its statute to avoid conflict with the Due Process Clause.

"We therefore vacate the judgment below and remand for further proceedings consistent with this opinion.

"It is so ordered.

"Justice KENNEDY took no part in the consideration or decision of this case.

"Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

"This case concerns a contempt proceeding against a parent who repeatedly failed to comply with a valid court order to make child support payments. In my view, the proceeding is civil as a matter of federal law. Therefore, the Due Process Clause of the Fourteenth Amendment does not prevent the trial court from applying a legislative presumption that the parent remained capable of complying with the order until the time of the contempt proceeding.

"The facts of this case illustrate how difficult it can be to obtain even modest amounts of child support from a noncustodial parent. Alta Sue Adams married respondent Phillip William Feiock in 1968. The couple resided in California and had three children. In 1973, respondent left the family. Mrs. Feiock filed a petition in the Superior Court of California for the County of Orange seeking dissolution of her marriage, legal custody of the children, and child support. In January 1976, the court entered an interlocutory judgment of dissolution of marriage, awarded

custody of the children to Mrs. Feiock, and ordered respondent to pay child support beginning February 1, 1976. The court ordered respondent to pay $35 per child per month for the first four months, and then $75 per child per month starting June 1, 1976. The order has never been modified.

"After the court entered a final judgment of dissolution of marriage, Mrs. Feiock and the children moved to Ohio. Respondent made child support payments only sporadically and stopped making any payments by December, 1982. Pursuant to Ohio's enactment of the Uniform Reciprocal Enforcement of Support Act (URESA), Mrs. Feiock filed a complaint in the Court of Common Pleas of Stark County, Ohio. See Ohio Rev.Code Ann. sec. 3115.09(B) (1980). The complaint recited that respondent was obliged to pay $225 per month in support, and that respondent was $2300 in arrears. The Ohio court transmitted the complaint and supporting documents to the Superior Court of California for the County of Orange, which had jurisdiction over respondent. Petitioner, the Orange County District Attorney, prosecuted the case on behalf of Mrs. Feiock in accordance with California's version of URESA. See Cal.Civ.Proc.Code Ann. sec. 1670 *et seq.* (West 1982).

"After obtaining several continuances, respondent finally appeared at a hearing before the California court on June 22, 1984. Respondent explained that he had recently become a partner in a flower business that had uncertain prospects. The court ordered respondent to pay $150 per month on a temporary basis, although it did not alter the underlying order. Payments were to begin July 1, 1984.

"Respondent made payments only for August and September. Respondent appeared in court three times thereafter, but never asked for a modification of the order. Eventually, the Orange County District Attorney filed Orders to Show Cause and Declarations of Contempt alleging nine counts of contempt based on respondent's failure to make nine of the $150 support payments. At a hearing held August 9, 1985, the district attorney invoked Cal.Civ.Proc.Code Ann sec. 1209.5 (West 1982), which says:

> 'When a court of competent jurisdiction makes an order compelling a parent to furnish support . . . for his child, . . . proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be *prima facie* evidence of a contempt of court.'

"In an effort to overcome this presumption, respondent testified regarding his ability to pay at the time if each alleged act of contempt. The court found that respondent had been able to pay five of the missed payments. Accordingly, the court found respondent in contempt on five of the nine counts and sentenced him to five days in jail on each count, to be served consecutively, for a total of 25 days. The court suspended execution of the sentence and placed respondent on three years' informal probation on the conditions that he make monthly support payments of $150 starting immediately and additional payments of $50 per month on the arrearage starting October 1, 1985.

"Respondent filed a petition for a writ of habeas corpus in the California Court of Appeal, where he prevailed on his argument that sec. 1209.5 is unconstitutional as a mandatory presumption shifting to the defendant the burden of proof of an element of a criminal offense. That is the argument that the Court confronts in this case. In my view, no remand is necessary because the judgment below is incorrect as a matter of federal law.

"The California Court of Appeals has erected a substantial obstacle to the enforcement of child support orders. As petitioner vividly describes it, the judgment turns the child's support into a 'worthless piece of scrap.' Brief for Petitioner 47. The judgment hampers the enforcement of support orders at a time when strengthened enforcement is needed. 'The failure of enforcement efforts in this area has become a national scandal. In 1983, only half of custodial parents received the full amount of child support ordered; approximately 26% received some lesser amount, and 24% received nothing at all.' Brief for Women's Legal Defense Fund et al. as *Amici Curiae* 26 (footnote omitted). The facts of this case illustrate how easily a reluctant parent can evade a child support obligation. Congress recognized the serious problem of enforcement of child support orders when it enacted the Child Support Enforcement Amendments of 1984, Pub.L. 98-378, 98 Stat. 1305. S.Rep. No. 98-387, p. 5-6 (1984), U.S.Code Cong. & Admin.News 1984, p. 2397; H.R.Rep. No. 98-527, p. 30, 49 (1983). The California legislature responded to the problem by

enacting the presumption described as sec. 1209.5. Now, says petitioner, the California Court of Appeals has sabotaged the California legislature's effort.

"Contempt proceedings often will be useless if the parent seeking enforcement of valid support orders must prove that the obligor can comply with the court order. The custodial parent will typically lack access to the financial and employment records needed to sustain the burden imposed by decision below, especially where the noncustodial parent is self-employed, as is the case here. Serious consequences follow from the California Court of Appeals' decision to invalidate California's statutory presumption that a parent continues to be able to pay the child support previously determined to be within his or her means.

"Petitioner asks us to determine as a matter of California law that inability to comply with a support order is an affirmative defense to a contempt charge, so that the burden of persuasion may be placed in the contemnor under *Martin v. Ohio,* 480 U.S. . . . , 107 S.Ct. 1098, . . . (1987). Petitioner also contends that the Court of Appeals erred in supposing that sec. 1209.5 shifts the burden of persuasion rather than merely the burden of production, citing *Lyons v. Municipal Court,* 75 Cal.App.3d 829, 838, . . . (1977); *Oliver v. Superior Court,* 197 Cal.App.2d 237, 242, . . . (1961); 4A J. Goddard, California Practice: Family Law Practice, sec. 686 (3d ed. 1981); 14 Cal.Jur.3d, Contempt, sec. 32, 71 (1974). But the interpretation of California law is the province of California courts. I agree with the majority that, for purposes of this decision, we should assume that the California Court of Appeals correctly determined these matters of State law. *Martin v. Ohio, supra; United States Gas Public Service Co. v. Texas,* 303 U.S. 123, 139, 58 S.Ct. 483, 491, . . . (1938). If the Court of Appeals was in error, the California courts may correct it in future cases. The linchpin of the Court of Appeals' opinion is its determination that the contempt proceeding against respondent was criminal in nature. The court applied what it understood are the federal due process standards for mandatory evidentiary presumptions in criminal cases. See *Ulster County Court v. Allen,* 442 U.S. 140, 167, 99 S.Ct. 2213, 2230, . . . (1979) (mandatory presumptions are impermissible unless 'the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt'); *Sandstrom v. Montana,* 442 U.S. 510, 523-524, 99 S.Ct. 2450, 2458-2459, . . . (1979). This Court has recognized, by contrast, that civil contempt proceedings do not require proof beyond a reasonable doubt and that the rules governing use of presumptions differ accordingly. In the civil contempt context, we have upheld a rule that shifts to the contemnor the burden of production on ability to comply, *United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 1552, . . . (1983), and we have recognized that the contemnor may bear the burden of persuasion on this issue as well, *Maggio v. Zeitz,* 333 U.S. 56, 75-76, 68 S.Ct. 401, 411-412, . . . (1948). If the contempt proceeding in this case may be characterized as civil in nature, as petitioner urges, then under our precedents the presumption provided in Cal.Civ.Proc.Code Ann. sec. 1209.5 (West 1982) would not violate the Due Process Clause.

"The characterization of a State proceeding as civil or criminal for the purpose of applying the Due Process Clause of the Fourteenth Amendment is itself a question of federal law. *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct. 2988, . . . (1986). The substance of particular contempt proceedings determines whether they are civil or criminal, regardless of the label attached by the court conducting the proceedings. See *Shillitani v. United States,* 384 U.S. 364, 368-370, 86 S.Ct. 1531, 1534-1535, . . . (1966); *Penfield Co. v. SEC,* 330 U.S. 585, 590, 67 S.Ct. 918, 921, . . . (1947); *Nye v. United States,* 313 U.S. 33, 42-43, 61 S.Ct. 918, 921, . . . (1947); *Lamb v. Cramer,* 285 U.S. 217, 220-221, 52 S.Ct. 315, 316-317, . . . (1932); *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441-443, 31 S.Ct. 492, 498-499, . . . (1911). Civil contempt proceedings are primarily coercive; criminal contempt proceedings are punitive. As the Court explained in *Gompers:* 'The distinction between refusing to do an act commanded, — remedied by imprisonment until the party performs the required act; and doing an act forbidden, — punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.' 221 U.S. at 443, 31 S.Ct. at 499. Failure to pay alimony is an example of the type of act cognizable in an action for civil contempt. *Id.,* at 442, 31 S.Ct. at 498.

"Whether a particular contempt proceeding is civil or criminal can be inferred from objective features of the proceeding and the sanction imposed. The most important indication is whether the judgment inures to the benefit of another party to the proceeding. A fine payable to

the complaint's loss is compensatory and civil. *United States v. Mine Workers,* 330 U.S. 258, 304, 67 S.Ct. 677, 701, . . . (1947). Because the compensatory purpose limits the amount of the fine, the contemnor is not exposed to a risk of punitive sanctions that would make criminal safeguards necessary. By contrast, a fixed fine payable to the court is punitiveand criminal in character.

"An analogous distinction can be drawn between types of sentences of incarceration. Commitment to jail or prison for a fixed term usually operates as a punitive sanction because it confers no advantage on the other party. *Gompers, supra,* 221 U.S. at 449, 31 S.Ct. at 501. But if a contemnor is incarcerated until he or she complies with a court order, the sanction is civil. Although the imprisonment does not compensate the adverse party directly, it is designed to obtain compliance with a court order made in that party's favor. 'When the [contemnors] carry 'the keys of their prison in their own pockets,' the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.' *Shillitani, supra,* 384 U.S. at 368, 86 S.Ct. at 1534 (citations omitted).

"Several peculiar features of California's contempt law make it difficult to determine whether the proceeding in this case was civil or criminal. All contempt proceedings in California courts are governed by the same procedural rules; . . . Wright, Byrne, Haakh, Westbrook, Wheat, Civil and Criminal Contempt in the Federal Courts, 17 F.R.D. 167, 180 (1955). Because State law provides that defendants in civil contempt proceedings are entitled to most of the protections guaranteed to ordinary criminal defendants, the California courts have held that civil contempt proceedings are quasi-criminal under State law. See, e.g., *Ross v. Superior Court,* . . . 569 P.2d 727, 736, (1977); . . . Therefore. indications that the California Superior Court conducted respondent's hearing as a criminal proceeding do not conclusively demonstrate for purposes of federal due process analysis that respondent was tried for criminal contempt.

"Certain formal aspects of the proceeding below raise the possibility that it involved criminal contempt. The orders to show cause stated that '[a] contempt proceeding is criminal in nature' and that a violation would subject the respondent to 'possible penalties.' App. 18, 21. The orders advised respondent of his right to an attorney. *Ibid.* During the hearing, the trial judge told the respondent that he had a constitutional right not to testify. *Id.,* at 27. Finally, the judge imposed a determinate sentence of five days in jail for each count of contempt, to be served consecutively. See Cal.Civ.Proc.Code Ann sec. 1218 (West 1982) (contempt may be punished by a fine not exceeding $500, or imprisonment not exceeding five days, or both); cf. Cal.Civ.Proc.Code Ann. sec. 1219 (West 1982) (contempt may be punished by imprisonment until an act is performed, if the contempt is the omission to perform the act).

"Nevertheless, the substance of the proceeding below and the conditions on which the sentence was suspended reveal that the proceeding was civil in nature. Mrs. Feiock initiated the underlying action in order to obtain enforcement of the child support order for the benefit of the Feiock children. The California District Attorney conducted the case under a provision of the URESA that authorizes him to act on Mrs. Feiock's behalf. Cal.Civ.Proc.Code Ann. sec. 1680 (West 1982). As the very caption of the case in this Court indicated, the district attorney is acting on behalf of Mrs. Feiock, not as the representative of the State of California in a criminal prosecution. Both of the provisions of California's enactment of the URESA that authorize contempt proceedings appear in a chapter of the Code of Civil Procedure entitled 'Civil Enforcement.' *Id.,* sec. 1672, 1685. It appears that most States enforce child and spousal support orders through civil proceedings like this one, in which the burden of persuasion is shifted to the defendant to show inability to comply. J. Atkinson, Modern Child Custody Practice 556 (1986); H. Krause, Child Support in America 65 (1981); Annot., 53 A.L.R.2d 591, 607-616 (1957 and Supp.1987).

"These indications that the proceeding was civil are confirmed by the character of the sanction imposes on respondent. The California Superior Court sentenced respondent to a fixed term of 25 days in jail. Without more, this sanction would be punitive and appropriate for a criminal contempt. But the court suspended the determinate sentence and placed respondent on three years' informal probation on the conditions that he comply with the support order in the future and begin to pay on the arrearage that he had accumulated in the past. App. 40. These special conditions aim exclusively at enforcing compliance with the existing child support order.

"Our precedents indicate that such a conditional sentence is coercive rather than punitive. Thus in *Gompers,* we observed that civil contempt may be punished by an order that 'the

defendant stand committed *unless* and until he performs the affirmative act required by the court's order.' 221 U.S. at 442, 31 S.Ct. at 498 (emphasis added). In *Shillitani,* we decided that civil contempt could be punished by a prison sentence fixed at two years if it included a provision that the contemnor would be released as soon as he complied with the court order. 384 U.S. at 365, 86 S.Ct. at 1553. In this case, if respondent performs his obligations under the original court order, he can avoid going to jail at all. Like the sentence in *Shillitani,* respondent's prison sentence is coercive rather than punitive because it effectively 'conditions release upon the contemnor's willingness to [comply].' *Id.,* at 370, 86 S.Ct. at 1535.

"It is true that the order imposing the sentence does not expressly provide that, *if* respondent is someday incarcerated and *if* he subsequently complies, he will be released immediately. The parties disagree about what will happen if this contingency arises, Tr. Oral Arg. 44, 45-47, and there is no need to address today the question of whether the failure to grant immediate release would render the sanction criminal. In the case before us respondent carries something even better than the 'keys to the prison' in his own pocket: as long as he meets the conditions of his informal probation, he will never enter the jail.

"It is critical that the only conditions placed on respondent's probation, apart from the requirement that he conduct himself generally in accordance with the law, are that he cure his past failures to comply with the support order and that he continue to comply in the future. The sanction imposed on respondent isunlike ordinary criminal probation because it is collateral to a civil proceeding initiated by a private party, and respondent's sentence is suspended on the condition that he comply with a court order entered for the benefit of that party. This distinguishes respondent's sentence from suspended criminal sentences imposed outside the contempt context.

"This Court traditionally has inquired into the substance of contempt proceedings to determine whether they are civil or criminal, paying particular attention to whether the sanction imposed will benefit another party to the proceeding. In this case, the California Superior Court suspended respondent's sentence on the condition that he bring himself into compliance with a court order providing support for his children, represented in the proceeding by petitioner. I conclude that the proceeding in this case should not be characterized as one for civil contempt, and I would reverse the judgment below."

Humphrey v. Cady

405 U.S. 504, 92 S.Ct. 1048 (1988)

CIVIL COMMITMENT - (Renewal) — ***A person committed to a mental institution in lieu of sentence for sex crimes is entitled to the same jury as to extensions of his commitment as he would be if he had been committed as mentally ill.***

"(p. 1050) Mr. Justice MARSHALL delivered the opinion of the Court.

"Petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year. . . . In lieu of sentence, he was committed to the 'sex deviate facility,' located in the State prison, for a potentially indefinite period of time, pursuant to the Wisconsin Sex Crimes Act. . . . In this petition for federal habeas corpus, he seeks to challenge the constitutional validity of the statutory procedures for commitment and the conditions of his confinement. The District Court dismissed his petition without an evidentiary hearing, on the grounds that (1) his claims were for the most part lacking in merit as a matter of law, and (2) his claims had been waived by his failure to present them adequately to the State Courts. The court of appeals refused to certify probable cause for an appeal, 28 U.S.C. sec. 2253. relying not on the ground of waiver but solely on the ground that the claims lacked merit. We granted *certiorari* to consider the constitutional challenge to the statute. . . . We have concluded that an evidentiary hearing is necessary to resolve petitioner's constitutional claims, and also to resolve the question of waiver; consequently we remand the case to the District Court for a hearing.

"The Wisconsin Sex Crimes Act provides that after a person is convicted of any crime, the court may consider whether the crime was 'probably directly motivated by a desire for sexual excitement.' If the court finds such motivation, it may commit the defendant to the Department of Public Welfare (now the Department of Health and Social Services) for a social, physical, and mental examination. If the Department recommends specialized treatment for the defendant's 'mental and physical aberrations,' the court must hold a hearing on the need for such treatment. If the State establishes the need for such treatment by a preponderance of the evidence, the court must commit the defendant to the Department for treatment in lieu of sentence, for a period equal to the maximum sentence authorized for the defendant's crime. At the end of that period, the Department may petition for an order renewing the commitment for five years. After notice and hearing, the court may renew the commitment if it finds that the defendant's discharge would be dangerous to the public because of [his] mental or physical deficiency, disorder or abnormality.' Further five-year renewals may be similarly obtained without limitation.

"Petitioner is presently subject to a five-year renewal order, obtained at the expiration of his one-year maximum sentence. His principle claims relate to the procedure that resulted on the order renewing his commitment. In addition, he challenges the original commitment of his confinement.

"A review of petitioner's claims compels us to conclude that they are at least substantial enough to warrant an evidentiary hearing, in light of this Court's decisions in *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, . . . (1966), and *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . (1967). Thus we reject the contrary conclusion of the Court of Appeals, implicit in its decision to deny leave to appeal.

"A. One of petitioner's principal arguments is that commitment for compulsory treatment under the Sex Crimes Act, at least after the expiration of the initial commitment in lieu of sentence, is essentially equivalent to commitment for compulsory treatment under Wisconsin's Mental Health Act; . . . that a person committed under the Mental Health Act has a statutory right to have a jury determine whether he meets the standards for confinement, . . . and that

petitioner's commitment under the Sex Crimes Act without such a jury determination deprived him of equal protection of the laws.

"In *Baxstrom,* substantially the same argument was advanced by a convicted prisoner who was committed under New York law for compulsory treatment, without a jury trail, at the expiration of his penal sentence. This Court held that the State, having made a jury determination generally available to persons subject to commitment for compulsory treatment, could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few. 383 U.S. at 110-112, 86 S.Ct. at 762-763. The Court recognized that the prisoner's criminal record might be a relevant factor in evaluating his mental condition, and in determining the type of care and treatment appropriate for his condition; it could not, however, justify depriving him of a jury determination on the basic question whether he was mentally ill and an appropriate subject for some kind of compulsory treatment.

"Since 1880, Wisconsin has relied on a jury to decide whether to confine a person for compulsory psychiatric treatment. Like most States with similar legislation, Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty. In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.

"Commitment for compulsory treatment under the Wisconsin Sex Crimes Act appears to require precisely the same kind of determination, involving a mixture of medical and social or legal judgments. If that is so (and that is properly a subject for inquiry on remand), then it is proper to inquire what justification exists for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Mental Health Act.

"Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. The renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom.* Moreover, the Wisconsin Supreme Court has expressly held that even the initial commitment under the Sex Crimes Act is not simply a sentencing alternative, but rather an independent commitment for treatment, comparable to commitment under the Mental Health Act. The Wisconsin court held, anticipating this Court's decision in *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . (1967), that a hearing was required even for the initial commitment under the Sex Crimes Act. *Huebner v. State,* . . . 147 N.W.2d 646, 654-658 (1967). While the *Huebner* decision was grounded in considerations of procedural due process, the Wisconsin court also noted carefully the relevance of *Baxstrom* and the Equal Protection Clause to its decision.

"An alternative justification for the discrimination might be sought in some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary. It appears, however, that the Mental Health Act and the Sex Crimes Act are not mutually exclusive; that 'aberrations' warrant commitment under the former. The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.

"B. The remand hearing will also provide an opportunity for the District Court to consider factual questions relevant to petitioner's other claims. In addition to the lack of a jury trial, petitioner challenges several other aspects of the hearing that led to the renewal of his commitment. He claims he was denied effective assistance of counsel, and he was denied the opportunity to be present and to confront the State's witnesses. These claims are tied inextricably to the question of possible waiver of rights at that hearing, a question that clearly requires further exploration on remand, see *infra,* at 1054-1056.

"Petitioner also challenges the adequacy of the hearing that led to his initial commitment. The record shows that petitioner was not represented by counsel at that initial commitment, . . . and thus the question arises whether the State Court ever in fact hold the hearing required by *Huebner* and *Specht,* and now by statute as well. Moreover, petitioner claims that, even if there was such a hearing, it provided at most an opportunity to challenge the finding that he needed treatment, and not an opportunity to challenge the initial determination that his crime was sexually motivated, a determination that was a necessary prerequisite to the invocation of the whole commitment process. Respondent argues that any defect in the initial commitment has been rendered moot by the intervening renewal hearing. It may be, however, that the initial commitment has continuing effects that cannot be remedied by a mere attack on the subsequent renewal order. On remand, the District Court should resolve this threshold question of mootness, and it should proceed to resolve the relevant factual and legal questions.

"Finally, petitioner challenges the place and character of his confinement under the Sex Crimes Act. He objects to the fact that he was committed to the State prison, rather than to a mental hospital, as he would have been under the Mental Health Act; and he contends that no treatment was provided at the prison, notwithstanding the fact that he was in a prison unit labeled 'Sex Deviate Facility.' These matters, in his view, deprived him of equal protections and due process. Respondent argues that this aspect of petitioner's claim has become moot, because (1) petitioner has been released on parole, see n. 2, *supra,* and (2) the State has established a new treatment facility at the State mental hospital, to which petitioner might be committed if his parole were revoked. On remand, the parties will have ample opportunity to develop the facts relevant to the question of mootness, as well as to petitioner's substantial constitutional claims.

"Plainly, then, we cannot accept as a ground for decision the conclusion of the court of appeals that petitioner's claims are too frivolous to require a hearing. An alternative ground was relied on by the District Court, however, and respondent presses that argument here. The District Court held that petitioner had waived his constitutional claims by failing to present them properly to the State Courts. In order to consider this argument, it will be necessary to review the somewhat complicated procedural history of this case.

"Petitioner first sought to challenge the constitutionality of the Sex Crimes Act at the hearing on the State's petition to renew his commitment beyond the initial one-year period. His appointed counsel argued that a new commitment order would constitute a prohibited second punishment for a single offense, and indicated that he was making a broad constitutional challenge to the Sex Crimes Act. The State Trial Judge adjourned the matter to permit the parties to brief the constitutional issues. When petitioner's counsel failed to submit a brief, or to take any further action on behalf of petitioner, the State Court concluded that the bare petition of the Department of Public Welfare was sufficient to support an order continuing petitioner's confinement. No appeal was taken from that order.

"Petitioner subsequently filed a petition for habeas corpus, without assistance of counsel, in the Wisconsin Supreme Court, which at that time was the only State Court authorized to grant habeas corpus relief to State prisoners. The petition was summarily dismisses without a response from the State or even an opinion by the court. While the petition is not in the record before us, both parties represent that it was substantially identical to the subsequent petition for federal habeas corpus that initiated the present proceedings.

"The federal petition, also prepared without assistance of counsel, alleges, in addition to the claim that petitioner was denied equal protection and due process, referring specifically to, *inter alia,* the lack of a jury trial, and confinement in the State prison. . . .

"Reversed and remanded."

Jones v. U.S.

463 U.S. 354, 103 S.Ct. 3043 (1983)

CIVIL COMMITMENT -(Insanity Plea) (Burden of Proof) — ***A defendant who proved by a fair preponderance of the evidence that he was not guilty by reason of insanity may be confined in a mental hospital until he is sane or until he is not dangerous and for a period longer than the sentence of the crime.***

"(p. 3045) Mr. Justice POWELL delivered the opinion of the Court.

"The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted.

"In the District of Columbia a criminal defendant may be acquitted by reason of insanity if his insanity is 'affirmatively established by a preponderance of the evidence.' D.C.Code sec. 24-301(j) (1981). If he successfully invokes the insanity defense, he is committed to a mental hospital. Sec. 24-301(d)(1). The statute provides several ways of obtaining release. Within 50 days of commitment the acquittee is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. Sec. 24-301(d)(2). If he fails to meet this burden at the 50-day hearing, the committed acquittee subsequently may be released, with court approval, upon certification of his recovery by the hospital chief of service. Sec. 24-301(e). Alternatively, the acquittee is entitled to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release. Sec. 24-302(k).

"Independent of its provision for the commitment of insanity acquitted, the District of Columbia also has adopted a civil commitment procedure, under which an individual may be committed upon clear and convincing proof by the government that he is mentally ill and likely to injure himself or others Sec. 21-545(b). The individual may demand a jury in the civil commitment proceeding. Sec. 21-544. Once committed, a patient may be released at any time upon certification of recovery by the hospital chief of service. Sec. 21-546, 21-548. Alternatively, the patient is entitled after the first 90 days, and subsequently at 6-month intervals, to request a judicial hearing at which he may gain his release by proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. Sec. 21-546, 21-547; see *Dixon v. Jacobs,* 138 U.S.App.D.C. 319, 328, 427 F.2d 589, 598 (1970).

"On September 19, 1975, petitioner was arrested for attempting to steal a jacket from a department store. The next day he was arraigned in the District of Columbia Superior Court on a charge of attempted petit larceny, a misdemeanor punishable by a maximum prison sentence of one year. Sec. 22-103, 22-2202. The court ordered petitioner committed to St. Elizabeths, a public hospital for the mentally ill, for a determination of his competency to stand trial. On March 1, 1976, a hospital psychologist submitted a report to the court stating that petitioner was competent to stand trial, that petitioner suffered from 'schizophrenia, a paranoid type,' and that petitioner's alleged offense was 'the product of his mental disease.' Record 51. The court ruled that petitioner was competent to stand trial. Petitioner subsequently decided to plead not guilty by reason of insanity. The government did not contest the plea, and it entered into a stipulation of facts with petitioner. On March 12, 1976, the Superior Court found petitioner not guilty by reason of insanity and committed him to St. Elizabeths pursuant to sec. 24-301(d)(1).

"On May 25, 1976, the court held the 50-day hearing required by sec. 24-301(d)(2)(A). A psychologist from St. Elizabeths testified on behalf of the government that, in the opinion of the staff, petitioner continued to suffer form paranoid schizophrenia and that 'because his illness is still quite active, he is still a danger to himself and to others.' Tr. 9. Petitioner's counsel

conducted a brief cross-examination, and presented no evidence. The court then found that 'the defendant-patient is mentally ill and as a result of his mental illness, at this time, he constitutes a danger to himself or others.' *Id.,* at 13. Petitioner was returned to St. Elizabeths. Petitioner obtained new counsel and, following some procedural confusion, a second release hearing was held on February 22, 1977. By that date petitioner had been hospitalized for more than one year, the maximum period he could have spent in prison if he had been convicted. On that basis he demanded that he be released unconditionally or recommitted pursuant to the civil commitment standards in sec. 21-545(b), including a jury trial and proof by clear and convincing evidence of his mental illness and dangerousness. The Superior Court denied petitioner's request for a civil commitment hearing, reaffirmed the findings made at the May 25, 1976, hearing, and continued petitioner's commitment to St. Elizabeths.

"Petitioner appealed to the District of Columbia Court of Appeals. A panel of the court affirmed the Superior Court, 396 A.2d 183 (1978), but then granted rehearing and reversed, 411 A.2d 624 (1980). Finally, the court heard the case *en banc* and affirmed the judgment of the Superior Court. 432 A.2d 364 (1981). The court of appeals rejected the argument 'that the length of the prison sentence [petitioner] might have received determines when he is entitled to release or civil commitment under Title 24 of the D.C.Code.' *Id.,* at 368. It then held that the various statutory differences between civil commitment and commitment of insanity acquittees were justified under the equal protection component of the Fifth Amendment. *Id.,* at 371-376.

"We granted *certiorari,* . . .

"It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, . . . (1979). Therefore, a State must have 'a constitutionally adequate purpose for the confinement.' *O'Connor v. Donaldson,* 422 U.S. 563, 574, 95 S.Ct. 2486, 2493, . . . (1975). Congress has determined that a criminal defendant found not guilty by reason of insanity in the District of Columbia should be committed indefinitely to a mental institution for treatment and the protection of society. See H.R. Rep. No. 91-907, p. 73-74 (1970); 432 A.2d at 371 ('[T]he District of Columbia statutory scheme for commitment of insane criminals is . . . a regulatory, prophylactic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients'). Petitioner does not contest the government's authority to commit a mentally ill and dangerous person indefinitely to a mental institution, but rather contends that 'the petitioner's trial was not a constitutionally adequate hearing to justify an indefinite commitment.' Brief for Petitioner 14.

"Petitioner's argument rests principally on *Addington v. Texas, supra,* in which the Court held that the Due Process Clause requires the government in a civil commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. 441 U.S. at 426-427, 99 S.Ct. at 1809-1810. Petitioner contends that these due process standards were not met in his case because his insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence. Petitioner then concludes that the government's only conceivably legitimate justification for automatic commitment is to ensure that insanity acquittees do not escape confinement entirely, and that this interest can justify commitment at most for a period equal to the maximum prison sentence the acquittee could have received if convicted. Because petitioner has been hospitalized for longer than the one year he might have served in prison, he asserts that he should be released unconditionally or recommitted under the District's civil commitment procedures.

"We first turn to the question whether the finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment. A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness. Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. See H.R.Rep. No.91-907, *supra,* at 74 (expressing fear that 'dangerous criminals, particularly psychopaths, [may] win acquittals of serious criminal charges on grounds of insanity' and yet 'escape hospital commitment'); S.Rep. No 1170, 84th Cong., 1st Sess., 13 (1955) ('Where [the] accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until

it can be shown that he has recovered'). We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination.

"The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicated dangerousness. See *Lynch v. Overholser,* 369 U.S.705, 714, 82 S.Ct. 1063, 1069, . . . (1962) (The fact that the accused was found to have committed a criminal act is 'strong evidence that his continued liberty could imperil the preservation of the public peace.'). Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil commitment proceeding. We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property. This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment.

"Nor can we say that it was unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment. The precise evidentiary force of the insanity acquittal, of course, may vary from case-to-case, but the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance. See *Marshall v. United States,* 414 U.S. 417, 428, 94 S.Ct. 700, 707, . . . (1974). Because a hearing is provided within 50 days of the commitment, there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered.

"Petitioner also argues that, whatever the evidentiary value of the insanity acquittal, the government lacks a legitimate reason for committing insanity acquittees automatically because it can introduce the insanity acquittal as evidence in a subsequent civil proceeding. This argument fails to consider the government's strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal — a hearing at which a jury trial may be demanded, sec. 21-544, and at which the government bears the burden of proof by clear and convincing evidence. Instead of focusing on the critical question whether the acquittee has recovered, the new proceeding likely would have to re-litigate much of the criminal trial. These problems accent the government's important interest in automatic commitment. See *Mathews v. Eldrige,* 424 U.S. 319, 348, 96 S.Ct. 893, 909, . . . (1976). We therefore conclude that a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society.

"Petitioner next contends that his indefinite commitment is unconstitutional because the proof of his insanity was based only on a preponderance of the evidence, as compared to *Addington's* civil commitment requirement of proof by clear and convincing evidence. In equating these situations, petitioner ignores important differences between the class of potential civil commitment candidates and the class of insanity acquittees that justify differing standards of proof. The *Addington* Court expressed particular concern that members of the public could be confined on the basis of 'some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable.' 441 U.S. at 426-427, 99 S.Ct. at 1809-1810. See, also, *O'Connor v. Donaldson,* 422 U.S. at 575, 95 S.Ct. at 2493. In view of this concern, the Court deemed it inappropriate to ask the individual 'to share equally with society the risk of error.' *Addington,* 441 U.S. at 427, 99 S.Ct. at 1820. But since automatic commitment under sec. 24-301(d)(1) follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior,' *Addington,* 441 U.S. at 427, 99 S.Ct. at 1810. A criminal act by definition is not 'within a range of conduct that is generally acceptable.' *Id.,* at 426-427, 99 S.Ct. at 1809-1810.

"We therefore conclude that concerns critical to our decision in *Addington* are diminished or absent in the case of insanity acquittees. Accordingly, there is no reason for adopting the same procedural protections as the particular situation demands.' *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, . . . (1972). The preponderance of the evidence standard comports with due process for commitment of insanity acquittees.

"The remaining question is whether petitioner nonetheless is entitled to his release because he has been hospitalized for a period longer than he could have been incarcerated if convicted.

The Due Process Clause 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' *Jackson v. Indiana,* 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, . . . (1972). The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. See *O'Connor v. Donaldson, supra,* 422 U.S. at 575-576, 95 S.Ct. at 2493-2494; 432 A.2d at 372, and n. 16; H.R.Rep. No. 91-907, p. 73-74 (1970). And because it is impossible to predict how long it will take for any given individual to recover — or indeed whether he ever will recover — Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release.

"In light of the congressional purposes underlying commitment of insanity acquittees, we think petitioner clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment. A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation. See, e.g., *Gregg v. Georgia,* 428 U.S. 153, 183-186, 96 S.Ct. 2909, 2929-2931, . . . (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 567, . . . (1963); *Williams v. New York,* 337 U.S. 241, 248-249, 69 S.Ct. 1079, 1083-1084, . . . (1949). The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.

"Different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness. Thus, under the District of Columbia statute, no matter how serious the act committed by the acquittee, he may be released within 50 days of his acquittal if he has recovered. In contrast, one who committed a less serious act may be confined for a longer period if he remains ill and dangerous. There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment.

"We hold that when a criminal defendant established by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment. We have observed before that '[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ' *Marshall v. United States,* 414 U.S. at 427, 94 S.Ct. at 706. This admonition has particular force in the context of legislative efforts to deal with the special problems raised by the insanity defense.

"The judgment of the District of Columbia Court of Appeals is

"*Affirmed.*

"Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

"The Court begins by posing the wrong question. The issue in this case is not whether petitioner must be released because he has been hospitalized for longer than the prison sentence he might have served had he been convicted, any more than the question in a motion to suppress an allegedly coerced confession at a murder trial is whether the murderer should go free. The question before us is whether the fact that an individual has been found 'not guilty by reason of insanity,' by itself, provides a constitutionally-adequate basis for involuntary, indefinite commitment to psychiatric hospitalization.

"None of our precedents directly addresses the meaning of due process in the context of involuntary commitments of persons who have been acquitted by reason of insanity. Petitioner's argument rests primarily on two cases dealing with civil commitments: *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, . . . (1975), and *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, . . . (1979). *O'Connor* held that a mentally ill individual has a 'right to liberty' that a State may not abridge by confining him to a mental institution, even for the purpose of treating his illness,

unless in addition to being mentally ill he is likely to harm himself or others if released. 422 U.S. at 573-576, 95 S.Ct. at 2492-2493; see *id.,* at 589, 95 S.Ct. at 2500 (BURGER, C.J., concurring). Then, in *Addington,* we carefully evaluated the standard of proof in civil commitment proceedings. Applying the due process analysis of *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976), we held that 'due process requires the State to justify confinement by proof more substantial than a mere preponderance of the evidence,' 441 U.S. at 427, 99 S.Ct. at 1810, specifically 'clear and convincing evidence,' *id.,* at 433, 99 S.Ct. at 1813.

"The core of both cases is a balance of three factors: the governmental interest in isolating and treating those who may be mentally ill and dangerous; the difficulty of proving or disproving mental illness and dangerousness in court; and the massive intrusion on individual liberty that involuntary psychiatric hospitalization entails. Petitioner contends that the same balance must be struck in this case, and that the government has no greater interest in committing him indefinitely than it has in ordinary civil commitment cases governed by the standards of *O'Connor* and *Addington.* While conceding that the government may have legitimate reasons to commit insanity acquittees for some definite period without carrying the burden of proof prescribed in *Addington,* he argues that he cannot be confined indefinitely unless the Government accords him the minimum due process protections required for civil commitment.

"The obvious difference between insanity acquittees and other candidates for civil commitment is that, at least in the District of Columbia, an acquittal by reason of insanity implies a determination beyond a reasonable doubt that the defendant in fact committed the criminal act with which he was charged. See *Bethea v. United States,* 365 A.2d 64, 93-95 (D.C. 1976); D.C. Code sec. 24-302(c) (1981). Conceivably, the government may have an interest in confining insanity acquittees to punish them for their criminal acts, but the government disclaims any such interest, and the Court does not rely on it. In any event, we have held that the government may no impose psychiatric commitment as an alternative to penal sentencing for longer than the maximum period of incarceration the legislature has authorized as punishment for the crime committed. *Humphrey v. Cady,* 405 U.S. 504, 510-511, 92 S.Ct. 1048, 1052-1053. . . . (1972). Once Congress has defined a crime and the punishment for that crime, additional facts, subject to the limits of the Double Jeopardy Clause, and upon notice to defendants that they are subject to such additional punishment. See *Specht v. Patterson,* 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, . . . (1967); *In re Winship,* 397 U.S. 358, 361-364, 90 S.Ct. 1068, 1070-1072, . . . (1970).

"Instead of relying on a punishment rationale, the Court holds that a finding of insanity at a criminal trial 'is sufficiently probative of mental illness and dangerousness to justify commitment.' *Ante,* at 3049. First, it declares that '[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicated dangerousness.' *Ante,* at 3049. Second, the Court decides that '[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment.' *Ante,* at 3050. Despite their superficial appeal, these propositions cannot support the decision necessary to the Court's disposition of this case — that the government may be excused from carrying the *Addington* burden of proof with respect to each of the *O'Connor* elements of mental illness and dangerousness in committing petitioner for an indefinite period.

"Our precedents in other commitment contexts are inconsistent with argument that the mere facts of past criminal behavior and mental illness justify indefinite commitment without the benefits of the minimum due process standards associated with civil commitment, most importantly proof of present mental illness and dangerousness by clear and convincing evidence. In *Addington* itself, the petitioner did not dispute that he had engaged in a wide variety of assaultive conduct that could have been the basis for criminal charges had the State chosen to prosecute him. See 441 U.S. at 420-421, 99 S.Ct. at 1806. Similarly, the petitioner in *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, . . . (1972), had been charged with two robberies, yet we required the State to follow its civil commitment procedures if it wished to commit him for more than a strictly limited period. *Id.,* at 729-730, 92 S.Ct. at 1853-1854. As the Court indicates, see *ante,* at 3049, n. 12, these cases are perhaps distinguishable on the ground that there was never proof that a crime had been committed, although in *Addington* the petitioner's violent acts were before the jury. That objection, however, cannot be leveled at *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, . . . (1966), or *Humphrey v. Cady, supra.*

"The petitioner in *Baxstrom* had been convicted of assault and sentenced to a term in prison, during which he was certified as insane by a prison physician. At the expiration of his criminal sentence, he was committed involuntarily to a State mental hospital under procedures substantially less protective than those used for civil commitment. 383 U.S. at 108-110, 86 S.Ct. at 761-762. We held that, once he had served his sentence, *Baxstrom* could not be treated differently from other candidates for civil commitment. *Id.,* at 112-113, 86 S.Ct. at 763. The principal difference between this case and *Baxstrom* is petitioner's admission, intrinsic to an insanity plea in the District of Columbia at the time of his trial, that his crime was 'the product' of his mental illness. *Humphrey,* however, indicates the limited importance of that distinction.

"In *Humphrey,* the petitioner had been convicted of contributing to the delinquency of a minor, the court had determined that his crime was 'probably directly motivated by a desire for sexual excitement,' and the State had established his 'need' for psychiatric treatment by a preponderance of the evidence at a special hearing. 405 U.S. at 506-507, 92 S.Ct. at 1050-1051. He was committed for treatment for the maximum period for which he could have been incarcerated as punishment for his crime — as in this case, one year — and at the end of that period his commitment was renewed for five more years after a judicial hearing on his present mental illness and dangerousness. See *id.,* at 507, 92 S.Ct. at 1051. Thus the situation was almost precisely identical to that in this case after petitioner's February 1977 hearing — the defendant had been found to have committed a criminal act beyond a reasonable doubt, a connection between that act and a mental disorder had been established by a preponderance of the evidence, and he had been confined for longer than the maximum sentence he could have received. If anything, Humphrey had received *more* protections than Michael Jones; the State had borne the burden of proof by a preponderance of the evidence at his 'release hearing,' *ibid.,* and his recommitment was for a strictly limited time. Nevertheless, we held that Humphrey's constitutional challenge to the renewal order had substantial merit, because Humphrey had not received the procedural protections given persons subject to civil commitment.

"The government's interests in committing petitioner are the same interests involved in *Addington, O'Connor, Baxstrom,* and *Humphrey* — isolation, protection, and treatment of a person who may, through no fault of his own, cause harm to others or to himself. Whenever involuntary commitment is a possibility, the government has strong interest in accurate, efficient commitment decisions. Nevertheless, *Addington* held both that the government's interest in accuracy was not impaired by a requirement that it bear the burden of persuasion by clear and convincing evidence, and that the individual's interests in liberty and autonomy required the government to bear at least that burden. An acquittal by reason of insanity of a single, nonviolent misdemeanor is not a constitutionally adequate substitute for the due process protections of *Addington* and *O'Connor,* i.e., proof by clear and convincing evidence of present mental illness or dangerousness, with the government bearing the burden of persuasion.

"A 'not guilty by reason of insanity' verdict is backward-looking, focusing on one moment in the past, while commitment requires a judgment as to the present and future. In some jurisdictions, most notably in federal criminal trials, an acquittal by reason of insanity may mean only that a jury found a reasonable doubt as to a defendant's sanity and as to the causal relationship between his mental condition and his crime. See *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, . . . (1895). As we recognized in *Addington,* '[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations.' 441 U.S. at 430, 99 S.Ct. at 1811. The question is not whether 'government may not act in the face of this uncertainty,' *ante,* at 3050, n. 13; everyone would agree that it can. Rather, the question is whether — in light of the uncertainty about the relationship between petitioner's crime, his present dangerousness, and his present mental condition — the government can force him for the rest of his life 'to share equally with society the risk of error,' 441 U.S. at 427, 99 S.Ct. at 1810.

"It is worth examining what is known about possibility of predicting dangerousness from *any* set of facts. Although a substantial body of research suggests that a consistent pattern of violent behavior may, from a purely statistical standpoint, indicate a certain likelihood of further violence in the future, mere statistical validity is far from perfect for purposes of predicting which individuals will be dangerous. Commentators and researchers have long acknowledged that even the best attempts to identify dangerous individuals on the basis of specified facts have been inaccurate roughly two-thirds of the time, almost always on the side of over-prediction. On a clinical basis, mental conditions with some confidence, but strong institutional biases lead them

to err when they attempt to determine an individual's dangerousness, especially when the consequence of a finding of dangerousness is that an obviously mentally ill patient will remain within their control. Research is practically nonexistent on the relationship of *nonviolent* criminal behavior, such as petitioner's attempt to shoplift, to future dangerousness. We do not even know whether it is even statistically valid as a predictor of similar nonviolent behavior, much less of behavior posing more serious risks to self and others.

"Even if an insanity acquittee remains mentally ill, so long as he has not repeated the same act since his offense the passage of time diminishes the likelihood that he will repeat it. Furthermore, the *frequency* of prior violent behavior is an important element in any attempt to predict future violence. Finally, it cannot be again said that some crimes are more indicative of dangerousness than others. Subject to the limits of *O'Connor,* a State may consider nonviolent misdemeanors 'dangerous,' but there is room for doubt whether a single attempt to shoplift and a string of brutal murders are equally accurate and equally permanent predictors of dangerousness. As for mental illness, certainly some conditions that satisfy the 'mental disease' element of the insanity defense do not persist for an extended period — thus the traditional inclusion of 'temporary insanity' within the insanity defense.

"Close reading of the Court's opinion reveals the utter emptiness of the legislative judgment it finds so unproblematic. Today's decision may overrule *Humphrey* by implication. It does not, however, purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom.* It is clear, therefore, that the separate facts of criminality and mental illness cannot support indefinite psychiatric commitment, for both were present in *Baxstrom.* The Court's careful phrasing indicated as much: 'someone *whose mental illness was sufficient to lead him to commit a criminal act* is likely to remain ill and in need of treatment.' *Ante,* at 3050 (emphasis added). The Court relies on a *connection* between mental condition and criminal conduct that is unique to verdicts of 'not guilty by reason of insanity.' Yet the relevance of that connection, as opposed to each of its separate components, is far from a matter of obvious 'common sense.' None of the available evidence that criminal behavior by the mentally ill is likely to repeat itself distinguishes between behaviors that were 'the product' of mental illness and those that were not. It is completely unlikely that persons acquitted by reason of insanity display a rate of future 'dangerous' activity higher than civil committees with similar arrest records, or than persons convicted of crimes who are later found to be mentally ill. The causal connection between mental condition and criminal behavior that 'not guilty by reason of insanity' formulations universally include is more a social judgment than a sound basis for determining dangerousness.

"Given the close similarity of the governmental interests at issue in this case and those at issue in *Addington,* and the highly imperfect 'fit' between the findings required for an insanity acquittal and those required under *O'Connor* to support an indefinite commitment, I cannot agree that the government should be excused from the burden that *Addington* held was required by due process.

"In considering the requirements of due process, we have often inquired whether alternative procedures more protective of individual interests, at a reasonable cost, were likely to accomplish the State's legitimate objectives. See, e.g., *Mathews v. Eldridge,* 424 U.S. at 335, 96 S.Ct. at 903; *Stanley v. Illinois,* 405 U.S. 645, 657-658, 92 S.Ct. 1208, 1215-1216, . . . (1972); *Bell v. Burson,* 402 U.S. 535, 542-543, 91 S.Ct. 1586, 1591, . . . (1971). There are many ways to take into account criminal behavior and past mental condition, and thereby to vindicate the government's legitimate interest in accurate commitment decisions, without depriving insanity acquittees of the *Addington* protections. Certain aspects of the District of Columbia's commitment procedures already embody less restrictive alternatives: all insanity acquittees are committed automatically for 50 days before an initial release hearing, sec. 24-301(d), and the testimony of mental health professionals at all hearings may be informed by their experience with mentally ill patients and by their familiarity with current research. The fact of an insanity acquittal and the evidence on insanity adduced at trial are clearly admissible in all commitment and release hearings.

"In addition, an insanity acquittal might conceivably justify commitment for a reasonably limited period without requiring the government to meet its *Addington* burden. See *United States v. Brown,* 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973); American Psychiatric Assn., statement on the Insanity Defense 15 (1982); cf. *Jackson v. Indiana,* 406 U.S. at 738, 92 S.Ct. at 1858; *McNeil v. Director, Patuxent Institution,* 407 U.S. 245, 92 S.Ct. 2083, 2086, . . . (1972). In this case, petitioner submits that such a reasonable period extends no longer than the

maximum sentence that could have been imposed had he been found guilty of the crime charged. But at some point the government must be required to justify further commitment under the standards of *Addington.*

"If the government's interests were the only ones at stake, an insanity acquittal would furnish a reasonable basis for indefinite commitment. Under the Constitution, however, the government's interests must be considered in light of the liberty interests of the individual who is subject to commitment. In the final analysis, the court disregards *Addington* not on the ground that the government's interests in committing insanity acquittees are different from or stronger than its interests in committing criminals who happen to be mentally ill, or mentally ill individuals who have done violent, dangerous things, but on the theory that 'there is good reason for diminished concern as to the risk of error' when a person is committed indefinitely on the basis of an insanity acquittal. See *ante,* at 3051.

"The 'risk of error' that, according to the Court, is diminished in this context subsumes two separate risks. First, the Court notes that in *Addington* we were concerned, at least in part, that individuals might be committed for mere idiosyncratic behavior, see 441 U.S. at 427, 99 S.Ct. at 1810, and it observes that criminal acts are outside the 'range of conduct that is generally acceptable.' *Ante,* at 3051, quoting 441 U.S. at 426-427, 99 S.Ct. at 1809-1810. *O'Connor,* however, requires that a person be proved dangerous, not merely 'unacceptable,' before he may be subjected to the massive curtailment of individual freedom and autonomy that indefinite commitment entails. In *Addington* itself, the State had clearly proved by a preponderance of the evidence that the petitioner had engaged repeatedly in conduct far beyond the pale of acceptable behavior, yet we did not regard that level of proof as furnishing adequate protection for the individual interests at stake.

"Second, the Court reasons that '[a] criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself,' and therefore that committing him does not involve the same risk of stigmatization a civil commitment may entail. *Ante,* at 3051, n. 16. This is perhaps the Court's most cynical argument. It is true that in *Addington* and in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, . . . (1980), we recognized that individuals have an interest in not being stigmatized by society at large on account of being labeled mentally ill. 441 U.S. at 426, 99 S.Ct. at 1809; 445 U.S. at 492, 100 S.Ct. at 1263. Avoiding stigma, however, is only one of the reasons for recognizing a liberty interest in avoiding involuntary commitment. We have repeatedly acknowledged that persons who have already been labeled as mentally ill nonetheless retain an interest in avoiding involuntary commitment. See, e.g., *O'Connor v. Donaldson,* 422 U.S. at 575, 95 S.Ct. at 2493; *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, . . . (1966). Other aspects of involuntary commitment affect them in far more immediate ways.

"In many respects, confinement in a mental institution is even more intrusive than incarceration in a prison. Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community; they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment. See *Youngberg v. Romeo,* 457 U.S. 307, 321, 102 S.Ct. 2452, 2461, . . . (1982) (involuntary committee's due process right to freedom from unreasonable restraint limited to a guarantee that professional medical judgment be exercised). The treatments to which he may be subjected include physical restraints such as straight-jacketing, as well as electro-shock therapy, aversive conditioning, and even in some cases psychosurgery. Administration of psychotropic medication to control behavior is common. See American Psychiatric Assn. statement on the Insanity defense 15 (1982) ('Greater emphasis is now placed upon psychopharmacological management of the hospitalized person'). Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. See *Mills v. Rogers,* 457 U.S. 291, 303, 102 S.Ct. 2442, 2450, . . . (1982); *Rennie v. Klein,* 653 F.2d 836, 845, (CA3 1981) *(en banc).* We should not presume that he lacks a compelling interest in having the decisions to commit him and to keep him institutionalized made carefully, and in a manner that preserves the maximum degree of personal autonomy.

"Therefore, I cannot agree with the Court that petitioner in this case has any less interest in procedural protections during the commitment process than the petitioners in *Addington,*

O'Connor, or *Baxstrom,* and I cannot agree that the risks or error which an indefinite commitment following an insanity acquittal entails are sufficiently diminished to justify relieving the government of the responsibilities defined in *Addington.*

"Indefinite commitment without the due process protections adopted in *Addington* and *O'Connor* is not reasonably related to any of the government's purported interests in confining insanity acquittees for psychiatric treatment. The rationales on which the Court justifies sec. 24-301's departures from *Addington* at most support deferring *Addington's* due process protections —specifically, its requirement that the Government carry the burden of proof by clear and convincing evidence — for a limited period only, not indefinitely.

"The maximum sentence for attempted petit larceny in the District of Columbia is one year. Beyond that period, petitioner should have been kept in involuntary confinement unless he had been committed under the standards of *Addington* and *O'Connor.* Petitioner had been in custody for 17 months at the time of his February, 1977 hearing, either in St. Elizabeths or the District of Columbia Correctional Center. At that time he should have received the benefit of the *Addington* due process standards, and, because he did not, the findings at that hearing cannot provide constitutionally adequate support for his present commitment. I would therefore reverse the judgment of the District of Columbia Court of Appeals.

"Justice STEVENS, dissenting.

"The character of the conduct that causes a person to be incarcerated in an institution is relevant to the length of his permissible detention. In my opinion, a plea of not guilty by reason of insanity, like a plea of guilty, may provide a sufficient basis for confinement for the period fixed by the legislature as punishment for the acknowledged conduct, provided of course that the acquittee is given fair opportunity to prove that he has recovered from his illness. But surely if he is to be confined for a longer period, the State must shoulder the burden of proving by clear and convincing evidence that such additional confinement is appropriate. As Justice BRENNAN demonstrates, that result is dictated by our prior cases. What Justice POWELL has written lends support to the view that the initial confinement of the acquittee is permissible, but provides no support for the conclusion that he has the burden of proving his entitlement to freedom after he has served the maximum sentence authorized by law. I respectfully dissent because I believe this shoplifter was presumptively entitled to his freedom after he had been incarcerated for a period of one year."

Kent v. United States

383 U.S. 541, 86 S.Ct. 1045 (1966)

CERTIFICATION - Due Process — ***The Juvenile Court has considerable latitude in determining whether a child should be certified to the adult court, but it must provide fairness and basic due process including: a fair though informal hearing, the assistance of counsel, access to social records, and findings by the court as to the reasons for certifying. (An Appendix lists factors for judicial considerations.)***

"Mr. Justice FORTAS delivered the opinion of the Court.

"This case is here on *certiorari* to the United States Court of Appeals for the District of Columbia Circuit. The facts and the contentions of counsel raise a number of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within the judicial competence, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

"Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a 'Social Service' file.

"On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p.m. on September 5, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the 'exclusive jurisdiction' of the Juvenile Court. . . . He was still on probation to that court as a result of the 1959 proceedings.

"Upon being apprehended, Kent was taken to police headquarters where he was interrogated by police officers. It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening.

"The record does not show when his mother became aware that the boy was in custody but shortly after 2 p.m. on September 6, 1961, the day following petitioner's apprehension, she retained counsel.

"Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility the Juvenile Court might waive jurisdiction . . . and remit Kent to trial by the District Court. Counsel made known his intention to oppose waiver.

"Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this time, no determination by a judicial officer of probable cause for petitioner's apprehension.

"During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the

Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner 'is a victim of severe psychopathology' and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation.

"At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court Judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this file was effective assistance of counsel.

"The Juvenile Court Judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after 'full investigations, I do hereby waive' jurisdiction of petitioner and direct that he be 'held for trial for [the alleged] offenses under the regular procedure of the U.S. District Court for the District Columbia.' He made no findings. He did not recite any reason for the waiver. He made no reference to the motions filed by petitioner's counsel. We must assume that he denied, *sub silentio,* the motions for a hearing, the recommendation for hospitalization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction.

"Presumably, prior to entry of his order, the Juvenile Court Judge received and considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the juvenile probation section. The Social Service file and the September 8 report were later sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of 'a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness.' As stated, neither this report nor the Social Service file was made available to petitioner's counsel.

"The provision of the Juvenile Court Act governing waiver expressly provides only for 'full investigation.' It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. . . .

"Petitioner appealed from the Juvenile Court's waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the court of appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. . . .

"Meanwhile, on September 25, 1961, shortly after the Juvenile Court order waiving its jurisdiction, petitioner was indicted by a grand jury of the United States District Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court . . . After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963.

"The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not 'go behind' the Juvenile Court Judge's recital that his order was entered 'after full investigation.' It held that 'The only matter before me is as to whether or not the statutory provisions were complied with and the courts have held *** with reference to full investigation, that that does not mean a quasi-judicial or judicial hearing. No hearing is required.'

"On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined that petitioner was competent.

"At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because 'his unlawful act was the product of mental disease or mental defect.' *Durham v. United States,* 94 U.S.App.D.S. 228, 241, 214 F.2d 862, 875, . . . (1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury

found as to the counts alleging rape that petitioner was 'not guilty by reason of insanity.' Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored. On six counts of housebreaking and robbery, the jury found that petitioner was guilty.

"Kent was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30 to 90 years in prison. The District Court ordered that the time spent at St. Elizabeths on the mandatory commitment after the insanity acquittal be counted as part of the 30-to-90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. . . .

"Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal. He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, *supra;* that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, *supra;* that he was interrogated by the police in the absence of counsel or a parent, . . . without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding.

"These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justiciability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated, or explained by action of the government, as *parens patriae,* evidencing the special solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions.

. . .

"(p. 1053) We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or — subject to the statutory delimitation — should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.' *Green v. United States,* 113 U.S.App.D.C. 348, 308 F.2d 303 (1962). The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in total disregard of a motion for hearing or statement or reasons, to decide — as in this case — that the child will be taken from the Receiving Home for Children and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.

"We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

"The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris.* Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the

child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection of society, not to fix criminal responsibility, guilt, and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness

"Because the State is supposed to proceed in respect of the child as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions . . . that he is not entitled to counsel.

"While there can be no doubt of the original laudable purpose of Juvenile Courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some Juvenile Courts, including that of the District of Columbia, lack the personnel, facilities, and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

"This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in Juvenile Court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.

"It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile. . . . The statutory scheme makes this plain. The Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. He is, as specified by statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection of the public can not be adequately safeguarded without *** removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and the disqualification for public employment . . .

"The net, therefore, is that petitioner — then a boy of 16 — was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as the waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in context of constitutional principles relating to due process and the assistance of counsel.

. . .

"(p. 1056) In *Watkins v. United States,* . . . 343 F.2d 278 (1964), decided in November 1964, the Juvenile Court had waived jurisdiction of appellant who was charged with housebreaking and larceny. In the District Court, appellant sought disclosure of the social record in order to attack the validity of the waiver. The court of appeals held that in a waiver proceeding a juvenile's attorney is entitled to access to such records. The court observed that

'All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. The relevance of particular items must be construed generously. Since an attorney has no certain knowledge of what the social records contain, he cannot be expected to demonstrate the relevance of particular items in his request.

'The child's attorney must be advised of the information upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver can be ordered only after 'full investigation,' and by guarding against action of the Juvenile Court beyond its discretionary authority.' . . . 343 F.2d at 282.

"The Court remanded the record to the District Court for a determination of the extent to which the records should be disclosed.

. . .

"(p. 1057) Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be informal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

"Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. Under *Black,* the child is entitled to counsel in connection with a waiver proceeding, and under *Watkins,* counsel is entitled to see the child's social records. These rights are meaningless — an illusion, a mockery — unless counsel is given an opportunity to function.

"The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel. There is no justification for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

"We do not mean by this to indicate that the hearing held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Pee v. United States,* . . . 274 F.2d 556, 559 (1959).

"With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. . . .

. . .

"(p. 1059) Ordinarily we would reverse the court of appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against the waiver, the indictment in the District Court would be dismissed. See *Black v. United States, supra.* However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the court of appeals fashioned in *Black, supra,* we do not consider it appropriate to grant this drastic relief. Accordingly, we vacate the order of the court of appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion. If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such further proceedings, if any, as may be warranted, to enter an appropriate judgement. . . .

"Reversed and remanded.

Appendix to Opinion of the Court

Policy Memorandum No. 7, November 30, 1959

"The authority of the Judge of the Juvenile Court of the District Court of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act . . . This section permits the judge to waive jurisdiction 'after full investigation' in the case of any child 'sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment.'

"The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the judge. A knowledge of the judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants and to the Metropolitan Police Department, as well as to the staff of this court, especially the juvenile Intake Section.

"Therefore, the judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

"An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or — even though less serious — if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

"The determinative factors which will be considered by the judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associated in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, Juvenile Court and other jurisdictions, prior periods of probation to the court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available to the Juvenile Court.

"It will be the responsibility of any officer of the court's staff assigned to make investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the judge will consider the relevant factors in a

specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that court.

"Mr. Justice STEWART, with whom Mr. Justice BLACK, Mr. Justice HARLAN and Mr. Justice WHITE join, dissenting.

"This case involves the construction of a statute applicable only to the District of Columbia. Our general practice is to leave undisturbed decisions of the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District . . . "

Kentucky v. Stincer

482 U.S. ———, 107 S.Ct. 2658 (1987)

CONFRONTATION — ***The right of confrontation does not apply to a hearing to determine a child witness' competence to testify.***

"Justice BLACKMUN delivered the opinion of the Court.

"The question presented in this case is whether the exclusion of a defendant from a hearing held to determine the competency of two child witnesses to testify violates the defendant's rights under the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

"After a jury was sworn, but before the presentation of evidence, the court conducted an in-chambers hearing to determine if the two young girls were competent to testify. Over his objection, respondent, but not his counsel (a public defender), was excluded from this hearing.

"The two children were examined separately and the judge, the prosecutor, and respondent's counsel asked questions of each girl to determine if they were capable of remembering basic facts and of distinguishing between telling the truth and telling a lie. The 8-year-old was asked her age, her date of birth, the name of her school, the names of her teachers, and the name of her Sunday School. She was also asked whether she knew what it meant to tell the truth, and whether she could keep a promise to God to tell the truth. N.G., the 7-year-old girl, was asked similar questions. The two children were not asked about the substance of the testimony they were to give at trial. The court ruled that the girls were competent to testify. Respondent's counsel did not object to these rulings. *Id.*, at 20, 25.

"Before each of the girls began her substantive testimony in open court, the prosecutor repeated some of the basic questions regarding the girl's background that had been asked at the competency hearing.

"On cross-examination, respondent's counsel asked each girl questions designed to determine if she could remember past events and if she know the difference between the truth and a lie. Some of these questions were similar to those that had been asked at the competency hearing. After the testimony of the girls was concluded, counsel did not request that the trial court reconsider its ruling that the girls were competent to testify. The jury convicted respondent of first-degree sodomy for engaging in deviate sexual intercourse and fixed his sentence at 20 years' imprisonment.

"The Commonwealth argues that respondent's exclusion from the competency hearing of the two children did not violate the Confrontation Clause because a competency hearing is not 'a stage of trial where evidence or witnesses are being presented to the trier of fact.' Brief for Petitioner 22. Cf. *Gannett Co. v. DePasquale*, 99 S.Ct. 2898 (1979) (BURGER, C.J., concurring). Distinguishing between a 'trial' and a 'pretrial proceeding' is not particularly helpful here, however, because a competency hearing may well be a 'stage of trial.' In this case, for instance, the competency hearing was held after the jury was sworn, in the judge's chambers, and in the presence of opposing counsel who asked questions of the witnesses. Moreover, although questions regarding the guilt or innocence of the defendant usually are not asked at a competency hearing, the hearing retains a direct relationship with the trial because it determines whether a key witness will testify. Further, although the preliminary determination of a witness' competency to testify is made at this hearing, the determination of competency is an ongoing one for the judge to make based on the witness' actual testimony at trial.

"Instead of attempting to characterize a competency hearing as a trial or pretial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination. No such interference occurred when respondent was

excluded from the competency hearing of the two young girls in this case. After the trial court determined that the two children were competent to testify, they appeared and testified in open court. At that point, the two witnesses were subject to full and complete cross-examination, and were so examined. Respondent was present throughout this cross-examination and was available to assist his counsel as necessary. There was no Kentucky rule of law, nor any ruling by the trial court, that restricted respondent's ability to cross-examine the witnesses at trial. Any questions asked during the competency hearing, which respondent's counsel attended and in which he participated, could have been repeated during direct-examination and cross-examination of the witnesses in respondent's present. See *California v. Green*, 90 S.Ct. 1930, ('[T]he ability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial').

"Moreover, the type of questions that were asked at the competency hearing in this case were easy to repeat on cross-examination at trial. Under Kentucky law, when a child's competency to testify is raised, the judge is required to resolve three basis issues: whether the child is capable of observing and recollecting facts, whether the child is capable of narrating those facts to a court or jury, and whether the child has a moral sense of the obligation to tell the truth. See *Moore v. Commonwealth,* 384 S.W.2d 498, 500 (Ky. 1964) ('when the competency of an infant to testify is properly raised it is then the duty of the Trial Court to carefully examine the witness to ascertain whether she (or he) is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth'). Thus, questions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial. Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie. See Comment, The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It," 40 U. Miami L. Rev. 245, 263, and n. 78 (1985); Comment, Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases, 69 Minn. L. Rev. 1377, 1381-1383, and n. 9-11 (1985).

"In Kentucky, as in certain other States, it is the responsiblity of the judge, not the jury, to decide whether a witness is competent to testify based on the witness' answers to such questions. *Whitehead v. Stith,* 105 S.W.2d 834, 837 (Ky. 1937) (question of competency is one for court, not jury, and if court finds witness lacks qualification, 'it commits a palpable abuse of its discretion' should it then permit witness to testify); *Payne v. Commonwealth,* 623 S.W.2d 867, 878 (Ky. 1981); *Capps v. Commonwealth,* 560 S.W.2d at 560. See 2 Wigmore on Evidence sec. 507, p. 714 (citing cases). In those States where the judge has the responsiblity for determining competency, that responsiblity usually continues throughout the trial. A motion by defense counsel that the court reconsider its earlier decision that a child is competent may be raised after the child testifies on direct examination, see, e.g., *In re R.R.,* (at close of State's case, defense attorney moved that 4-year-old boy be declared incompetent on basis of actual testimony given by boy), or after direct and cross-examination of the witness. See, e.g., Reply Brief for Petitioner 12 ('If, during trial, there arises some basis for challenging the judge's competency determination, the judge may be asked to reconsider, referring to respondent's motion to that effect. Tr 126-127). Moreover, Appellate Courts reviewing a trial judge's determination of competency also often will look at the full testimony at trial.

"In this case both T.G. and N.G. were asked several background questions during the competency hearing, as well as several questions directed at what it meant to tell the truth. Some of the questions regarding the witnesses' backgrounds were repeated by the prosecutor on direct examination, while others — particularly those regarding the witnesses' ability to tell the difference between truth and falsehood — were repeated by respondent's counsel on cross-examination. At the close of the children's testimony, respondent's counsel, had he thought it appropriate, was in a position to move that the court reconsider its competency rulings on the ground that the direct and cross-examination had elicited evidence that the young girls lacked the basic requisites for serving as competent witnesses. Thus, the critical tool of cross-examination was available to counsel as a means of establishing that the witnesses were not competent to testify, as well as a means of undermining the credibility of their testimony.

"Because respondent had the opportunity for full and effective cross-examination of the two witnesses during trial, and because of the nature of the competency hearing at issue in this

case, we conclude that respondent's rights under the Confrontation Clause were not violated by his exclusion from the competency hearing of the two girls.

"Respondent argues that his rights under the Due Process Clause of the Fourteenth Amendment were violated by his exclusion from the competency hearing. The court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' *Snyder v. Massachusetts,* 54 S.Ct. 330, 90 ALR 575 (1934). Although the Court has emphasized that this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow.' *id.,* due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence.' Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

"We conclude that respondent's due process rights were not violated by his exclusion from the competency hearing in this case. We emphasize, again, the particular nature of the competency hearing. No question regarding the substantive testimony that the two girls would have given during trial was asked at that hearing. All the questions, instead, were directed solely to each child's ability to recollect and narrate facts, to her ability to distinquish between truth and falsehood, and to her sense of moral obligation to tell the truth. Thus, although a competency hearing in which a witness is asked to discuss upcoming substantive testimony might bear a substantial relationship to a defendant's opportunity better to defend himself at trial, that kind of inquiry is not before us in this case.

"Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He has presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency. On the record of this case, therefore, we cannot say that respondent's rights under the Due Process Clause of the Fourteenth Amendment were violated by his exclusion from the competency hearing. As was said in *United States v. Gagnon,* 105 S.Ct. 1482 (1985) (per curiam), there is no indication that respondent 'could have done [anything] had [he] been at the [hearing] nor would [he] have gained anything by attending.

"Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

"The court today defines respondent's Sixth Amendment right to be confronted with the witnesses against him as guaranteeing nothing more than an opportunity to cross-examine these witnesses *at some point* during his trial. The Confrontation Clause protects much more. In this case, it secures at a minimum respondent's right of presence to assist his lawyer at the in-chambers hearing to determine the competency of the key prosecution witnesses. Respondent's claim under the Due Process Clause of the Fourteenth Amendment, though similar in this testimonial context to his claim under the Confrontation Clause, was not addressed by the Court below and should not be decided here. Were this issue properly before the Court, however, I would again dissent. Due process requires that respondent be allowed to attend every critical stage of his trial.

"The Sixth Amendment guarantees the criminal defendant 'the right . . .to be confronted with the witnesses against him' The text plainly envisions that witnesses against the accused shall, as a rule, testify *in his presence.* I can only marvel at the manner in which the Court avoids this manifest import of the Confrontation Clause. Without explanation, the Court narrows its analysis to address *exclusively* what is accurately identified as simply a primary interest the Clause was intended to secure: the right of cross-examination. This use of analytical blinders is undoubtedly convenient. Since respondent ultimately did receive an opportunity for full cross-examination of the witnesses in his presence, the narrowly-drawn standard enables the Court to conclude with relative ease that respondent's confrontation rights were not violated, even though the in-chambers competency hearing admittedly was, in this case, a 'crucial' phase of respondent's trial from which he was physically excluded.

"Although cross-examination may be a primary means for ensuring the reliability of testimony from adverse witnesses, we have never helds that standing alone it will suffice in every

case. It is true that we have addressed in some detail the Confrontation Clause as it pertains to the admission of out-of-court statements, e.g., *Ohio v. Roberts,* 100 S.Ct. 2531 (1980); *California v. Green,* 90 S.Ct. 1930 (1970), and restrictions on the scope of cross-examination, e.g., *Davis v. Alaska,* 94 S.Ct. 1105 (1974). But these cases have arisen in contexts in which the defendant's right to be present during the testimony was never doubted, thus making the Court's categorical analysis largely beside the point. Not until today has this Court gone so far as to substitute a defendant's subsequent opportunity for cross-examination for his right to confront adverse witnesses in a prior testimonial proceeding. Rather, the Court has taken care *not* to identify the right of cross-examination as the exclusive interest protected by the Confrontation Clause. That right is simply among those 'included in' the defendant's broad right to confront the witnesses against him. *Pointer v. Texas,* 85 S.Ct. 1065 (1965). Though '[c]onfrontation means more than being allowed to confront the witness physically,' *Davis v. Alaska,* it must by implication encompass the right of physical presence at any testimonial proceeding. As this Court has previously recognized, 'it is this literal right to confront the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause,' *California v. Green, supra,* guaranteeing the accused an opportunity to compel the witness to meet him 'face-to-face' before the trier of fact.

"Physical presence of the defendant enhances the reliability of the fact-finding process. Under Kentucky law, in a witness competency proceeding the trial judge must assess the witness' ability to observe and recollect facts with accuracy and with committed truthfulness. This determination necessarily requires the judge to make independent factual findings against which can be measured the accuracy of the witness' testimony at the competency proceeding, whether addressing facts such as the witness' name, age, and relation to the defendant, or events concerning the alleged offense itself. These findings are critical to the trial judge's assessment of the witness' competency to testify, and they often concern matters about which the defendant, and not his counsel, possess the knowledge needed to expose inaccuracies in the witness' answers. Having the defendant present ensures that these inaccuracies are called to the judge's attention immediately — *before* the witness takes the stand with the Trial Court's *imprimatur* of competency and testifies in front of the jury as to the defendant's commission of the alleged offense. It is both functionally inefficient and fundamentally unfair to attribute to the defendant's attorney complete knowledge of the facts which the trial judge, in the defendant's involuntary absence, deems relevant to the competency determination. That determination, which turns entirely on the Trial Court's evaluation of the witness' statements, cannot be made out of the physical presence of the defendant without violating the basic guarantee of the Confrontation Clause."

Kulko v. Superior Court of California

436 U.S. 84, 98 S.Ct. 1690 (1978)

SUPPORT (Jurisdiction) — ***A State does not acquire personal jurisdiction for the purposes of ordering child support by the fact that children and the custodial parent move to that State.***

"(p. 1694) Mr. Justice MARSHALL delivered the opinion of the Court.

"The issue before us whether, in this action for child support, the California State Courts may exercise *in persona,* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled within the State. For reasons set forth below, we hold that the exercise of such jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.

"Appellant Ezra Kulko married appellee Sharon Kulko Horn in 1959, appellant's three-day stopover in California enroute from a military base in Texas to a tour of duty in Korea. At the time of this marriage, both parties were domiciled in and residents of New York State. Immediately following the marriage, Sharon Kulko returned to New York, as did appellant after his tour of duty. Their first child, Darwin, was born to the Kulkos in New York in 1961, and a year later their second child, Ilsa, was born, also in New York. The Kulkos and their two children resided together as a family in New York City continuously until March 1972, when the Kulkos separated.

"Following the separation, Sharon Kulko moved to San Francisco, Calif. A written separation agreement was drawn up in New York; in September 1972, Sharon Kulko flew to New York City in order to sign this agreement. The agreement provided, *inter alia,* that the children would remain with their father during the school year but would spend their Christmas, Easter, and summer vacations with their mother. While Sharon Kulko waived any claim for her own support or maintenance, Ezra Kulko agreed to pay his wife $3,000 per year in child support for the periods when the children were in her care, custody, and control. Immediately after execution of the separation agreement, Sharon Kulko flew to Haiti and procured a divorce there; the divorce decree incorporated the terms of the agreement. She then returned to California, where she remarried and took the name Horn.

"The children resided with appellant during the school year and with their mother on vacations, as provided by the separation agreement, until December 1973. At this time, just before Ilsa was to leave New York to spend Christmas vacation with her mother, she told her father that she wanted to remain in California after her vacation. Appellant bought his daughter a one-way plane ticket, and Ilsa left, taking her clothing with her. Ilsa then commenced living in California with her mother during the school year and spending vacations with her father. In January 1976, appellant's other child, Darwin, called his mother from New York and advised her that he wanted to live with her in California. Unbeknownst to appellant, appellee Horn commenced this action against appellant in the California Superior Court. She sought to establish the Haitian divorce decree as a California judgment so as to award her full custody of the children; and to increase appellant's child support obligations. Appellant appeared specially and moved to quash service of the summons on the ground that he was not a resident of California and lacked sufficient 'minimum contacts' with the State under *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, . . . (1945), to warrant the State's assertion of personal jurisdiction over him.

"The trial court summarily denied the motion to quash, and appellant sought review in the California Court of Appeals by petition for a writ of mandate. Appellant did not contest the court's jurisdiction for purposes of the custody determination, but, with respect to the claim for increased support, he renewed his argument that the California courts lacked personal

jurisdiction over him. The Appellate Court affirmed the denial of appellant's motion to quash, reasoning that, by consenting to his children's living in California, appellant had 'caused as effect in th[e] State' warranting the exercise of jurisdiction over him. 133 Cal.Rptr. 627, 628 (1976).

"The California Supreme Court granted appellant's petition for review, and in a 4-2 decision sustained the rulings of the lower State Courts. . . . 564 P.2d 353 (1977). It noted first that the California Code of Civil Procedures demonstrated an intent that the courts of California utilize all bases of *in persona* jurisdiction 'not inconsistent with the Constitution.' Agreeing with the court below, the Supreme Court stated that, where a nonresident defendant has caused as effect in the State by an act or omission outside the State, personal jurisdiction over the defendant in causes arising from that effect may be exercised whenever 'reasonable.' . . . 564 P.2d at 356. It went on to hold that such an exercise was 'reasonable' in this case because appellant had purposely availed himself of the benefits and protections of the laws of California' by sending Ilsa to live with her mother in California. . . . 564 P.2d at 356, 358. While noting that appellant had not, 'with respect to his other child, Darwin, caused an effect in [California]' — since it was appellee Horn who had arranged for Darwin to fly to California in January 1976 — the court concluded that it was 'fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers [sic] personal jurisdiction and has consented to the permanent residence of the other child in California.' . . . 564 P.2d at 358-359.

"In the view of the two dissenting justices, permitting a minor child to move to California could not be regarded as a purposeful act by which appellant had invoked the benefits and protection of State law. Since appellant had been in the State of California on only two brief occasions many years before on military stopovers, and lacked any other contact with the State, the dissenting opinion argued that appellant could not reasonably be subjected to the *in persona* jurisdiction of the California State Courts. . . . 564 P.2d at 359-360.

"On Ezra Kulko's appeal to this Court, probable jurisdiction was postponed. . . . We have concluded that jurisdiction by appeal does not lie, but, treating the papers as a petition for a writ of *certiorari,* we hereby grant the petition and reverse the judgment below.

"The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of State Courts to enter judgments affecting rights or interests of nonresident defendants. See *Shaffer v. Heitner,* 433 U.S. 186, 198-200, 97 S.Ct. 2569, 2577, . . . (1977). It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Pennoyer v. Neff,* 95 U.S. 714, 732-733, . . . (1878); *International Shoe Co. v. Washington,* 326 U.S. at 316, 66 S.Ct. at 158. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought. *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 313-314, 70 S.Ct. 652, 656-657, . . . (1950), and a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum. *Milliken v. Meyer,* 311 U.S. 457, 463-464, 61 S.Ct. 339, 342-342, . . . (1940). In this case, appellant does not dispute the adequacy of the notice he received, but contends that his connection with the State of California it too attenuated, under the standards implicit in Due Process Clause of the Constitution. to justify imposing upon him the burden and inconvenience of defense in California.

"The parties are in agreement that the constitutional standard for determining whether the State may enter a binding judgment against appellant here is that set forth in this Court's opinion in *International Shoe Co. v. Washington, supra:* that a defendant 'have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' 326 U.S. at 316, 66 S.Ct. at 158, quoting *Milliken v. Meyer, supra,* 311 U.S. at 463, 61 S.Ct. at 342. While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered, see *McGee v. International Life Insurance Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 201, . . . (1957), an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State. *International Shoe Co. v. Washington, supra,* 326 U.S. at 316-317, 319, 66 S.Ct. at 158, 159. Accord, *Shaffer v. Heitner, supra,* 433 U.S. at 207-212, 97 S.Ct. at 2581-2584; *Perkins v. Benguet Mining Co.,* 342 U.S. 437, 445, 72 S.Ct. 413, 418, . . . (1952).

"Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. *Hanson v. Denckla,* 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, . . . (1958). We recognize that this determination is one in which a few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' *Estin v. Estin,* 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, . . . (1948). But we believe that the California Supreme Court's application of the minimum-contacts test in this case represents an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable.

"In reaching its result, the California Supreme Court did not apply on appellant's glancing presence in the State some 13 years before the events that led to this controversy, nor could it have. Appellant has been in California on only two occasions, once in 1959 for a three-day military stopover on his way to Korea, see *supra,* at 1694, and again in 1960 for a 24-hour stopover on his return from Korean service. To hold such temporary visits to a State a basis for the assertion of *in persona,* jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on State jurisdiction imposed by the Fourteenth Amendment. Nor did the California court rely on the fact that appellant was actually married in California on one of his two brief visits. We agree that where two New York domicilaries, for reasons of convenience, marry in the State of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident in an action relating to child support.

"Finally, in holding that personal jurisdiction existed, the court below carefully disclaimed reliance in the fact that appellant had agreed at the time of separation to allow his children to live with their mother three months a year and that pursuant to this agreement, as was noted below, . . . 564 P.2d at 357, to find personal jurisdiction in a State on the basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements. Moreover, it could arbitrarily subject one parent to suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement. As we have emphasized:

> 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities with the forum State . . . .' *Hanson v. Denckla, supra,* 357 U.S. at 253, 78 S.Ct. at 1240.

"The 'purposeful act' that the California Supreme Court believed did warrant the exercise of personal jurisdiction over appellant in California was his 'actively' and fully consent[ing] to Ilsa living in California for the school year . . . and . . . send[ing] her to California for that purpose.' . . . 564 P.2d at 358. We cannot accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws. See *Shaffer v. Heitner,* 433 U.S. at 216, 97 S.Ct. at 2586.

"Nor can we agree with the assertion of the court below that the exercise of *in persona* jurisdiction here was warranted by the financial benefit appellant derived from his daughter's presence in California for nine months of the year. . . . 564 P.2d at 358. This argument rests on the premise that, while appellant's liability for support payments remained unchanged, his yearly expenses for supporting the child in New York decreases. But this circumstance, even if true, does not support California's assertion of jurisdiction here. Any diminution in appellant's household costs resulted, not from the child's presence in California, but rather from her absence from appellant's home. Moreover, an action by appellee Horn to increase support payments could not be brought when Ilsa first moved to California, in the State of New York; a New York court would clearly have personal jurisdiction over appellant and, if a judgement were entered by

a New York court increasing appellant's child support obligations, it could properly be enforced against him in both New York and California. Any ultimate financial advantage to appellant thus results not from the child's presence in California, but from appellee's failure earlier to seek an increase in payments under the separation agreement. The argument below to the contrary, in our view, confuses the question of appellant's liability with that of the proper forum in which to determine that liability.

"In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an 'effect' in California was misplaced. See *supra.*, at 1695. This 'effect' test is derived from the American Law Institute's Restatement (Second) of Conflict of Laws sec. 37 (1971), which provides:

> 'A State has power to exercise judicial jurisdiction over an individual who causes effects in the State by an act done elsewhere with respect to any cause of action arising from these effects and of the individual's relationship to the State make the exercise of such jurisdiction unreasonable.'

"While this provision is not binding on the court, it does not in any event support the decision below. As is apparent from the examples accompanying sec. 37 in the Restatement, this section was intended to reach wrongful activity outside of the State causing injury within the State, see, *e.g.*, Comment *a*, p. 157 (shooting bullet from one State into another), or commercial activity affecting State residents, *ibid.* Even in such situations, moreover, the Restatement recognizes that there might be circumstances that would render 'unreasonable' the assertion of jurisdiction over the nonresident defendant.

"The circumstances in this case clearly render 'unreasonable' California's assertion of personal jurisdiction. There is no claim that appellant has visited physical injury on either property or persons within the State of California. Cf. *Hess v. Pawloski,* 274 U.S. 352, 47 S.Ct. 632, . . . (1927). The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could be reasonably render him liable to suit in State Court; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State. Cf. *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, . . . (1957). Furthermore, the controversy between the parties arises from a separation that occurred in the State of New York; appellee Horn seeks modification of a contract that was negotiated in New York and that she flew to New York to sign. As in *Hanson v. Denckla,* 357 U.S. at 252, 78 S.Ct. at 1239, the instant action involves an agreement that was entered into with virtually no connection with the forum State. See, also, n. 6, *supra.*

"These points decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. Cf. *May v. Anderson,* 345 U.S. 528, 534-535, n. 8, 73 S.Ct. 840, 843-844, . . . (1953). Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court,' *Shaffer v. Heitner,* 433 U.S. at 216, 97 S.Ct. at 2586. To make jurisdiction in a case such as this turn on whether appellant bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the 'quality and nature' of appellant's activities in or relating to the State of California. *International Shoe Co. v. Washington,* 326 U.S. at 319, 66 S.Ct. at 159.

"In seeking to justify the burden that would be imposed on appellant were the exercise of *in*

persona jurisdiction in California sustained, appellee argues that California has substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised. These interests are unquestionably important. But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant. *Hanson v. Denckla, supra,* 357 U.S. at 254, 78 S.Ct. at 1240. And California has not attempted to assert any particularized interest in trying such cases in its courts by, *e.g.,* enacting a special jurisdictional statute. Cf. *McGee v. International Life Ins. Co., supra,* 355 U.S. at 221, 224, 78 S.Ct. at 200-201.

"California's legitimate interest in ensuring the support of children resident in California without unduly disrupting the children's lives, moreover, is already being served by the State's participation in the Revised Uniform Reciprocal Enforcement of Support Act of 1968. This statute provides a mechanism for communication between court systems in different States, in order to facilitate the procurement and enforcement of child support decrees where the dependant children reside in a State that cannot obtain personal jurisdiction over the defendant. California's version of the Act essentially permits a California resident claiming support from a nonresident to file a petition in California and have its merits adjudicated in the State of the alleged obligor's residence, without either party's having to leave his or her own State. . . . New York State is a signatory to a similar Act. Thus, not only may plaintiff-appellee here vindicate her claimed right to additional child support from her former husband in a New York court, see *supra,* at 1698-1699, but also the Uniform Acts will facilitate both her prosecution of a claim for additional support and collection of any support payments found to defend a child support suitor to suffer liability by default.

"We therefore believe that the State Courts in the instant case failed to heed our admonition that 'the flexible standard of *International Shoe'* does not 'heral[d] the eventual demise of all restrictions on the personal jurisdiction of State Courts.' *Hanson v. Denckla,* 357 U.S. at 251, 78 S.Ct. at 1238. In *McGee v. International Life Ins. Co.,* we commented on the extension of *in persona* jurisdiction under evolving standards of due process, explaining that this trend was in large part 'attributable to the . . . increasing nationalization of commerce . . . [accompanied by] modern transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.' 355 U.S. at 222-223, 78 S.Ct. at 201. But the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction.

"Accordingly, we conclude that the appellant's motion to quash service, on the ground of lack of personal jurisdiction, was erroneously denied by the California courts. The judgment of the California Supreme Court is, therefore,

"Reversed.

"Mr. Justice BRENNAN, with whom Mr. Justice WHITE and Mr. Justice POWELL join dissenting.

"The Court properly treats this case as presenting a single narrow question. That question is whether the California Supreme Court correctly 'weighed the facts,' *ante,* at 1697, of this particular case in applying the settled 'constitutional standard,' *ibid.,* that before State Courts may exercise *in persona* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled in the State, it must appear that the nonresident has 'certain minimum contacts [with the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, . . . (1945). The Court recognizes that 'this determination is one in which few answered will be written 'in black and white,' *ante,* at 1697. I cannot say that the Court's determination against State Court *in persona* jurisdiction is implausible, but, though the issue is close, my independent weighing of the facts leads me to conclude, in agreement with the analysis and determination of the California Supreme Court, that appellant's connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the Due Process Clause, to require him to conduct his defense in the California courts. I therefore dissent."

Lassiter v. Dept. of Soc. Serv. of Durham Cty

452 U.S. 18, 101 S.Ct. 2153 (1981)

TERMINATION - (Counsel) — ***There is no constitutional requirement for counsel for a parent in termination proceedings if (a) there are no allegations which could result in criminal charges, (b) no expert witnesses will testify, (c) that are no troublesome points of law involved, and (d) the presence of counsel will not affect the outcome.***

"(p. 2156) Mr. Justice STEWART delivered the opinion of the Court.

"In the late spring of 1975, after hearing evidence that the petitioner, Abby Gail Lassiter, had not provided her infant son William with proper medical care, the District Court of Durham County, N.C., adjudicated him a neglected child and transferred him to the custody of the Durham County Department of Social Services, the respondent here. A year later, Ms. Lassiter was charged with first-degree murder, and was convicted of second-degree murder, and began a sentence of 25 to 40 years of imprisonment. In 1978 the Department petitioned the court to terminate Ms. Lassiter's parental rights because, the Department alleged, she 'has not had any contact with the child since December of 1975' and 'has willfully left the child in foster case for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with construc(ve planning for the future of the child.'

"Ms. Lassiter was served with the petition and with notice that a hearing on it would be held. Although her mother had retained counsel for her in connection with an effort to invalidated the murder conviction, Ms. Lassiter never mentioned the forthcoming hearing to him (or, for that matter, to any other person except, she said, to 'someone' in the prison). At the behest of the Department of Social Services' attorney, she was brought from prison to the hearing, which was held August 31, 1978. The hearing opened, apparently at the judge's insistence, with a discussion of whether Ms. Lassiter should have more time in which to find legal assistance. Since the court concluded that she 'has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause,' the court did not postpone the proceedings. Ms. Lassiter did not aver that she was indigent, and the court did not appoint counsel for her.

"A social worker from the respondent Department was the first witness. She testified that in 1975 the Department 'received a complaint from the Duke Pediatrics that William had not been followed in the pediatric clinic for medical problems and that they were having difficulty in locating Ms. Lassiter.' . . . She said that in May 1975 a social worker had taken William to the hospital, where doctors asked that he stay 'because of breathing difficulties [and] malnutrition and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated.' The witness further testified that, except for one 'prearranged' visit and a chance meeting on the street, Ms. Lassiter had not seen William after he had come into the State's custody, and that neither Ms. Lassiter nor her mother had 'made any contact with the Department of Social Services regarding that child.' When asked whether William should be placed in his grandmother's custody, the social worker said he should not, since the grandmother 'has indicated to me on a number of occasions that she was not able to take responsibility for the child' and since 'I have checked with people in the community and from Ms. Lassiter's church who also feel that this additional responsibility would be more than she can handle.' The social

worker added that William 'has not seen his grandmother since the chance meeting in July of '76 and that was the only time.'

"After the direct examination of the social worker, the judge said:

> 'I notice we made extensive findings in June of '75 that you were served with papers and called the social services and told them you weren't coming; and the serious lack of medical treatment. And, as I have said in my findings of the 16th day of June '75, the court finds that the grandmother, Ms. Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that the daughter often left the children, Candina, Felicia and William L. with her for days without providing money or food while she was gone.'

"Ms. Lassiter conducted a cross-examination of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.

"Ms. Lassiter herself then testified, under the judge's questioning, that she properly cared for William. Under cross-examination, she said that she had seen William more than five or six times after he had been taken from her custody and that, if William could not be with her, she wanted him to be with her mother since 'He knows us. Children know they family . . . They know they people, they know they family and that child knows us anywhere . . . I got four more other children. Three girls and a boy and they know they little brother when they see him.'

"Ms. Lassiter's mother was then called as a witness. She denied, under the questioning of the judge, that she had filed the complaint against Ms. Lassiter, and on cross-examination she denied both having failed to visit William when he was in the State's custody and having said that she could not care for him.

"The court found that Ms. Lassiter 'has not contacted the Department of Social Services about her child since December 1975, has not expressed any concern for his care and welfare, and has made no efforts to plan for his future.' Because Ms. Lassiter thus had 'willfully failed to maintain concern or responsibility for the welfare of the minor,' the court terminated Ms. Lassiter's status as William's parent.

"On appeal, Ms. Lassiter argued only that, because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her. The North Carolina Court of Appeals decided that '[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.' *In re Lassiter,* . . . 259 S.E.2d 336, 337 (N.C.App.). The Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review, . . . and we granted *certiorari* to consider the petitioner's claim under the Due Process Clause of the Fourteenth Amendment, . . .

"For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a flawed content unrelated to time, place, and circumstances.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, . . . Rather, the phrase expresses the requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

"The pre-eminent generalization that emerges from the Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. Thus, when the Court overruled the principle of *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, . . . that counsel in criminal trials need be appointed only where the circumstances in a given case demand it, the Court did so in the case of a man sentenced to prison for five years. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, . . . And thus *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, . . . establishing that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief.

"That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . that 'the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed,'* the juvenile has a right to appointed counsel even though proceedings may be styled 'civil' and not 'criminal.' *Id.,* at 41, 87 S.Ct. at 1451 (emphasis added). Similarly, four of the five Justices who reached the merits in *Vitek v. Jones,* 445 U.S.480, 100 S.Ct. 1254, . . . concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a State mental hospital. The fifth Justice differed from the other four only in declining to exclude the 'possibility that the required assistance may be rendered by competent laymen in some cases.' *Id.,* at 500, 100 S.Ct. at 1267. . . .

"Significantly, as a litigant's interest in personal liberty diminished, so does his right to appointed counsel. In *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, . . . the Court gauged the due process rights of a previously sentenced probationer at a probation-revocation hearing. In *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 2599, . . . which involved an analogous hearing to revoke parole, the Court had said: 'Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.' Relying on that discussion, the Court in *Scarpelli* declined to hold that indigent probationers have, *per se,* a right to counsel at revocation hearings, and instead left the decision whether counsel should be appointed to be made on a case-by-case basis. "Finally, the Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty. The Court in *Scott v. Illinois,* 440 U.S. 367, 99 S.Ct. 1158, . . . for instance, interpreted the 'central premise of *Argersinger'* to be 'that actual imprisonment is a penalty difference in kind from fines or the mere threat of imprisonment,' and the Court endorsed that premise as 'eminently sound and warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.' *Id.,* 440 U.S. at 373, 99 S.Ct. at 1162. The Court thus held 'that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.' *Id.,* at 373-374, 99 S.Ct. at 1162.

"In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

"The case of *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . 18, propounds three elements to be evaluated in deciding what due process requires, *viz.,* the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

"This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, . . . Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. Cf. *May v. Anderson,* 345 U.S. 528, 533, 73 S.Ct. 840, 843, . . . ; *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, . . . A parent's interest in the accuracy and injustice of the decision to terminate his or her parental statuis, therefore a commanding one.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in the availability of appointed counsel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed

interests, the State's interest in the child's welfare may perhaps be best served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. North Carolina itself acknowledges as much by providing that where a parent files a written answer to a termination petition, the State must supply a lawyer to represent the child. N.C. Gen.Stat. . . .

"The State's interests, however, clearly diverge from the parent's insofar as the State wished the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the 'potential costs of appointed counsel in termination proceedings . . . is [sic] admittedly *de minimis* compared to the costs in all criminal actions.'

"Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: A petition to terminate parental rights may be filed only by a parent seeking the termination of the other parent's rights, by a county department of Social Services or licensed child-placing agency with custody of the child, or by a person with whom the child has lived continuously for the two years preceding the petition. . . . A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, . . . ; and the parent must be notified of the petition and given 30 days in which to file a written answer to it. . . . If that answer denied a material allegation, the court must, as has been noted, appoint a lawyer as the child's guardian ad litem and must conduct a special hearing to resolve the issues raised by the petition and the answer. . . . If the parent files no answer, 'the court shall issue an order terminating all parental and custodial rights . . . ; provided the court shall order a hearing on the petition.' . . . Findings of fact are made by a court sitting without a jury and must 'be based on clear, cogent, and convincing evidence.' . . . Any party may appeal who gives notice of appeal within 10 days after the hearing. . . .

"The respondent argues that the subject of a termination hearing — the parent's relationship with her child — far from being abstruse, technical, or unfamiliar, is one as to which the parent must be uniquely well-informed and to which the parent must have given prolonged thought. The respondent also contends that a termination hearing is not likely to produce difficult points of evidentiary law, or even of substantive law, since the evidentiary problems peculiar to criminal trials are not present and since the standards for termination are not complicated. In fact, the respondent reports, the North Carolina Departments of Social Services are themselves sometimes represented at termination hearings by social workers instead of lawyers.

"Yet the ultimate issues which a termination hearing deals are not always simple, however complacent they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made. See, e.g., *Davis v. Page,* 442 F.Supp. 258, 261 (SD Fla. 1977); *State v. Jamison,* 251 . . . 444 P.2d 15, 17 (Ore. 1968). Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. *State ex rel. Heller v. Miller,* 61 Ohio St.2d 6, 399 N.E.2d 66 (1980); *Department of Public Welfare v. J.K.B.,* 379 Mass. 1, 393 N.E.2d 406 (1979); *In re Chad S.,* 580 P.2d 983 (Okla. 1978); *In re Myricks,* 85 Wash.2d 252, 533 P.2d 841 (1975); *Crist v. Division of Youth and Family Services,* 128 N.J.Super. 402, 320 A.2d 203 (1974); *Danforth v. Maine Dept. of Health and Welfare,* 303 A.2d 794 (Me. 1973); *In re Friez,* 190 Neb. 347, 208 N.W.2d 259 (1973). The respondent is able to point to no present authoritative case, except for the North Carolina judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings.

"The dispositive question, which must now be addressed, is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of

counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupptably high. "If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since 'due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed,' *Gagnon v. Scarpelli,* 411 U.S. at 788, 93 S.Ct. at 1762, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli,* and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., *Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, . . .

"Here, as in *Scarpelli,* '[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when providing of counsel is necessary to meet the applicable due process requirements,' since here, as in that case, '[t]he facts and circumstances . . . are susceptible of almost infinite variation . . . ' 411 U.S. at 790, 93 S.Ct. at 1764. Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness, we decide today whether the trial judge denied Ms. Lassiter due process of law when he did not appoint counsel for her.

"The respondent represents that the petition to terminate Ms. Lassiter's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based, and hence Ms. Lassiter could not well have argued that she required counsel for that reason. The Department of Social Service was represented at the hearing by counsel, but no ex[pert] witnesses tes[3]fied and the case presented no specially troublesome points of law, either procedural or substantive. While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she has few sparks of such interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference. True, a lawyer might have done more with the argument that William should live with Ms. Lassiter's mother -- but that argument was quite explicitly made by both Lassiters, and the evidence that the elder Ms. Lassiter had said that she could not handle another child. The social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter's custody was, though controverted, sufficiently substantial that the absence of counsel's guidance on this point did not render the proceedings fundamentally unfair. Finally, a court diding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing. Here, the trial court had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

"In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3(b) (1980); Uniform Juvenile Court Act sec. 26(a), 9A U.L.A. 35 (1979); National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 39 (1969);

U.S. Dept. of HEW, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts sec. 25(b) (1969); U.S. Dept. of HEW, Children's Bureau, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Pt. II, sec. 8 (1961); National Council on Crime and Delinquency, Standard Juvenile Court Act sec. 19 (1959). Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

"For the reasons stated in this opinion, the judgment is affirmed.

"It is so ordered.

"Chief Justice BURGER, concurring.

"I join the Court's opinion and add only a few words to emphasize a factor I believe is misconceived by the dissenters. The purpose of the termination proceeding at issue here was not 'punitive.' *Post,* at 2170. On the contrary, its purpose was *protective* of the child's best interests. Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a 'candidate' for dismissal as improvidently granted. See *ante,* at 2162-2163. However, I am content to join the narrow holding of the Court, leaving appointment of counsel in termination proceedings to be determined by the State Courts on a case-by-case basis.

"Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join dissenting.

"The Court today denies an indigent mother the representation of counsel in a judicial proceeding initiated by the State of North Carolina to terminate her parental rights with respect to her youngest child. The Court most appropriately recognizes that the mother's interest is a 'commanding one,' *ante,* at 2160, and it finds no countervailing state of interest of even remotely comparable significance, see *ante,* at 2159-2160, 2161-2162. Nonetheless, the Court avoids what seems to me the obvious conclusion that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights, and, instead, revives an ad hoc approach thoroughly discredited nearly 20 years ago in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, . . . (1963). Because I believe that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be extinguished through formal judicial proceedings without the benefit of counsel, I dissent.

"This Court is not familiar with the problem of determining under what circumstances legal representation is mandated by the Constitution. In *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, . . . (1942), it reviewed at length both the tradition behind the Sixth Amendment right to counsel in criminal trials and the historical practices of the States in that area. The decision in *Betts* — that the Sixth Amendment right to counsel did not apply to the States and that the due process guarantee of the Fourteenth Amendment permitted a flexible, case-by-case determination of the defendant's need for counsel in State criminal trials — was overruled in *Gideon v. Wainwright,* 372 U.S. at 345, 83 S.Ct. at 797. The Court in *Gideon* rejected the *Betts* reasoning to the effect that counsel for indigent criminal defendants was 'not a fundamental right, essential to a fair trial.' 372 U.S. at 340, 83 S.Ct. at 794 (quoting *Betts v. Brady,* 316 U.S. at 471, 62 S.Ct. at 1261). Finding the right well-founded in its precedents, the Court further concluded that 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.' 372 U.S. at 344, 83 S.Ct. at 796. Similarly, in *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, . . . (1972), assistance of counsel was found to be a requisite under the Sixth Amendment, as incorporated into the Fourteenth Amendment, even for a misdemeanor offense punishable by imprisonment for less than six months.

"Outside the criminal context, however, the Court has relied on the flexible nature of the due process guarantee whenever it has decided that counsel is not constitutionally required. The special purposes of probation revocation determinations, and the informal nature of those administrative proceedings, including the absence of counsel for the State, led the Court to conclude that due process does not require counsel for probationers. *Gagnon v. Scarpelli,* 411 U.S. 778, 785-789, 93 S.Ct. 1756, 1761-1763, . . . (1973). In the case of the school disciplinary proceedings, which are brief, informal, and intended in part to be educative, the Court also found no requirement for legal counsel. *Goss v. Lopez,* 419 U.S. 565, 583, 95 S.Ct. 729, 740, . . .

(1975). Most recently, the Court declined to intrude the presence of counsel for a minor facing voluntary civil commitment by his parent, because of the parent's substantial role in that decision and because of the decision's essentially medical and informal nature. *Parham v. J.R.*, 442 U.S. 584, 604-609, 99 S.Ct. 2493, 2505, . . . (1979).

"In each of the instances, the Court has recognized that what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decision-making without the trappings of an adversarial trial-type proceeding, counsel has not been requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding sought to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness. See *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967). To say this is simply to acknowledge that due process allows for the adoption of different rules to address different situations or contexts.

"It is not disputed that State intervention to terminate the relationship between petitioner and her child must be accomplished by procedures meeting the requisites of the Due Process Clause. Nor is there any doubt here about the kind of procedure North Carolina has prescribed. North Carolina law requires notice and a trial-type hearing before the State on its own initiative may sever the bonds of parenthood. The decision-maker is a judge, the rules of evidence are in force, and the State is represented by counsel. The question, then, is whether proceedings in this mold, that relate to a subject so vital, can comport with fundamental fairness when the defendant parent remains unrepresented by counsel. As the Court today properly acknowledges, our consideration of the process due in this context, as in others, must rely on a balancing of the competing private and public interests, an approach succinctly described in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976). As does the majority, I evaluate the 'three distinct factors' specified in *Eldridge:* the private interest affected; the risk of error under the procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure.

"At stake here is 'the interest of a parent in the companionship, care, custody, and management of his or her children.' *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, . . . (1972). This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. '[F]armore precious . . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533, 73 S.Ct. 840, 843, . . . (1953), parental rights have been deemed to be among those 'essential to the orderly pursuit of happiness by free men,' *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, . . . (1923), and to be more significant and priceless than 'liberties which derive merely from shifting economic arrangements.' *Stanley v. Illinois,* 405 U.S. at 651, 92 S.Ct. at 1212, quoting *Kovacs v. Cooper,* 336 U.S. 77, 95, 69 S.Ct. 448, 458, . . . (1949) (FRANKFURTER, J., concurring). Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Smith v. Organization of Foster Families,* 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, . . . (1977); *Moore v. East Cleveland,* 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, . . . (1977) (plurality opinion); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S.Ct. 571, 573, . . . (1925); *Meyer v. Nebraska,* 262 U.S. at 399, 43 S.Ct. at 626. Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing, *Wisconsin v. Yoder,* 406 U.S. 205, 232-234, 92 S.Ct. 1526, 1541-1542, . . . (1972); *Pierce v. Society of Sisters,* 268 U.S. at 534-535, 45 S.Ct. at 573, and in retaining the custody and companionship of the child, *Smith v. Organization of Foster Families,* 431 U.S. at 842-847, 97 S.Ct. at 2108-2111; *Stanley v. Illinois,* 405 U.S. 651, 92 S.Ct. at 1212.

"In this case, the State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. It is hardly surprising that this forced

dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators. The Court candidly notes, as it must, *ante,* at 2160, that termination of parental rights by the State is a 'unique kind of deprivation.'

"The magnitude of this deprivation is of critical significance in the due process calculus, for the process to which an individual is entitled is in part determined 'by the extent to which he may be 'condemned to suffer gof federal rights. Instead, past decisions have limited the writ's availability to challenges to State Court judgments in situations where — as a result of a State Court criminal conviction — a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was 'in custody' within the meaning of sec. 2254.

"Ms. Lehman argues that her sons are involuntarily in the custody of the State for purposes of sec. 2254 because they are in foster homes pursuant to an order issued by a State Court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a State criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to State Court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the 'custody' of the State in the sense in which that term has been used by this Court in determining the availability of the writ if habeas corpus. They are in the 'custody' of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley and Jones,* and they suffer no 'collateral consequences' — like those in *Carafas* — sufficient to outweigh the need for finality. The 'custody' of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas. Ms. Lehman simply seeks to re-litigate, through federal habeas, not any liberty interest of her sons, but the interest in her parental rights.

"Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody. Indeed, in two cases, the Court refuses to allow the writ in such instances. *Matters v. Ryan,* 249 U.S. 375, 39 S.Ct. 315, . . . (1919); *In re Burrus,* 136 U.S. 586, 10 S.Ct. 850, . . . (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover, federal courts consistently have shown special solicitude for State interest 'in the field of family and family-property arrangements.' *United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 507, . . . (1966). Under these circumstances, extending the federal writ to challenges to State child-custody decisions — challenges based on alleged constitutional defects collateral to the actual custody decision — would be an unprecedented expansion of the jurisdiction of the lower federal courts.

"Federalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition. The writ of habeas corpus is a major exception to the doctrine of *res judicata,* as it allows re-litigation of a final State Court judgment disposing of precisely the same claims. Because of this tension between the State's interest, federal courts properly have been reluctant to extend the writ beyond its historical purpose. As Judge Campbell noted in *Sylvander v. New England Home for Little Wanderers:*

> 'Federal habeas involves a substantial thrust by the federal system into the sphere normally reserved to the States and hence a change in the federal-state balance. This is so because the federal habeas remedy, as recently fashioned, offers a federal forum regardless of what State proceedings have already taken place and in effect allows a single federal district judge to overrule the judgment of the highest State Court, unfettered by the constraints of collateral estoppel and *res judicata.*' 584 F.2d at 1111-1112.

"The State's interest in finality is unusually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his

current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable is many cases if federal courts had jurisdiction re-litigate State custody decisions.

"Petitioner argues that habeas corpus should be available to her because it has been used as a procedure in child custody cases in various States and in England. She noted that, in *Jones v. Cunningham,* 371 U.S. at 238-240, 83 S.Ct. at 374-375, the Court indicated that in construing the habeas corpus statute, reference may be made to the common-law and to practices in the States and in England. It is true that habeas has been used in child custody cases in England and in many of the States. See *id.,* at 239-240, and n. 8, 12, and 13, 83 S.Ct. at 375-376, and n. 8, 12, and 13, citing *Ford v. Ford,* 371 U.S. 187, 83 S.Ct. 273, . . . (1962); *Boardman v. Boardman,* 135 Conn. 124, 138, 62 A.2d 521, 528 (1948); *Ex parte Swall,* . . . 134 P. 96, 97 (Nev. 1913); *Ex parte M'Clellan,* 1 Dowl. 81 (K.B. 1831); *Earl of Westmeath v. Countess of Westmeath,* as set out in reported's footnote in *Lyons v. Blenkin,* 1 Jac. 245, 264, 37 Eng.Rep. 842, 848 (Ch.1821). As these cases illustrate, the term 'custody' in 28 U.S.C. sec. 2255 — authorizing federal court collateral review of federal decisions -- could be construes to include the type of custody the Lehman children are subject to, since they are in foster homes pursuant to court orders. But reliance on what may be appropriate *within* the federal system or *within* a State system is of little force where — as in this case — a *state judgment* is attacked collaterally in a *federal* court. It is one thing to use a proceeding called 'habeas corpus' in resolving child custody disputes within a single system obligated to resolve such disputes. The question in such a case may be which procedure is most appropriate. The system is free to set time limits on the bringing of such actions as well as to impose other requirements to ensure finality and speedy resolution of disputes in cases involving child custody or termination of parental rights. In this case, however, petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a State judicial system. In *Sylvander v. New England Home for Little Wanderers,* the Court of Appeals for the First Circuit gave a compelling answer to this argument:

> 'Federal habeas when applied to persons under State control is a procedure of unique potency within the federal-state framework, having far reaching consequences than a State's utilization of habeas within its own system. State utilization of habeas to test the legal custody matters. If a habeas remedy were not provided, some other procedure would be needed to effectuate the State's substantive interest in these relationships. It is purely a matter of procedural detail whether the remedy is called 'habeas' or something else. The federal government, however, has no parallel substantive interest in child custody matters that federal habeas would serve. The sole federal interest is in the constitutional issues collateral to such disputes. At bottom, the question is whether these constitutional issues can be adequately raised through the usual channels — appeal, *certiorari,* and civil rights statutes — or whether the vehicle of federal habeas, with its unique features, is required.' 584 F.2d at 1111.

"The considerations in a child custody case are quite different from those present in any prior case in which this Court has sustained federal court jurisdiction under sec. 2254. The federal writ of habeas corpus, representing as it does a profound interference with State decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns. Congress has indicated no intention that the reach of sec. 2254 encompass a claim like that of petitioner. We therefore hold that sec. 2254 does not confer federal court jurisdiction. The decision below, affirming the denial of a writ of habeas corpus, therefore is affirmed.

"It is so ordered.

"Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

"Although I can sympathize with what the Court seeks to accomplish in this case today, I cannot reconcile myself to its holding that 'sec. 2254 does not confer federal court jurisdiction,' *ante,* this page, to consider collateral challenges to State Court judgments involuntarily terminating parental rights. In my view, the literal statutory requisites for the exercise of sec. 2254 federal habeas corpus jurisdiction are satisfied here — in particular, the requirement that petitioner's children must be 'in custody.' Because I believe the Court could have achieved much

the same practical result in this area without decreeing a complete withdrawal of federal jurisdiction, I respectfully dissent.

"Justice BLACK, speaking for the unanimous Court in *Jones v. Cunningham,* 371 U.S. 236, 243, 83 S.Ct. 373, 377, . . . (1963), observed that the federal writ of habeas corpus 'is not now and never has been a static, narrow, formalistic remedy.'

> 'While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and history of habeas corpus both in England and in this country.' *Id.,* at 238, 83 S.Ct. at 374.

"Even a brief historical examination of common-law usages teaches two lessons: first, for centuries, the English and American common-law courts have had the undisputed *power* to issue writs of habeas corpus ordering the release of children from unlawful custody; and, second, those courts have exercised broad *discretion* in deciding whether or not to invoke that power in a given case. English common-law courts traditionally were authorized to order the release of minor children from unlawful custody. Relying on the English tradition, American State Courts very early asserted their own power to issue common-law habeas writs in child custody matters. See generally Oaks, Habeas Corpus in the State — 1776-1865, 32 U.Chi.L.Rev. 243, 270-274 (1965).

"While acknowledging that 'habeas has been used in child custody cases in England and in many of the States,' *ante,* at 3239, the Court suggests that a State Court derives its authority to issue a writ of habeas corpus in such disputes not from the common-law, but from 'the fabric of its reserved jurisdiction over child custody matters.' *Ante,* at 3239, quoting *Sylvander v. New England Home for Little Wanderers,* 584 F.2d 1103, 1111 (CA1 1978). While such a conclusion is not illogical, it is surely a historical. Contrary to the Court's suggestion, it is *not* 'purely a matter of procedural detail whether the [state] remedy is called 'habeas' or something else.' *Ibid.* A State Court's traditional power to issue a writ of habeas corpus to free a confined child always has been derived directly from the nature of the writ, not from any reserved jurisdiction over child custody matters.

"The codification of the writ into federal law indicated no congressional intent to contract its common-law scope. The sparse legislative history of the predecessor statute to 28 U.S.C. sec. 2254, the Habeas Corpus Act of February 5, 1867, ch. 28, sec. 1, 14 Stat. 385, gave 'no indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction.' Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 476-477 (1963) (emphasis in original). Nor, since that the congressional purpose originally underlying the statute barred use of the federal writ to free children from unlawful State custody. The Court's more recent precedents have firmly established sec. 2254's 'in custody' requirement as its most flexible element, stressing that the test of 'custody' is not present physical restraint, but whether 'there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.' *Jones v. Cunningham,* 387 U.S. at 240, 83 S.Ct. at 376.

"Today the Court bows in the direction of this historical precedent only by leaving open the possible availability of federal habeas if a child is actually confined in a State institution, rather than in the custody of a foster parent pursuant to a court order. *Ante,* at 3237, n. 12. At the same time, however, the Court presents three reasons why federal courts lack 'jurisdiction' to issue writs of federal habeas corpus to release children from the latter form of State custody. Not one of these reasons is sufficient to erect a *jurisdictional,* as opposed to a prudent, bar to federal habeas relief.

. . .

"(p. 3243) This Court has found the statutory concept of 'custody' broad enough to confer jurisdiction on federal courts to hear and determine habeas applications from petitioners who have freely traveled across State borders while released on their own recognizance, *Hensley v. Municipal Court, supra,* and who are on unattached, inactive Army Reserve duty, *Strait v. Laird,* 406 U.S. 341, 92 S.Ct. 1693, . . . (1972). Under these precedents, I have difficulty finding that minor children, who as State wards are fully subject to State Court custody orders, are not

sufficiently and peculiarly restrained to be deemed 'in custody' for the purposes of the habeas corpus statute. Cf. *Braden v. 30th Judicial Circuit Court of KY,* 410 U.S. 484, 501, 93 S.Ct. 1123, 1133, . . . (1973) (opinion concurring in result); *Hensley v. Municipal Court,* 411 U.S. at 353, 93 S.Ct. at 1576 (opinion concurring in result). Equally important, '[w]ith respect to the argument, that some force or improper restraint must be used, in order to authorize the Court in removing an infant from the custody of any one,' historical authorities show that 'it is not necessary that any part of the person having the custody of the infant towards it.' *Ex parte M'Clellan,* 1 Dowl. 81, 84 (K.B.1831) (Patterson, J.). Accord: R. Hurd, A Treatise of the Right of Personal Liberty and on the Writ of Habeas Corpus 445 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555 (1886).

"Third, the Court asserts that '[f]ederalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition.' *Ante,* at 3238. While I am fully sensitive to these concerns, once again I cannot understand how they deprive federal courts of statutory jurisdiction to entertain habeas petitions. Although the Court's decisions involving collateral attack by State prisoners against State criminal convictions have recognized similar federalism and finality concerns, they have never held that those interests erect jurisdictional bars to relief. To contrary, the Court has carefully separated the question whether federal courts have the power to issue a writ of habeas corpus from the question whether 'in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power.' *Francis v. Henderson,* 425 U.S. 536, 539, 96 S.Ct. 1708, 1710, . . . (1976). See, also, *Stone v. Powell,* 428 U.S. 465, 478, n. 11, and 495, n. 37, . . . (1976) ('Our decision does not mean that the federal court lacks jurisdiction over such a claim . . . '); *Fay v. Noia,* 372 U.S. 391, 425-426, 83 S.Ct. 822, 842, . . . (1963).

"As a matter of history and precedent, then, '[t]here can be no question of a federal District Court's power to entertain an application for a writ of habeas corpus in a case such as this . . . The issue . . . goes rather to the appropriate exercise of that power.' *Francis v. Henderson,* 425 U.S. at 538-539, 96 S.Ct. at 1709-1710. Cf. 648 F.2d 135, 155 (CA3 1981) *(en banc)* (Seitz, C. J., concurring). In my view, the difficult discretionary question in this case is whether, 11 years after petitioner voluntarily relinquished her sons to State custody and 4 years after the involuntary termination of her parental rights was affirmed on direct appeal, she remains a proper 'nest friend' to apply for the federal habeas writ on behalf of her natural children. . . .

"Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights. American common-law courts, however, soon relied on Lord Mansfield's language in *King v. Delaval,* see n. 1, *supra,* to resolve custody disputes initiated by way of a habeas writ in a manner best adapted to serve the welfare of the child. See Oaks, Habeas Corpus in the State — 1776-1865, 32 U.Chi.L.Rev., at 270 and 274. Thus, the American common-law rule came to be that 'the parent stands in court as the real party in interest, upon his natural right of parent; but he is liable to be defeated by his own wrong-doing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent.' Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent.L.J. 385, 389, (1903).

"Similarly, the federal courts have interpreted the writ as being available only to serve the best interest of the child. 'When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bound duty to show that he really acts for the benefit of the infants and not to promote purposes of his own.' *King v. McLean Asylum of Massachusetts General Hospital,* 64 F. 331, 356 (CA1 1894), quoting *Sale v. Sale,* 1 Beav. 586, 587, 48 Eng.Rep. 1068, 1069 (1839). '[I]n such cases the court exercised a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements.' *New York Foundling Hospital v. Gatti,* 203 U.S. 429, 439, 27 S.Ct. 53, 55, 51 L.Ed. 254 (1906).

"Against this historical background, then, I find most telling the Court's observation that 'Ms. Lehman simply seeks to re-litigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.' *Ante,* at 3237. As the Court noted, the record reveals no evidence that any of the cons wanted to return to their natural mother. See *ante,* at 3234, n. 2. Moreover, in filing her federal habeas petition, petitioner expressly did not seek to disturb the State trial court's factual findings. See Brief for Petitioner 6. Those findings made 'absolutely clear . . . that, by reason of her very limited social and intellectual development

combined with her five-year separation from the children, [petitioner] is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied.' *In re William L.*, 477 Pa. 322, 345, 383 A.2d 1228, 1239-1240, cert. denied *sub nom. Lehman v. Lycoming County Children's Services,* 439 U.S. 880, 99 S.Ct. 216, . . . (1978).

"On such a record, I believe that the District Court could have found, as a discretionary matter, that petitioner had not made a sufficient showing that she acted in the interests of the children to warrant issuing her the writ as their 'next friend.' Indeed, I believe that the common-law habeas corpus tradition would have supported recognition of broad District Court discretion to withhold the writ in all but the conditions of the child's liberty, and that release of the child to his natural parent very likely would serve the child's best interest.

"Such a ruling would not have been inconsistent with the Court's decision today, which expressly bases denial of habeas relief on a need to reserve the federal writ 'for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.' *Ante,* at 3240. Indeed, I cannot understand why the Court's explicit balancing approach yields a strict jurisdictional bar. A discretionary limit would have allowed the writ to issue only in those very rare cases that demanded its unique 'capacity to . . . cut through barriers of form and procedural mazes.' *Harris v. Nelson,* 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, . . . (1969). Because the Court overrides contrary history and precedent to find that habeas jurisdiction does not lie, I dissent.

Lehman v. Lycoming County Children's Service Agencies

458 U.S. 502, 102 S.Ct. 3231 (1982)

HABEAS CORPUS - Custody - Termination — ***A writ of habeas corpus is not available in a Federal Court to review a State Court decision involuntarily terminating the rights of a mother who had placed her children with a county agency because the matter is not criminal, the children were not prisoners, and use of the writ to re-litigate such matters would unnecessarily extend the time of uncertainty for the children.***

"(p. 3233) Justice POWELL delivered the opinion of the Court.

"The question presented is whether the habeas corpus statute, 28 U.S.C. sec. 2254, confers jurisdiction on the Federal Courts to consider collateral challenges to State Court judgments involuntarily terminating parental rights.

"The facts of this case are described in detail in *In re William L.*, . . . 383 A.2d 1228 (Pa.), cert. denied, *sub nom. Lehman v. Lycoming County Children's Services,* 439 U.S. 880, 99 S.Ct. 216, . . . (1978), the Pennsylvania Supreme Court decision terminating the parental rights of petitioner Marjorie Lehman with respect to three sons born in 1963, 1965, and 1969. In 1971, Ms. Lehman discovered that she was pregnant again. Because of housing and other problems related to the care of her sons, Ms. Lehman voluntarily placed them in the legal custody of the Lycoming County Children's Services Agency, and it placed them in foster homes.

"Although Ms. Lehman visited her sons monthly, she did not request their return until 1974. At that point, the Lycoming County Children's Services Agency initiated parental termination proceedings. In those proceedings, the Orphan Court Division of the Lycoming County Court of Common Pleas heard testimony from agency caseworkers, a psychologist, nutrition aides, petitioner, and the three sons. The judge concluded: '[I]t is absolutely clear to the Court that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control, and supervision for the three children. Her incapacity cannot and will not be remedied.' *In re Lehman,* No. 2986, 2987, and 2988, p. 4 (Ct. Common Pleas, Lycoming County, Pa., June 3, 1976). The court therefore declared that petitioner's parental rights respecting the three sons were terminated.

"The Pennsylvania Supreme Court affirmed the termination order based on 'parental incapacity, which does not involve parental misconduct.' *In re William L., supra,* at 331, 383 A.2d at 1232. It held that the legislature's power to protect the physical and emotional need of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of parental misconduct. The Court stressed that, '[i]n the instant case, the basis for termination is several years of demonstrated parental incapacity . . . ' *Ibid.* It also held that the statute was not constitutionally vague either on its face or as applied.

"Petitioner sought this Court's review in a petition for *certiorari* rather than by appeal. We denied the petition. *Lehman v. Lycoming County Children's Services,* 439 U.S. 880, 99 S.Ct. 216, . . . (1978). Petitioner then filed the instant proceeding on January 16, 1979, in the United States District Court for the Middle District of Pennsylvania, seeking a writ of habeas corpus pursuant to 28 U.S.C. sec. 2241 and 2254. Petitioner requested (i) a declaration of the invalidity of the Pennsylvania statute under which her parental rights were terminated; (ii) a declaration that petitioner was the legal parent of the children; and (iii) an order releasing the children to her custody unless within 60 days an appropriate State Court judicially determined that the best interests of the children required that temporary custody remain with the State.

"The District Court dismissed the petition without a hearing. Relying primarily on *Sylvander v. New England Home for Little Wanderers,* 584 F.2d 1103 (CA 1 1978), the Court concluded that 'the custody maintained by the respondent over the three Lehman children is not that type of custody to which the federal habeas corpus remedy may be addressed.' *Lehman v. Lycoming County Children's Services Agency,* Civ. No. 79-65 (Md. Pa. 1979), reprinted in App. to Pet. for Cert. 135a, 147a.

"Sitting *en banc,* the Court of Appeals for the Third Circuit affirmed the District Court's order of dismissal by a divided vote of six to four. 648 F.2d 135 (1981). No majority opinion was written. A plurality of four, in an opinion written by Judge Garth, concluded that 'disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus.' *Id.,* at 146. In support of this conclusion, Judge Garth reasoned that '[i]t is not liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them.' *Id.,* at 140 (footnote omitted).

"A second plurality of four, in an opinion written by Judge Adams wrote that it 'would appear to be both unwise and impolitic for the Federal Courts to uncover a whole new font of jurisdiction . . . ' *Id.,* at 151. He would have disposed of the case on the grounds that Ms. Lehman did not have standing to assert a habeas corpus action on behalf of her children. See *id.,* at 151-155. This view was based on the conclusion that once a parent's rights have been terminated in a State proceeding, a parent is no longer presumed to represent the interest of the child. See *id.,* at 153-154.

"The question presented to this Court can be stated more fully as whether federal habeas corpus jurisdiction, under sec. 2254, may be invoked to challenge the constitutionality of a State statute under which a State has obtained custody of children and has terminated involuntarily the parental rights of their natural parent. As this is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided, . . . we now affirm.

"Petitioner seeks habeas corpus collateral review by a Federal Court of the Pennsylvania decision. Her application was filed under 28 U.S.C. sec. 2254(a):

> 'The Supreme Court, a Justice thereof, a circuit judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'

"Although the language of sec. 2254(a), especially in light of sec. 2241, suggests that habeas corpus is available only to challenge the convictions of prisoners actually in the physical custody of the State, three modern cases have extended it to other situations involving challenges to State Court decisions. The first of these cases is *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, . . . (1963), in which the Court allowed a parolee to challenge his conviction by a habeas petition. The Court considered the parolee in 'custody' for purposes of sec. 2254(b) because 'the custody and control of the Parole Board involves significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally.' 371 U.S. at 242, 83 S.Ct. at 377. And in *Carafas v. LaCallee,* 391 U.S. 234, 88 S.Ct. 1556, . . . (1968), the Court allowed the writ in a challenge to a State Court judgment even though the prisoner, incarcerated at the time the writ was filed, had finished serving his sentence during the proceedings. The custody requirement had, of course, been met at the time the writ was filed, and the case was not moot because Carafas was subject to 'collateral consequences' as a result of his conviction, *id.,* at 237, 88 S.Ct. at 1559, and 'is suffering, and will continue to suffer, serious disabilities . . . ' *Id.,* at 239, 88 S.Ct. at 1560. Most recently, in *Hensley v. Municipal Court,* 411 U.S. 345, 93 S.Ct. 1571, . . . (1973), the Court allowed the writ to be used to challenge a State Court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration. The Court held that the defendant was in the custody of the State for purposes of sec. 2254(b) because he was 'subject to restraints not shared by the public generally,' 411 U.S. at 351, 93 S.Ct. at 1575 (citation omitted) — indeed, his arrest was imminent.

"Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights. Instead, past decisions

have limited the writ's availability to challenges to State Court judgments in situations where —as a result of a State Court criminal conviction — a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was 'in custody' within the meaning of sec. 2254.

"Ms. Lehman argues that her sons are involuntarily in the custody of the State for purposes of sec. 2254 because they are in foster homes pursuant to an order issued by a State Court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a State criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to State Court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the 'custody' of the State in the sense in which that term has been used by this Court in determining the availability of the writ if habeas corpus. They are in the 'custody' of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley and Jones,* and they suffer no 'collateral consequences' — like those in *Carafas* — sufficient to outweigh the need for finality. The 'custody' of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas. Ms. Lehman simply seeks to re-litigate, through federal habeas, not any liberty interest of her sons, but the interest in her parental rights.

"Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody. Indeed, in two cases, the Court refuses to allow the writ in such instances. *Matters v. Ryan,* 249 U.S. 375, 39 S.Ct. 315, . . . (1919); *In re Burrus,* 136 U.S. 586, 10 S.Ct. 850, . . . (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover, federal courts consistently have shown special solicitude for State interest 'in the field of family and family-property arrangements.' *United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 507, . . . (1966). Under these circumstances, extending the federal writ to challenges to State child-custody decisions — challenges based on alleged Constitutional defects collateral to the actual custody decision — would be an unprecedented expansion of the jurisdiction of the lower Federal Courts.

"Federalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition. The writ of habeas corpus is a major exception to the doctrine of *res judicata,* as it allows re-litigation of a final State Court judgment disposing of precisely the same claims. Because of this tension between the State's interest, Federal Courts properly have been reluctant to extend the writ beyond its historical purpose. As Judge Campbell noted in *Sylvander v. New England Home for Little Wanderers:*

> 'Federal habeas involves a substantial thrust by the federal system into the sphere normally reserved to the States and hence a change in the Federal-State balance. This is so because the federal habeas remedy, as recently fashioned, offers a federal forum regardless of what State proceedings have already taken place and in effect allows a single Federal District Judge to overrule the judgment of the highest State Court, unfettered by the constrains of collateral estoppel and *res judicata.*' 584 F.2d at 1111-1112.

"The State's interest in finality is usually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little than can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if Federal Courts had jurisdiction to re-litigate State custody decisions.

"Petitioner argues that habeas corpus should be available to her because it has been used as a procedure in child custody cases in various States and in England. She noted that, in *Jones v. Cunningham,* 371 U.S. at 238-240, 83 S.Ct. at 374-375, the Court indicated that in construing the habeas corpus statute, reference may be made to the common-law and to practices in the States

and in England. It is true that habeas has been used in child custody cases in England and in many of the States. See *id.*, at 239-240, and n. 8, 12, and 13, 83 S.Ct. at 375-376, and n. 8, 12, and 13, citing *Ford v. Ford,* 371 U.S. 187, 83 S.Ct. 273, . . . (1962); *Boardman v. Boardman,* 135 Comm. 124, 138, 62 A.2d 521, 528 (1948); *Ex parte Swall,* . . . 134 P. 96, 97 (Nev. 1913); *Ex parte M'Clellan,* 1 Dowl. 81 (K.B. 1831); *Earl of Westmeath v. Countess of Westmeath,* as set out in reporter's footnote in *Lyons v. Blenkin,* 1 Jac. 245, 264, 37 Eng.Rep. 842, 848 (Ch. 1821). As these cases illustrate, the term 'custody' in 28 U.S.C. sec. 2255 — authorizing Federal Court collateral review of federal decisions — could be construed to include the type of custody the Lehman children are subject to, since they are in foster homes pursuant to Court orders. But reliance on what may be appropriate *within* the federal system or *within* a State system is of little force where — as in this case — a *State judgment* is attacked collaterally in a *Federal* Court. It is one thing to use a proceeding called 'habeas corpus' in resolving child custody disputes within a single system obligated to resolve such disputes. The question in such a case may be which procedure is most appropriate. The system if free to set time limits on the bringing of such actions as well as to impose other requirements to ensure finality and speedy resolution of disputes in cases involving child custody or termination of parental rights. In this case, however, petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a State judicial system. In *Sylvander v. New England Home for Little Wanderers,* the Court of Appeals for the First Circuit gave a compelling answer to this argument:

> 'Federal habeas when applied to persons under State control is a procedure of unique potency within the Federal-State framework, having far-reaching consequences than a State's utilization of habeas within its own system. State utilization of habeas to test the legal custody matters. If a habeas remedy were not provided, some other procedure would be needed to effectuate the State's substantive interest in these relationships. It is purely a matter of procedural detail whether the remedy is called 'habeas' or something else. The federal government, however, has no parallel substantive interest in child custody matters that federal habeas would serve. The sole federal interest is in the constitutional issues collateral to such disputes. At bottom, the question is whether these constitutional issues can be adequately raised through the usual channels — appeal, *certiorari,* and civil rights statutes — or whether the vehicle of federal habeas, with its unique features, is required.' 584 F.2d at 1111.

"The considerations in a child custody case are quite different from those present in any prior case in which this Court has sustained Federal Court jurisdiction under sec. 2254. The federal writ of habeas corpus, representing as it does a profound interference with State decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns. Congress has indicated no intention that the reach of sec. 2254 encompass a claim like that of petitioner. We therefore hold that sec. 2254 does not confer Federal Court jurisdiction. The decision below, affirming the denial of a writ of habeas corpus, therefore is affirmed.

"It is so ordered.

"Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

"Although I can sympathize with what the Court seeks to accomplish in this case today, I cannot reconcile myself to its holding that 'sec. 2254 does not confer Federal Court jurisdiction,' *ante,* this page, to consider collateral challenges to State Court judgments involuntarily terminating parental rights. In my view, the literal statutory requisites for the exercise of sec. 2254 federal habeas corpus jurisdiction are satisfied here — in particular, the requirement that petitioner's children must be 'in custody.' Because I believe the Court could have achieved much the same practical result in this area without decreeing a complete withdrawal of federal jurisdiction, I respectfully dissent.

"Justice BLACK, speaking for the unanimous Court in *Jones v. Cunningham,* 371 U.S. 236, 243, 83 S.Ct. 373, 377, . . . (1963), observed that the federal writ of habeas corpus 'is not now and never has been a static, narrow, formalistic remedy.'

'While limiting its availability to those 'in custody,' the statute does not attempt to mark the

boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and history of habeas corpus both in England and in this country.' *Id.,* at 238, 83 S.Ct. at 374.

"Even a brief historical examination of common-law usages teaches two lessons: first, for centuries, the English and American common-law courts have had the undisputed *power* to issue writs of habeas corpus ordering the release of children from unlawful custody; and, second, those courts have exercised broad *discretion* in deciding whether or not to invoke that power in a given case. English common-law courts traditionally were authorized to order the release of minor children from unlawful custody. Relying on the English tradition, American State Courts very early asserted their own power to issue common-law habeas writs in child custody matters. See, generally, Oaks, Habeas Corpus in the State — 1776-1865, 32 U.Chi.L.Rev. 243, 270-274 (1965).

"While acknowledging that 'habeas has been used in child custody cases in England and in many of the States,' *ante,* at 3239, the Court suggests that a State Court derives its authority to issue a writ of habeas corpus in such disputes not from the common-law, but from 'the fabric of its reserved jurisdiction over child custody matters.' *Ante,* at 3239, quoting *Sylvander v. New England Home for Little Wanderers,* 584 F.2d 1103, 1111 (CA1, 1978). While such a conclusion is not illogical, it is surely historical. Contrary to the Court's suggestion, it is *not* 'purely a matter of procedural detail whether the [state] remedy is called 'habeas' or something else.' (Ibid. A State Court's traditional power to issue a writ of habeas corpus to free a confined child always has been derived directly from the nature of the writ, not from any reserved jurisdiction over child custody matters.

"The codification of the writ into federal law indicated no congressional intent to contract its common-law scope. The sparse legislative history of the predecessor statute to 28 U.S.C. sec. 2254, the Habeas Corpus Act of February 5, 1867, ch. 28, sec. 1, 14 Stat. 385, gave 'no indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction.' Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 476-477 (1963) (emphasis in original). Nor, that since the congressional purpose originally underlying the statute barred use of the federal writ to free children from unlawful State custody. The Court's more recent precedents have firmly established sec. 2254's 'in custody' requirement as its most flexible element, stressing that the test of 'custody' is not present physical restraint, but whether 'there are other restraints on a man's liberty, restraints not shared by the public generally, which have been though sufficient in the English-speaking world to support the issuance of habeas corpus.' *Jones v. Cunningham,* 387 U.S. at 240, 83 S.Ct. at 376.

"Today the Court bows in the direction of this historical precedent only by leaving open the possible availability of federal habeas if a child is actually confined in a State institution, rather than in the custody of a foster parent pursuant to a court order. *Ante,* at 3237, n. 12. At the same time, however, the Court presents three reasons why Federal Courts lack 'jurisdiction' to issue writs of federal habeas corpus to release children from the latter form of State custody. Not one of these reasons is sufficient to erect a *jurisdictional,* as opposed to a prudent, bar to federal habeas relief.

. . .

"(p. 3243) This Court has found the statutory concept of 'custody' broad enough to confer jurisdiction on Federal Courts to hear and determine habeas applications from petitioners who have freely traveled across State borders while released on their own recognizance, *Hensley v. Municipal Court, supra,* and who are on unattached, inactive Army Reserve duty, *Strait v. Laird,* 406 U.S. 341, 92 S.Ct. 1693, . . . (1972). Under these precedents, I have difficulty finding that minor children, who as State wards are fully subject to State Court custody orders, are not sufficiently and peculiarly restrained to be deemed 'in custody' for the purposes of the habeas corpus statute. Cf. *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 501, 93 S.Ct. 1123, 1133, . . . (1973) (opinion concurring in result); *Hensley v. Municipal Court,* 411 U.S. at 353, 93 S.Ct. at 1576 (opinion concurring in result). Equally important, '[w]ith respect to the argument, that some force or improper restraint must be used, in order to authorize the Court in removing an infant from the custody of anyone,' historical authorities show that 'it is not necessary that any part of the person having the custody of the infant towards it.' *Ex parte M'Clellan,* 1 Dowl.

81, 84 (K.B. 1931) (Patterson, J.). Accord: R. Hurd, A Treatise of the Right of Personal Liberty and on the Writ of Habeas Corpus 445 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555 (1886).

"Third, the Court asserts that '[f]ederalism concerns and the exceptional need for finality in child custody disputes argue strongly against the grant of Ms. Lehman's petition.' *Ante,* at 3238. While I am fully-sensitive to these concerns, once again I cannot understand how they deprive Federal Courts of Statutory jurisdiction to entertain habeas petitions. Although the Court's decisions involving collateral attack by State prisoners against State criminal convictions have recognized similar federalism and finality concerns, they have never held that those interests erect jurisdictional bars to relief. To the contrary, the Court has carefully separated the question whether Federal Courts have the power to issue a writ of habeas corpus from the question whether 'in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a Federal Court to forgo the exercise of its habeas corpus power.' *Francis v. Henderson,* 425 U.S. 536, 539, 96 S.Ct. 1708, 1710, . . . (1976). See, also, *Stone v. Powell,* 428 U.S. 465, 478 n. 11, and 495, n. 37, . . . (1976) ('Our decision does not mean that the Federal Court lacks jurisdiction over such a claim . . . '); *Fay v. Noia,* 372 U.S. 391, 425-426, 83 S.Ct. 822, 842, (. . . 1963).

"As a matter of history and precedent, then, '[t]here can be no question of a federal District Court's power to entertain an application for a writ of habeas corpus in a case such as this . . . The issue . . . goes rather to the appropriate exercise of that power.' *Francis v. Henderson,* 425 U.S. at 538-539, 96 S.Ct. at 1709-1710. Cf. 648 F.2d 135, 155 (CA3 1981) *(en banc)* (Seitz, C.J., concurring). In my view, the difficult discretionary question in this case is whether, 11 years after petitioner voluntarily relinquished her sons to State custody and 4 years after the involuntary termination of her parental rights was affirmed on direct appeal, she remains a proper 'nest friend' to apply for the federal habeas writ on behalf of her natural children. . . .

"Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights. American common-law courts, however, soon relied on Lord Mansfield's language in *King v. Delaval,* see n. 1, *supra,* to resolve custody disputes initiated by way of a habeas writ in a manner best adapted to serve the welfare of the child. See Oaks, Habeas Corpus in the State — 1776-1865, 32 U.Chi.L.Rev., at 270 and 274. Thus, the American common-law rule came to be that 'the parent stands in court as the real party in interest, upon his natural right of parent; but he is liable to be defeated by his own wrong-doing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent.' Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent.L.J. 385, 389 (1903).

"Similarly, the Federal Courts have interpreted the writ as being available only to serve the best interest of the child. 'When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bound duty to show that he really acts for the benefit of the infants and not to promote purposes of his own.' *King v. Mclean Asylum of Massachusetts General Hospital,* 64 F. 331, 356 (CA1, 1895), quoting *Sale v. Sale,* 1 Beav. 586, 587, 48 Eng.Rep. 1068, 1069 (1839). '[I]n such cases the court exercised a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements.' *New York Foundling Hospital v. Gatti,* 203 U.S. 429, 439, 27 S.Ct. 53, 55, 51 L.Ed. 254 (1906).

"Against this historical background, then, I find most telling the Court's observation that 'Ms. Lehman simply seeks to re-litigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.' *Ante,* at 3237. As the Court noted, the record reveals no evidence that any of the sons wanted to return to their natural mother. See, *ante,* at 3234, n. 2. Moreover, in filing her federal habeas petition, petitioner expressly did not seek to disturb the State Trial Court's factual findings. See, Brief for Petitioner 6. Those findings made 'absolutely clear . . . that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, [petitioner] is incapable of providing minimal care, control, and supervision for the three children. Her incapacity cannot and will not be remedied.' *In re William L.,* 477 Pa. 322, 345, 383 A.2d 1228, 1239-1240, cert. denied *sub nom. Lehman v. Lycoming County Children's Services,* 439 U.S. 880, 99 S.Ct. 216, . . . (1978).

"On such a record, I believe that the District Court could have found, as a discretionary matter, that petitioner had not made a sufficient showing that she acted in the interests of the children to warrant issuing her the writ as their 'next friend.' Indeed, I believe that the common-

law habeas corpus tradition would have supported recognition of broad District Court discretion to withhold the writ in all but the conditions of the child's liberty, and that release of the child to his natural parent very likely would serve the child's best interest.

"Such a ruling would not have been inconsistent with the Court's decision today, which expressly bases denial of habeas relief on a need to reserve the federal writ 'for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.' *Ante,* at 3240. Indeed, I cannot understand why the Court's explicit balancing approach yields a strict jurisdictional bar. A discretionary limit would have allowed the writ to issue only in those very rare cases that demanded its unique 'capacity to . . . cut through barriers of form and procedural mazes.' *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, . . . (1969). Because the Court overrides contrary history and precedent to find that habeas jurisdiction does not lie, I dissent.

Lehr v. Robertson

463 U.S. 248, 103 S.Ct. 2985 (1983)

ADOPTION - Notice - Parental Rights — ***A father whose whereabouts were known was not deprived of due process by failure to give him notice of the adoption if his illegitimate child where he had paid no attention to the child and had not sent in a postcard to State's putative father registry.***

"(p. 2987) Justice STEVENS delivered the opinion of the Court.

"The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth. The appellant, Jonathan Lehr, claims that the Due Process of Equal Protection Clauses of the Fourteenth Amendment, as interpreted in *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1760, . . . (1979), give him an absolute right to notice and an opportunity to be heard before the child may be adopted. We disagree.

"Jessica M. was born out-of-wedlock on November 9, 1976. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica's birth. On December 21, 1978, when Jessica was over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard their testimony and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the court entered an order of adoption. In this proceeding, appellant contends that the adoption order is invalid because he, Jessica's putative father, was not given advance notice of the adoption proceeding.

"The State of New York maintains a 'putative father registry.' A man who files with that registry demonstrates his intent to claim paternity of a child born out-of-wedlock and is therefore entitled to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the Ulster County Family Court had the putative father registry examined. Although appellant claims to be Jessica's natural father, he had not entered his name in the registry.

"In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out-of-wedlock — those who have been adjudicated to be the father, those who have been identified to be the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn statement, and those who were married to the child's mother before the child was six months old. Appellant admittedly was not a member of any of those classes. He has lived with appellee prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name does not appear on Jessica's birth certificate. He did not live with appellee or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry appellee. Nevertheless, he contends that the following special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted.

"On January 30, 1979, one month after the adoption proceeding was commenced in Ulster County, appellant filed a 'visitation and paternity petition' in Westchester County Family Court. In that petition, he asked for a determination of paternity, an order of support, and reasonable visitation privileges with Jessica. Notice of that proceeding was served on appellee in February 22, 1979. Four days later appellee's attorney informed the Ulster County Court that appellant had commenced a paternity proceeding in Westchester County; the Ulster County Judge then entered an order staying appellant's paternity proceeding until he could rule on a motion to change the venue of that proceeding to Ulster County. On March 3, 1979, appellant received

notice of the change of venue motion and, for the first time, learned that an adoption proceeding was pending in Ulster County.

"On March 7, 1979, appellant's attorney telephoned the Ulster County Judge to inform him that he planned to seek a stay of the adoption proceeding pending the determination of the paternity petition. In that telephone conversation, the judge advised the lawyer that he had already signed the adoption order earlier that day. According to appellant's attorney, the judge stated that he was aware of the pending paternity petition but did not believe he was required to give notice to appellant prior to the entry of the order of adoption.

"Thereafter, the Family Court in Westchester County granted appellee's motion to dismiss the paternity petition, holding that the putative father's right to seek paternity 'must be deemed severed so long as an order of adoption exists.' . . . Appellant did not appeal from that dismissal. On June 22, 1979, appellant filed a petition to vacate the order of adoption on the ground that it was obtained by fraud and in violation of his constitutional rights. The Ulster County Family Court received written and oral argument on the question whether it had 'dropped the ball' by approving the adoption without giving appellant advance notice. . . . After deliberating for several months, it denied the petition, explaining its decision in a thorough written opinion. *In re Adoption of Martz,* . . . 423 N.Y.S.2d 378 (1979).

"The Appellate Division of the Supreme Court affirmed. *In re Adoption of Jessica 'XX,'* . . . 434 N.Y.S.2d 772 (1980). The majority held that appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional, and that *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, . . . (1979), was not retroactive. Parenthetically, the majority observed that appellant 'could have insured his right to notice by signing the putative father registry.' . . . 434 N.Y.S.2d at 774. One justice dissented on the ground that the filing of the paternity proceeding should have been viewed as the statutory equivalent of filing notice of intent to claim paternity with the putative father registry.

"The New York Court of Appeals also affirmed by a divided vote. *In re Adoption of Jessica 'XX,'* . . . 446 . . . 430 N.E.2d 896 (N.Y. 1981). The majority first held that it did not need to consider whether our decision in *Caban* affected appellant's claim that he had a right to notice, because *Caban* was not a retroactive. It then rejected the argument that the mother had been guilty of a fraud upon the court. Finally, it addressed what it described as the only contention of substance advanced by appellant: that it was an abuse of discretion to enter the adoption order without requiring that notice provision of sec. 111 — a was to enable the person served to provide the court with evidence concerning the best interest of the child, and that appellant had made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest. Considering the record as a whole, and acknowledging that it might have been prudent to give notice, the court concluded that the Family Court had not abused its discretion either when it entered the order without notice or when it denied appellant's petition to reopen the proceedings. The dissenting judges concluded that the family court had abused its discretion, both when it entered the order without notice and when it refused to reopen the proceedings.

"Appellant has now invoked our appellate jurisdiction. He offers two alternative grounds for holding the New York statutory scheme unconstitutional. First, he contends that a putative father's actual or potential relationship with a child born out-of-wedlock is an interest in liberty which may not be destroyed without due process of law; he argues therefore that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contends that the gender-based classification in the statute, which both denied him the right to consent to Jessica's adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.

The Due Process Claim.

"The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. . . . Only after that interest has been identified, can we

properly evaluate the adequacy of the State's process. See *Morrissey v. Brewer,* 408 U.S. 471, 482-483, 92 S.Ct. 2593, 2600-2601, . . . (1972). We therefore first consider the nature of the interest in liberty for which appellant claims constitutional protection and then turn to a discussion of the adequacy of the procedure that New York has provided for its protection.

"The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. In deciding whether this is such a case, however, we must consider that broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.

"In the vast majority of cases, State law determines the final outcome. Cf. *United States v. Yazell,* 382 U.S. 341, 351-353, 86 S.Ct. 500, 506-507, . . . (1966). Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied State laws governing marriage and divorce affect a multitude of parent-child relationships. The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our demo ratic society. In recognition of that role, and as part of their general ovir-arching concern for serving the best interests of children, State laws almost universally express an appropriate preference for the formal family.

"In some cases, however, this Court has held that the Federal Constitution supersedes State law and provides even greater protection for certain formal family relationships. In those cases, as in the State cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the 'liberty' of parents to control the education of their children that was vindicated in *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . (1925), was described as a 'right, couples with the high duty, to recognize and prepare [the child] for additional obligations.' *Id.,* at 535, 45 S.Ct. at 573. The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944), when the Court declared it a cardinal principle 'that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.' *Ibid.* In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection. See, also, *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, . . . (1977) (plurality opinion). '[S]tate intervention to terminate [such a] relationship . . . must be accompanied by procedures meeting the requisites of the Due Process Clause.' *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, . . . (1982).

"There are also a few cases in which this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out-of-wedlock. In some we have been concerned with the rights of the children, see, e.g., *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, . . . (1977); *Jimenez v. Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, . . . (1974); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, . . . (1972). In this case, however, it is a parent who claims that the State has improperly deprived him of a protected interest in liberty. This Court has examined the extent to which a natural father's biological relationship with his child receives protection under the Due Process Clause in precisely three cases: *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, . . . (1972), *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, . . . (1978), and *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, . . . (1979).

"*Stanley* involved the constitutionality of an Illinois statute that conclusively presumed every father of a child born out-of-wedlock to be an unfit person to have custody of his children. The father in that case had lived with his children all their lives and had lived with their mother for 18 years. There was nothing in the record to indicate that Stanley had been neglectful father who had not cared for his children. 405 U.S. at 655, 92 S.Ct. at 1214. Under the statute, however, the nature of the actual relationship between parent and child was completely irrelevant. Once the mother died, the children were automatically made wards of the State. Relying in part on a Michigan case recognizing that the preservation of 'a subsisting relationship with the child's father' may better serve the child's best interest than 'uprooting him from the family which he

knew from birth,' *id.*, at 654-655, n. 7, 92 S.Ct. at 1214-1215, n. 7, the Court held that the Due Process Clause was violated by the automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent.

"*Quilloin* involved the constitutionality of a Georgia statute that authorized the adoption, over the objection of the natural father, of a child born out-of-wedlock. The father in that case had never legitimated the child. It was only after the mother had remarried and her new husband had filed an adoption petition that the natural father sought visitation rights and filed a petition for legitimation. The trial court found adoption by the new husband to be in the child's best interests, and we unanimously held that action to be consistent with the Due Process Clause.

"*Caban* involved the conflicting claims of two natural parents who had maintained joint custody of their children from the time of their birth until they were respectively two and four years old. The father challenged the validity of an order authorizing the mother's new husband to adopt the children; he relied on both the Equal Protection Clause and the Due Process Clause. Because this Court upheld his equal protection claim, the majority did not address his due process challenge. The comments on the latter claim by the four dissenting Justices are nevertheless instructive, because they identify the clear distinction between a mere biological relationship and an actual relationship of parental responsibility.

"Justice STEWART correctly observed:

> 'Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863 (97 S.Ct. 2094, 2119, . . .) (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.'* 441 U.S. at 397, 99 S.Ct. at 1770 (emphasis added).

"In a similar vein, the other three dissenters in *Caban* were prepared to 'assume that, *if and when one develops,* the relationship between a father and his natural child is entitled to protection against arbitrary State action as a matter of due process.' *Caban v. Mohammed, supra,* 441 U.S. at 414, 99 S.Ct. at 1779, . . . (emphasis added).

"The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban,* and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban,* 441 U.S. at 393, 99 S.Ct. at 1768, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' *Id.,* at 389, n. 7, 99 S.Ct. at 1766, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.' *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, . . . (1977) (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, . . . (1972)).

"The significance of the biological connection is that it offers the natural father an opportunity that no other male processes to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of respectability for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contribution to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

"In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old. We are concerned only with whether New York has adequately protected his opportunity to form such a relationship.

"The most effective protection of the putative father's opportunity to develop a relationship

with his child is provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child. Thus, New York has adopted a special statutory scheme to protect the unmarried father's interest in assuming a responsible role in the future of his child.

"After this Court's decision in *Stanley,* the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the case of their natural children. If this scheme were likely to omit many responsible fathers, and it qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be sufficient reason for criticizing the law itself. The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the State's conclusion as arbitrary.

"Appellant argues, however, that even if the putative father's opportunity to establish a relationship with an illegitimate child is adequately protected by the New York statutory scheme in the normal case, he was nevertheless entitled to special notice because the court and the mother knew that he had filed an affiliation proceeding in another court. This argument amounts to nothing more that an indirect attack on the notice provisions of the New York statute. The legitimate State interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to all procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the family court strictly complied with the notice provisions of the statute.

The Equal Protection Claim

"The concept of equal justice under law requires the State to govern impartially. *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587, 99 S.Ct. 1355, 1366, . . . (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254, . . . (1971). Specifically, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important State purpose. *Ibid.; Craig v. Boren,* 429 U.S. 190, 197-199, 97 S.Ct. 451, 456-457, . . . (1976).

"The legislation at issue in this case, . . . is intended to establish procedures for adoptions. Those procedures are designed to promote the best interests of the child, to protect the rights of interested third parties, and to ensure promptness and finality. To serve those ends, the legislation guarantees to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. Appellant contends that the gender-based distinction in invidious.

"As we have already explained, the existing or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child. In *Quilloin v. Walcott,* we noted that the putative father, like appellant, 'ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities . . . ' 434 U.S. at 256, 98 S.Ct. at 555. We therefore found

that a Georgia statute that always required a mother's consent to the adoption of a child born out-of-wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. Because appellant, like the father in *Quilloin,* has never established a substantial relationship with his daughter, see *supra,* at 2993 the New York statutes at issue in this case did not operate to deny appellant equal protection.

"We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, . . . (1979), the Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of a four-year-old girl and a six-year-old boy, but not to grant a veto to their father, who had admitted paternity and had participated in the rearing of the children. The Court made it clear, however, that if the father had not 'come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclud[e] the State from withholding from him the privilege of vetoing the adoption of that child.' 441 U.S. at 392, 99 S.Ct. at 1768.

"Jessica's parents are not like the parents involved in Caban. Whereas appellee had a continuous custodial responsibility for Jessica's, appellant never established any custodial, personal, or financial relationship with her. If one parent has established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.

"The judgment of the New York Court of Appeals is

"*Affirmed.*

"Justice WHITE, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

"The question in this case is whether the State may, consistent with the Due Process Clause, deny notice and an opportunity to be heard in an adoption proceeding to a putative father when the State has actual notice of his existence, whereabouts, and interest in the child.

"It is axiomatic that '[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, . . . (1976), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, . . . (1965). As Jessica's biological father. Lehr either had an interest protected by the Constitution or he did not. If the entry of the adoption order in this case deprived Lehr of a constitutionally protected interest, he is entitled to notice and an opportunity to be heard before the order can be accorded finality.

"According to Lehr, he and Jessica's mother met in 1971 and began living together in 1874. The couple cohabitated for approximately two years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here.

"The majority posits that '[t]he intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection in appropriate cases.' It then purports to analyze the particular facts of this case to determine whether appellant has a constitutionally protected liberty interest. We have expressly rejected that approach. In *Board of Regents v. Roth,* 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2705-2706, . . . (1972), we stated that although 'a

weighing process has long been a part of any determination of the form of hearing required in particular situations . . . to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection . . . ' See, e.g., *Smith v. Organization of Foster Families,* 431 U.S. 816, 839-842, 97 S.Ct. 2094, 2106-2108, . . . (1977); *Ingraham v. Wright,* 430 U.S. 651, 672, 97 S.Ct. 1401, 1413, . . . (1977); *Meachum v. Fano,* 427 U.S. 215, 224, 96 S.Ct. 729, 736-737, . . . (1975); *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, . . . (1972).

"The 'nature of the interest' at stake here is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection. We have frequently 'stresses the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection.' *Little v. Streater,* 452 U.S. 1, 13, 101 S.Ct. 2202, 2209, . . . (1981). If 'both the child and the [putative father] in a paternity action have a compelling interest' in the accurate outcome of such a case, *ibid.,* it cannot be disputed that both the child and the putative father have a compelling interest in the outcome of a proceeding that may result in the termination of the father-child relationship. 'A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.' *Lassiter v. Department of Social Services,* 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, . . . (1982). It is beyond dispute that a formal order of adoption, no less than a formal termination proceeding, operates to permanently terminate parental rights.

"Lehr's version of the 'facts' paints a far different picture than that portrayed by the majority. The majority's recitation, that '[a]ppellant has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old,' *ante,* at 2994, obviously does not tell the whole story. Appellant has never been afforded an opportunity to present his case. The legitimation proceeding he instituted was first stayed, and then dismissed, on appellees' motions. Nor could appellant establish his interest during the adoption proceedings, for it is the failure to provide Lehr notice and an opportunity to be heard there that us at issue here. We cannot fairly make a judgment based on the quality or substance of a relationship without a complete and developed factual record. This case requires us to assume that Lehr's allegations are true — that but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.

"I reject the peculiar notion that the only significance of the biological connection between father and child is that 'it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.' *Ante,* at 2993. A 'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggests.

"[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.' *Smith v. Organization of Foster Families, supra,* 431 U.S. at 843, 97 S.Ct. at 2109. The 'biological connection' is itself a relationship that creates a protected interest. Thus the 'nature' of the interest is the parent-child relationship; how well developed that relationship has become goes to its 'weight,' not its 'nature.' Whether Lehr's interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists -- a fact that even the majority agrees must be assumed to be established.

"Beyond that, however, because there is no established factual basis on which to proceed, it is quite untenable to conclude that a putative father's interest in his child is lacking in substance, that the father in effect has abandoned the child, or ultimately that the father's interest is not entitled to the same minimum procedural protection as the interests of other putative fathers. Any analysis of the adequacy of the notice in this case must be conducted on the assumption that the interest involved here is as strong as that of *any* putative father. That is not to say that due process requires actual notice to every putative father or that adoptive parents or the State must conduct an exhaustive search of records or an intensive investigation before a final adoption order may be entered. The procedures adopted by the State, however, must at least represent a reasonable effort to determine the identity of the putative father and to give him adequate notice.

"In this case, of course, there was no question about either the identity or the location of the putative father. The mother knew exactly who he was and both she and the court entering the order of adoption knew precisely where he was and how to give him actual notice that his

parental rights were about to be terminated by an adoption order. Lehr was entitled to due process, and the right to be heard is one of the fundamentals of that right, which 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' *Schroeder v. City of New York,* 371 U.S. 208, 212, 83 S.Ct. 279, 282, . . . (1962), quoting *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, . . . (1950).

"The State concedes this much but insists that Lehr has had all the process that is due to him. It relies on sec.111-a, which designates seven categories of unwed fathers to whom notice of adoption proceedings must be given, including any unwed father who has filed with the State a notice of his intent to claim paternity. The State submits that it need not give notice to anyone who has not filed his name, as he is permitted to do, and who is not otherwise within the designated categories, even if his identity and interest are known or are reasonably ascertainable by the State.

"I am unpersuaded by the State's position. In the first place, sec. 111-a defines six categories of unwed fathers to whom notice must be given even though they have not placed their names in file pursuant to the section. Those six categories, however, do not include fathers such as Lehr who have initiated filiation proceedings, even though their identity and interest are as clearly and easily ascertainable as those fathers in the six categories. Initiating such proceedings necessarily involves a formal acknowledgment of paternity, and requiring the State to take note of such a case in connection with pending adoption proceedings would be a trifling burden, no more than the State undertakes when there is a final adjudication in a paternity action. Indeed, there would appear to be more reason to give notice to those such as Lehr who acknowledge paternity than to those who have been adjudged to be a father in a contested paternity action.

"The State assert that any problem in this respect is overcome by the seventh category of putative fathers to whom notice must be given, namely, those fathers who have identified themselves in the putative fathers' register maintained by the State. Since Lehr did not take advantage of this device to make his interest known, the State contends, he was not entitled to notice and a hearing even though his identity, location, and interest were known to the adoption court prior to entry of the adoption order. I have difficulty with this position. First, it represents a grudging and crabbed approach to due process. The State is quite willing to give notice and a hearing to putative fathers who have made themselves known by resorting to the putative fathers' register. It makes little sense to me to deny notice and hearing to a father who has not placed his name in the register but who has unmistakably identified himself by filing suit to establish his paternity and has notified the adoption court of his action and his interest. I thus need not question the statutory scheme on its face. Even assuming that Lehr would have been foreclosed if his failure to utilize the register had somehow disadvantaged the State, he effectively made himself known by other means, and it is the sheerest formalism to deny him a hearing because he informed the State in the wrong manner.

"No State interest is substantially served by denying Lehr adequate notice and a hearing. The State no doubt has an interest in expediting adoption proceedings to prevent a child from remaining unduly long in the custody of the State or foster parents. But this is not an adoption involving a child in the custody of an authorized State agency. Here the child is in the custody of the mother and will remain in her custody. Moreover, has Lehr utilized the putative fathers' register, he would have been granted a prompt hearing, and there was no justifiable reason, in terms of delay, to refuse him a hearing in the circumstances of this case.

"The State's undoubted interest in the finality of adoption orders likewise is not well served by procedure that will deny notice and a hearing to a father whose identity and location are known. As this case well-illustrates, denying notice and a hearing to such a father may result in years of additional litigation and threaten the reopening of adoption proceedings and the vacation of the adoption. Here, the family court's unseemly rush to enter an adoption order after ordering that cause be shown why the filiation proceeding should not be transferred and consolidated with the adoption proceeding can hardly be justified by the interest in finality. To the contrary, the adoption order entered in March 1979 has remained open to question until this very day.

"Because in my view the failure to provide Lehr with notice and an opportunity to be heard violated rights guaranteed him by the Due Process Clause, I need not address the question

whether sec. 111-a violates the Equal Protection Clause by discriminating between categories of unwed fathers or by discriminating on the basis of gender.

"Respectfully, I dissent."

Lynch v. Overholser

369 U.S. 705, 82 S.Ct. 1063 (1962)

INSANITY DEFENSE -Civil Commitment — ***When a person is found not guilty by reason of insanity, the statute cannot require that he be automatically committed to a mental hospital, rather a civil commitment proceeding is required with affirmative proof of insanity rather than merely a reasonable doubt of sanity.***

"Mr. Justice HARLAN delivered the opinion of the Court.

"This is a habeas corpus proceeding instituted in the District Court by petitioner, presently confined in Saint Elizabeths Hospital for the insane pursuant to a commitment, . . . to test the legality of his detention. The District Court, holding that petitioner had been unlawfully committed, directed his release from custody unless civil commitment proceedings . . . were begun within 10 days of the court's order. The Court of Appeals, sitting *en banc,* reversed by a divided vote. . . . 288 F.2d 388. Since the petition for *certiorari* raised important questions regarding the procedure for confining the criminally insane in the District of Columbia and suggested possible constitutional infirmities . . . we granted the writ. . . .

"Two informations filed in the Municipal Court for the District of Columbia on November 6, 1959, charged petitioner with . . . by drawing and negotiating checks in the amount of $50 each with knowledge that he did not have sufficient funds or credit with the drawee bank for payment. On the same day, petitioner appeared in Municipal Court to answer these charges and a plea of not guilty was recorded. He was thereupon committed . . . to the District of Columbia General Hospital for a mental examination to determine his competence to stand trial. On December 4, 1959, the Assistant Chief Psychiatrist of the Hospital reported that petitioner's mental condition was such that he was then 'of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense.' The case was continued while petitioner was given treatment at the General Hospital.

"On December 28, 1959, the Assistant Chief Psychiatrist sent a letter to the court advising that petitioner had 'shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense.' This communication also noted that it was the psychiatrist's opinion that petitioner 'was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged,' such that the crime 'would be a product of this mental disease.' As for petitioner's current condition, the psychiatrist added that petitioner 'appears to be in an early stage of recovery from manic depressive psychosis,' but that it was 'possible that he may have further lapses of judgment in the near future.' He stated that it 'would be advisable for him to have a period of further treatment in a psychiatric hospital.'

"Petitioner was brought to trial the following day in the Municipal Court before a judge without a jury. The record before us contains no transcript of the proceedings, but it is undisputed that petitioner, represented by counsel, sought at that time to withdraw the earlier plea of not guilty and to plea guilty to both informations. The trial judge refused to allow the change of plea, apparently on the basis of the Hospital's report that petitioner's commission of the alleged offenses was the product of mental illness.

"At the trial on of the prosecution's witnesses, a physician representing the General Hospital's Psychiatric Division, testified, over petitioner's objection, that petitioner's crimes had been committed as a result of mental illness. Although petitioner never claimed that he had not been mentally responsible when the offenses were committed and presented to evidence to support an acquittal by reason of insanity, the trial judge concluded that petitioner was 'not guilty on the ground that he was insane at the time of the commission of the offense.' The court then ordered that petitioner be committed to Saint Elizabeths Hospital as prescribed by D.C.Code, sec. 24-301(d), which reads:

'(d) If any person tried upon an indictment or information for an offense, or tried in the Juvenile Court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.'

"There can be no doubt as to the effect of this provision with respect to a defendant who has asserted a defense of insanity at some point during the trial. By its plain terms it directs confinement in a mental hospital of any criminal defendant in the District of Columbia who is 'acquitted solely on the ground' that his offense was committed while he was mentally irresponsible, and forecloses the trial judge from exercising any discretion in this regard. Nor does the statute require a finding by the trial judge or jury, or by a medical board, with respect to the accused's mental health on the date of the judgment of acquittal. The sole necessary and sufficient condition for bringing the compulsory commitment provision into play is that the defendant be found guilty of the crime with which he is charged because of insanity 'at the time of its commission.' Petitioner does not contend that the statute was misinterpreted in these respects.

"Petitioner maintains, however, that his confinement is illegal for a variety of other reasons, among which is the assertion that the 'mandatory commitment' provision, as applied to an accused who protests that he is presently sane and that the crime he committed was not the product of mental illness, deprives one so situated of liberty without due process of law. We find it unnecessary to consider this and other constitutional claims concerning the fairness of the Municipal Court proceeding, since we read sec. 24-301(d) as applicable only to a defendant acquitted on the ground of insanity, and not to one, like petitioner, who has maintained that he was mentally responsible when the alleged offense was committed.

. . .

"(p. 1068) Thus, a civil commitment must commence with the filing of a verified petition and supporting affidavits. D.C.Code, sec. 21-310. This is followed by a preliminary examination by the staff of Saint Elizabeths Hospital, a hearing before the Commission on Mental Health, and then another hearing in the District Court, which must be before a jury if the person being committed demands one. . . . At both of these hearings representation by counsel or by a guardian ad litem is necessary. *Doolong v. Overholser,* . . . 243 F.2d 825, construing D.C.Code, sec. 21-308, 21-311. The burden of proof is on the party seeking commitment, and it is only if the trier of fact is 'satisfied that the alleged insane person is insane,' that he may be committed 'for the best interests of the public and of the insane person.' D.C.Code, sec. 21-315.

"Likewise, Congress has afforded protection from improvident commitment to an accused in a criminal case who appears to the trial court 'from the court's own observations, or from *prima facie* evidence submitted to the court *** [to be] of unsound mind or *** mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense.' D.C.Code, sec. 24-301(a). In such circumstances preliminary commitment for a 'reasonable period' is authorized in order to permit observation and examination. If the medical report shows that the accused is of unsound mind, the court may 'commit by order the accused to a hospital for the mentally ill *unless* the accused or the Government objects.' (Emphasis added.) In case of objection, there must be a judicial determination with respect to the accused's mental health, and it is only 'if the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial' that an order for continued commitment is permissible. Hence if the accused denies that he is mentally ill, he is entitled to a judicial determination of his present mental state despite the hospital board's certification that he is of unsound mind. And it should be noted that the burden rests with the party seeking commitment to prove that the accused is 'then of unsound mind.' D.C.Code, sec. 24-301(a).

"Considering the present case against this background, we should be slow in our reading of sec. 24-301(d) to attribute to Congress a purpose to compel commitment of an accused who never throughout the criminal proceedings suggests that he is, or ever was, mentally irresponsible. This is the more so when there is kept in mind the contrast between the nature of an acquittal by reason of insanity required in other kinds of commitment proceedings. In the District Court of Columbia, as in all federal courts, an accused 'is entitled to an acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of

committing crime.' *Davis v. United States,* 160 U.S. 469, 484, 16 S.Ct. 353, 356, . . . Consequently the trial judge or jury must reach a judgment or verdict of not guilty by reason of insanity even if the evidence as to mental responsibility at the time the offense was committed raises no more than a reasonable doubt of sanity. If sec. 24-301(d) were taken to apply to petitioner's situation, there would be an anomalous disparity between what sec. 24-301(d) commands and what sec. 24-301(a) forbids. On the one hand, sec. 24-301(d) would *compel* post-trial commitment upon the suggestion of the Government and over the objection of the accused merely on evidence introduced by the Government that raises a reasonable doubt of the accused's sanity as of the time at which the offense was committed. On the other hand, sec. 24-301(a) would *prohibit* pretrial commitment upon the suggestion of the Government and over the objection of the accused, although the record contained an affirmative medical finding of present insanity, unless the Government is able to prove, by a preponderance of the evidence, that the accused is presently of unsound mind.

"Of course the post-trial commitment of sec. 24-301(d) presupposes a determination that the accused has committed the criminal act with which he is charged, whereas pretrial commitment antedates any such finding of guilt. But the fact that the accused has pleaded guilty or that, overcoming some defense other than insanity, the Government has established that he committed a criminal act constitutes only strong evidence that his continued liberty could imperil 'the preservation of public peace.' It no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past sanity than would any other cogent proof of possible jeopardy to 'the rights of persons and of property' in any civil commitment. . . .

"Moreover, the literal construction urged here by the Government is quite out of keeping with the congressional policy that underlies the elaborate procedural precautions included in the civil commitment provisions. It seems to have been Congress' intention to insure that only those who need treatment and may be dangerous are confined; committing a criminal defendant who denies the existence of any mental abnormality merely on the basis of a reasonable doubt as to his condition at some earlier time is surely at odds with this policy.

"The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. It is true that he may avoid the ordinary criminal penalty merely by submitting enough evidence of an abnormal mental condition to raise a reasonable doubt of his responsibility at the time of committing the offense. Congress might have thought, however, that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts. Alternatively, Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity. We need go no further here that to say that such differentiating considerations are pertinent to ascertaining the intended reach of this statutory provision.

. . .

"(p. 1072) In light of the foregoing considerations we conclude that it was not Congress' purpose to make commitment compulsory when as here, an accuses disclaims reliance on a defense of mental irresponsibility. This does not mean, of course, that a criminal defendant has an absolute right to have his guilty plea accepted by the court. As provided in Rule 11, Fed.Rules Crim.Proc., 18 U.S.C.A., and Rule 9, D.C.Munic.Ct.Crim. Rules, the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused. We decide in this case only that if this is done and the defendant, despite his own assertions of sanity, sec. 24-301(d) does not apply. If commitment is then warranted, it must be accomplished either by resorting to sec. 24-301(a) or by recourse to the civil commitment provisions in Title 21 of the D.C.Code.

"The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion. It is so ordered.

"Reversed and remanded.

"Mr. Justice FRANKFURTER took no part in the decision of this case.

"Mr. Justice WHITE took no part in the consideration or decision of this case.

"Mr. Justice CLARK, dissenting.

"Eighty-seven years ago, Chief Justice WAITE in speaking of the function of this Court said: 'Our province is to decide what the law is, not to declare what it should be. *** If the law is

wrong, it ought to be changed; but the power for that is not with us.' *Minor v. Happersett,* 21 Wall. 162, 178, 22 L.Ed. 627 (1875). This holding followed as long a line of cases as it preceded. Today the Court seems to me to do what this long-established rule of statutory interpretation forbids. With sophisticated frankness it admits that the District's statute '[b]y its plain terms *** directs confinement in a mental hospital of any criminal defendant *** who is 'acquitted solely on the ground' that this offense was committed while he was mentally irresponsible, and forecloses the trial judge from exercising any discretion in this regard.' Despite these 'plain terms' the Court writes into the statute an exception, *i.e.,* it applies 'only to criminal defendants who have interposed a defense of insanity ***.' It does this despite the fact that the petitioner here apparently made no such contention in the trial court. Indeed, though he had counsel at the time of his trial in Municipal Court on two charges of passing bad checks, he made no attempt to appeal from the refusal of the court to accept his guilty plea and its finding that he was 'not guilty on the ground that he was insane at the time of the commission of the offense.' After being committed to St. Elizabeths Hospital for treatment for some six months, he files this habeas corpus application. Today's action may have the effect of setting him free though he makes no claim that he was sane at the time of trial or is so at this time. In fact, the last doctor's report in the record shows him to be suffering from a manic depressive psychosis from which though he 'appears to be in an early stage of recovery' it is 'possible that he may have further lapses ***.' It further states that it 'would be advisable for him to have a period of further treatment in a psychiatric hospital.' The order today risks bringing that to an end.

"The case therefore presents the complex and challenging problem of criminal incompetency with which the people of the District of Columbia have for years been plagued. The Congress in 1955 adopted the present statute to meet what it called the 'serious and dangerous imbalance *** in favor of the accused and against the public' which was created in part by the rule in *Durham v. United States,* . . . 214 F.2d 862, 45 A.L.R.2d 1430 (1954). . . . The statute, in my view, is not only designed to protect the public from the criminally incompetent but at the same time has the humanitarian purpose of affording hospitalization for those in need of treatment. It is, therefore, of the utmost importance to this community. Moreover, it has its counterpart in varying degrees in 36 of our States and in the federal system as well, many of which will be affected by this decision. In my view the Court undermines the purposes of these statutes; places a premium on pleas of guilty by defendants who were insane when they acted, made either *pro se* or through their attorneys; and thereby forces the conviction of innocent persons. And all of this is done in the face of the admitted 'plain terms' of the mandate of Congress under the guise that the Court's holding 'is more consistent with the general pattern of laws governing the confinement of the mentally ill in the District of Columbia.' I believe, however, that the Congress in adopting sec. 24-301(d) said what it meant and that it meant what it said. I regret that the Court has seen fit to repeal the 'plain terms' of this statute and write its own policy into the district's law. Especially do I deplore its suggestion of doubt as to its constitutionality. In the light of the cases this is chimerical. Finding myself with reference to the opinion like Mrs. Gummidge, 'a lone, lorn creature' and every think [about it] goes contrary with me,' I respectfully dissent.

"It is well to point out first what is not involved here. First, this is not a civil commitment case, although this Court attempts to force one upon the parties. In providing the safeguards of D.C.Code, sec. 21-310 as to the ordinary civil commitment of persons claimed to be insane the Congress clearly acted in protection of those who were not charged with criminal offenses or who had never exhibited any criminal proclivities. In protecting the public from the criminally incompetent it could with reason act with less caution. See *Overholser v. Leach,* . . . 257 F.2d 667, 669, and *Kenstrip v. Cranor,* 39 Wash.2d 403, 405, 235 P.2d 467, 468. In criminal cases the person could be held in custody in any event and humanitarian principles require his hospitalization where needed. Nor are the procedures for release involved here. Petitioner has not sought his release under the statue. The procedure, however, is simple and effective, i.e., a doctor's certificate recommending release filed with the court is sufficient. If the doctor refuses such certificate, the inmate may seek to prove his sanity on habeas corpus. Here, however, no claim of sanity has been made.

"Nor does this case involve commitment under D.C.Code, sec. 24-301(a). The first provision of that section largely has to do with cases before trial. The accused is entitled to a speedy trial. He may be acquitted. Hence his commitment to a hospital would delay the

effectuation of these rights. The Congress, therefore, provided safeguards, *i.e.*, he might object to such a commitment and the consequent delay of his trial. But here — under sec. 24-310(d) — the accused has already had his trial.

"Finally, the fallacy in the Court's position is clearly apparent when in an attempt to justify its holding on practical grounds it says that an accused who pleads guilty and is sentenced may thereafter be transferred from the prison to a hospital and the assurances of hospitalization provided by sec. 24-301(d) thus afforded. The short of this is that if the accused pleads guilty and is sentenced he then may suffer in addition to his conviction the same fate as petitioner suffers here. With due deference, this is a most cruel position. The accused, though innocent of the crime because of insanity, pleads guilty in hopes of a short jail sentence. He then has the stigma of criminal conviction permanently on his record. During or after sentence he is transferred to the hospital where he *may* be released at the end of his sentence but if found not cured at that time may still be subject to further custody and treatment. D.C.Code, sec. 24-302; . . . 18 U.S.C.A. sec. 4247.

"It has long been generally acknowledged that justice does not permit punishing persons with certain mental disorders for committing acts offending against the public peace and order. But insane offenders are no less a menace to society for being held irresponsible, and reluctance to impose blame on such individuals does not require their release. The community has an interest in protecting the public from antisocial acts whether committed by sane or by insane persons. We have long recognized that persons who because of mental illness are dangerous to themselves or to others may be restrained against their will in the interest of public safety and to seek their rehabilitation, even if they have done nothing proscribed by the criminal law. The insane who have committed acts otherwise criminal are a still greater object of concern, as they have demonstrated their risk to society. In an attempt to deal with these problems, Congress has enacted sec. 24-301(d), which requires the court to find that he was insane at the time of its commission, to be confined in a hospital for the mentally ill.

"Commitment to an institution of persons acquitted of crime because of insanity is no novelty. At common-law, before 1800, the trial judge had power to order detention in prison of an acquitted defendant he considered dangerous because of insanity. Hadfield, acquitted of attempted regicide in 1800 as insane, was remanded to an English prison because his future confinement was 'absolutely necessary for the safety of society,' 27 How.St.Tr. 1281, 1354. Parliament responded by providing for automatic commitment to a mental institution rather than prison in felony cases in which accused was acquitted on grounds of insanity, 39 & 40 Geo. III, c. 94, and mandatory commitment has been the rule in misdemeanor cases as well in England since 1883. 46 & 47 Vict., c. 38. An accused acquitted on insanity grounds in Massachusetts was remanded to the sheriff for continued custody as early as 1810, *Commonwealth v. Meriam,* 7 Mass. 168, and in the District of Columbia, the judge being convinced that 'it would be extremely dangerous to permit him to be at large,' in 1835, *United States v. Lawrence,* 26 Fed.Cas.No. 15.577. The District of Columbia Code of 1901, 31 Stat. 1189, 1340, authorized the trial judge, in his discretion and without further hearing, to forward the defendant's name to an administrator, who, in his discretion, again without hearing, might order commitment. Most defendants acquitted on insanity grounds were committed under this rule. At the present time statutes provide for mandatory commitment of persons acquitted by reason of insanity in 12 States and the Virgin Islands as well as in England and the District of Columbia. Six States permit commitment in the discretion of the trial judge. Eighteen more provide for mandatory or discretionary commitment if the trial judge finds that the defendant's insanity continues or that his discharge would be dangerous to the public peace. In 10 States and in Puerto Rico, mandatory commitment follows a like finding by the trial jury or by a second jury. In three States standards for civil commitment must be met. Only Tennessee makes no provision for such cases. Many of these laws providing for commitment of acquitted defendants are by no means new, see the tabulation in Glueck, Mental Disorder and the Criminal Law, 394-399 (1925), and with very few exceptions such laws have been upheld by state courts against constitutional attacks. The Model Penal Code of the American Law Institute contains a provision for mandatory commitment. ALI Model Penal Code Proposed Final Draft No. 1, sec. 4.08. See, also, comments on this section in *id.,* Tentative Draft No. 4, p. 199. In practice, it has been said despite the varying provisions in the several jurisdictions that acquitted defendants are 'nearly always' committed. Note, 68 Yale L.J. 293.

"The Court does not deny that petitioner was tried for an offense and acquitted solely on the ground of insanity at the time of commission. It argues, however, that the procedure of sec. 24-301(d), as applied to a criminal defendant who has not pleaded insanity, is inconsistent with the whole scheme of procedural safeguards provided for commitment of other individuals to mental hospitals in the District of Columbia and therefore could not have been intended by Congress. But the procedure of sec. 24-301(d)applies only to defendants committed before or during the trial, see *State ex. rel. Smilack v. Bushong,* 159 Ohio St. 259, 111 N.E.2d 918, all persons committed under sec. 24-301(d) either have been found after trial to have committed the act itself, or, as here, have conceded that they committed it. It is this adjudication, or this admission, that serves to explain and, in Congress' opinion, to justify different treatment for such individuals. *Overholser v. Leach,* . . . 257 F.2d 667. Whether we would have drawn this distinction is not the question; it suffices that the distinction was drawn and is not so untenable that we can say Congress could not reasonably have drawn it. And, insofar as sec. 24-301(a) applies also to those who have been tried and found guilty, it is no more inconsistent with mandatory commitment where the defendant has not pleaded insanity than where he has done so. In either case Congress wanted commitment if the judge found the accused insane or if the jury entertained a reasonable doubt.

"I agree with the Court that the present sec. 24-301(d) was the response of Congress to the decision in *Durham v. United States, supra.* That decision substituted for the McNaghten rule the simple question whether the 'unlawful act was the product of mental disease or mental defect.' . . . 214 F.2d at 874-875. In amending the then sec. 24-301(d), Congress sought 'to protect the public against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity ***.' H.R.Rep. No. 892, 84th Cong., 1st Sess. 3; 101 Cong. Rec. 9258, 12229. This danger of improvident release, so crucial in the eyes of the Congress, has in fact inhibited the adoption of the Durham rule by other courts in jurisdictions where no mandatory commitment statute is available. *Sauer v. United States,* 241 F.2d 640 (C.A. 9th Cir.); *United States v. Smith,* 5 U.S.C.M.A. 314, 329, 17 C.M.R. 314, 329; *United States v. Currens,* 3rd Cir., 290 F.2d 751, 776-777, (dissenting opinion); SOBELOFF, Insanity and the Criminal Law: From McNaghten to Durham, and Beyond, 41 A.B.A.J. 793, 879 (1955).

. . .

" . . . (p. 1079) The Court should not, as I have said, rewrite a statue merely to escape upholding it against easily parried constitutional objections. I would uphold that statute. I shall not go into details, however, since the Court does not deal with the issue. In short, petitioner has no constitutional right to choose jail confinement instead of hospitalization. It is said automatic hospitalization without a finding of present insanity renders the statute invalid but, as I see it, Congress may reasonably prefer the safety of compulsory hospitalization subject to the release procedures offered by the statute and through habeas corpus. It is said that these release procedures are too strict, placing the burden on the petitioner. But it appears reasonable once a jury or a judge has found a reasonable doubt as to the sanity of a man who has admittedly passed bad checks to require a doctor's certificate to authorize release, and failing such to require proof of the doctor's error in refusing to issue it. There is no reason to believe that the doctors or, for that matter, the judge would be improperly motivated. Release is by no means illusory. In the past six years over 25% of those committed have been released. It must be remembered that here the constitutionality of sec. 24-301(d) is at issue, not the wisdom of its enactment. That is for Congress. So long as its choice meets due process standards it cannot be overturned. The problem which faced Congress was the reconciliation of the opportunity for release of the accused through a judicial hearing with the vital public interest, deference to the views of institutional authorities and a decent regard for the hospitalization and cure of the accused. The balance struck by Congress, in my view, meets the essential requirements of due process.

"In any event, petitioner does not claim that he is now sane. He has made no effort to secure his release on the ground of being cured. Surely he should be required to make such an effort before asking the Court to strike down the statute on that ground. Moreover, if the burden is too heavy, rather than opening the hospital doors to all persons committed under the statute, it would be more fitting to rewrite the release procedures by shifting the burden to the hospital authorities to prove the necessity for further hospitalization. The Court has not hesitated to use a

similar device in another area. *Coppedge v. United States,* 369 U.S.438, 82 S.Ct. 917, . . . I would also think the Court would prefer to do this rather than create a loophole for those who seek to plead guilty. In so doing, the Court would not force the badge of criminal conviction on innocent persons but would afford them the benefit of treatment, safeguarded by entirely fair and reasonable release procedures, and at the same time afford the public protection from those unfortunates among us that know not what they do. The Court has chosen not to reverse the burden of proof; perhaps the Congress will consider doing so."

McCarty v. McCarty

453 U.S. 210, 101 S.Ct. 2728 (1981)

PROPERTY SETTLEMENT - (Military Pension) — ***Where Congress has vested a military pension in the serviceman, his wife cannot reach it for property settlement of their divorce.***

"(p. 2730) Justice BLACKMUN delivered the opinion of the Court.

"A regular or reserve commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. . . . The question presented by this case is whether, upon dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.

. . .

"(p. 2732) Appellant Richard John McCarty and appellee Patricia Ann McCarty were married in Portland, Ore., on March 23, 1957, while appellant was in his second year in medical school at the University of Oregon. During his fourth year in medical school, appellant commenced active duty in the United States Army. Upon graduation, he was assigned to successive tours of duty in Pennsylvania, Hawaii, Washington, D.C., California, and Texas. After completing duty in Texas, appellant was assigned to Letterman Hospital on the Presidio Military Reservation in San Francisco, where he became Chief of Cardiology. At the time this suit was instituted in 1976, appellant held the rank of Colonel and had served approximately 18 of the 20 years required . . . for retirement with pay.

"Appellant and appellee separated in October 31, 1976. On December 1 of that year, appellant filed a petition in the Superior Court of California in and for the City and County of San Francisco requesting dissolution of the marriage. Under California law, a court granting dissolution of a marriage must divide 'the community property and the quasi-community property of the parties.' . . . Like seven other States, California treats all property earned by either spouse as community property; each spouse is deemed to make an equal contribution to the marital enterprise, and therefore each is entitled to share equally in its assets. See *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 577-578, 99 S.Ct. 802, 806-807, . . . (1979). . . . Upon dissolution of a marriage, each spouse has an equal and absolute right to a half interest in all community and quasi-community property; in contrast, each spouse retains his or her separate property, which includes assets the spouse owned before marriage or acquired separately during the marriage through gift. See *Hisquierdo,* 439 U.S. at 578, 99 S.Ct. at 806.

"In his dissolution petition, appellant requested that all listed assets, including '[a]ll military retirement benefits,' be confirmed to him as his separate property. . . . In her response appellee also requested dissolution of the marriage, but contended that appellant had no separate property and that therefore his military retirement benefits were 'subject to disposition by the court in this proceeding.' . . . On November 23, 1977, the Superior Court entered findings of fact and conclusions of law holding that appellant was entitled to an interlocutory judgment dissolving the marriage. . . . Appellant was awarded custody of the three minor children; appellee was awarded spousal support. The court found that the community property of the parties consisted of two automobiles, cash, the cash value of life insurance policies, and an uncollected debt. . . . It allocated this property between the parties. . . . In addition, the court held that appellant's 'military pension and retirement rights' were subject to division as quasi-community property. . . . Accordingly, the court ordered appellant to pay appellee, so long as she lives,

'that portion of his total monthly pension or retirement payment which equal one-half (½) of the ration of the total time between marriage and separation during which [appellant] was in

the United States Army to the total number of years he has served with the . . . Army at the time of retirement.' *Id.,* at 43-44.

"The court retained jurisdiction 'to make such determination at that time and to supervise distribution . . . ' . . . On September 30, 1978, appellant retired from the Army after 20 years of active duty and began receiving retired pay; under the decree of dissolution, appellee was entitles to approximately 45% of that retired pay.

"Appellant sought review of the portion of the Superior Court's decree that awarded appellee an interest in the retired pay. The California Court of Appeal, . . . , however, affirmed the award. . . . In so ruling, the court declined to accept appellant's contention that because the federal scheme of military retirement benefits preempts state community property laws, the Supremacy Clause, U.S. Const., Art. VI, cl. 2. precluded the trial court from awarding appellee a portion of his retire pay. The court noted that this precise contention had been rejected in *In re Fithian,* . . . , 517 P.2d 449, (Cal.) cert. denied, 419 U.S. 825, 95 S.Ct. 41, . . . (1974). Furthermore, the court concluded that the result in *Fithian* had not been called into question by this Court's subsequent decision in *Hisquierdo v. Hisquierdo, supra,* where it was held that benefits payable under the federal Railroad Retirement Act of 1974 could not be divided under state community property law. See, also, *Gorman v. Gorman,* 90 . . . (Cal. 1979).

"The California Supreme Court denied appellant's petition for hearing. . . .

. . .

"This Court repeatedly has recognized that '[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.' *Hisquierdo,* 439 U.S. at 581, 99 S.Ct. at 808, quoting *In re Burrus,* 136 U.S. 586, 593-594, 10 S.Ct. 850, 852-853, . . . (1890). Thus, '[s]tate family and family-property law must do 'major damage' to clear and substantial 'federal interests before the Supremacy Clause will demand that state law be overridden.' *Hisquierdo,* 439 U.S. at 581, 99 S.Ct. at 808, with references to *United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 506, . . . (1966). See, also, *Alessi v. Paybestos-Manhattan, Inc.,* 451 U.S. 504, 522, 101 S.Ct. 1895, 1905, . . . (1981). In *Hisquierdo,* we concluded that California's application of community property principles to Railroad Retirement Act benefits worked such an injury to federal interests. The 'critical terms' of the federal statute relied upon in reaching that conclusion included provisions establishing 'a specified beneficiary protected by a flat prohibition against attachment and anticipation,' . . . , and a limited community property concept that terminated upon divorce, see 45 U.S.C. sec. 231d. 439 U.S. at 582-585, 99 S.Ct. at 808-810. Appellee argues that no such provisions are to be found in the statute presently under consideration, and that therefore *Hisquierdo* is inapposite. But *Hisquierdo* did not hold that only the particular statutory terms there considered would justify a finding of preemption; rather, it held that '[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.' *Id.,* at 583, 99 S.Ct. at 809. It is to that two-fold inquiry that we now turn.

"Appellant argues that California's application of community property concepts to military retire pay conflicts with federal law in two distinct ways. He contends, first, that the California court's conclusion that retired pay is 'awarded in return for services previously rendered,' see *Fithian,* . . . , 517 P.2d at 457, (Cal.), ignores clear federal law to the contrary. The community property division of military retired pay rests on the premise that pay, like a typical pension, represents deferred compensation for services performed during a marriage. . . . , 517 P.2d at 451. But appellant asserts, military retired pay in fact is currently rendered, services; accordingly, even under California law, that pay may not be treated as community property to the extent that it is earned after the dissolution of the marital community, since the earnings of a spouse while living 'separate and apart' are separate property. . . .

. . .

"(p. 2736) . . . , we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retired pay is defined as current or as deferred compensation. . . .

. . .

"(p. 2739) . . . , it is clear that Congress intended that military retires pay 'actually reach the beneficiary.' See *Hisquierdo,* 439 U.S. at 584, 99 S.Ct. at 809. Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage. In enacting the SBP, Congress rejected a provision in the House Bill, H.R.10670, that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child. See H.R.Rep. No.92-481, at 1;S.Rep.No. 92-1089, at 25. The House Report accompanying H.R.10670 noted that under *Buchanan v. Alexander,* 4 How. 20, 11 L.Ed. 857 (1845), and *Applegate v. Applegate,* 39 F.Supp. 887 (Ed.Va. 1941), military pay could not be attached so long as it was in the Government's hands; thus, this clause of H.R.10670 represented a 'drastic departure' from current law, but one that the House Committee on Armed Services believed to be necessitated by the difficulty of enforcing support orders. H.R.Rep.No. 92-481 at 17-18. Although this provision passed the House, it was not included in the Senate version of the bill. See S.Rep.No. 92-1089 at 25. Thereafter, the House acceded to the Senate's view that the attachment provision would unfairly 'single out military retirees for a form of enforcement of court orders imposed on no other employees or retired employees of the Federal Government.' 118 Cong.Rec. 30151 (1972) (remarks of Rep. Pike); S.Rep.No. 92-1089 at 25. Instead, Congress determined that the problem of the attachment of military retire pay should be considered in the context of legislation that might require all Federal pays to be subject to attachment.' *Ibid.,* 118 Cong.Rec. 30151 (1972) (remarks of Rep. Pike).

. . .

"*Hisquierdo* also pointed out that Congress might conclude that this distinction between support and community property claims is 'undesirable.' *Id.,* at 589, 99 S.Ct. at 813. Indeed, Congress recently enacted legislation that requires that Civil Service retirement benefits be paid to an ex-spouse to the extent provided for in 'the terms of any other court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.' Pub.L. 95-366, sec. 1(a), 92 Stat. 600, 5 U.S.C. sec. 8345(j)(1) (1976 ed., Supp. IV). In an even more extreme recent step, Congress amended the Foreign Service retirement legislation to provide that, as a matter of federal law, an ex-spouse is entitled to a pro rata share of Foreign Service retirement benefits. Thus, the Civil Service amendments require the United States to recognize the community property division of Civil Service retirement benefits by a state court, while the Foreign Service amendments establish a limited federal community property concept. Significantly, however, while legislation affecting military retired pay was introduced in the 96th Congress, none of those bills was reported out of committee. Thus, in striking contrast to its amendment of the Foreign Service and Civil Service retirement systems, Congress has neither authorized nor required the community property division of military pay. On the contrary, that pay continues to be the personal entitlement of the retiree.

"We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But '[a] mere conflict in words is not sufficient;' the question remains whether the 'consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition.' *Hisquierdo,* 439 U.S. at 581-583, 99 S.Ct. at 808-809. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests. See *United States v. Yazell,* 382 U.S. at 352, 86 S.Ct. at 507. Under the Constitution, Congress has the power '[t]o raise and support Armies,' '[t]o provides and maintain a Navy,' and '[t]o make Rules for the Government and Regulation of the land and naval Forces.' U.S.Const., Art. I, sec. 8, cls. 12, 13, and 14. See generally *Rostkler v. Goldberg,* 453 U.S. 57, 59, 101 S.Ct. 2646, 2649, 69 L.Ed.2d 478. Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management needs of the military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

. . .

"(p. 2743) The judgment of the California Court of Appeals is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

"*It is so ordered.*

"Justice REHNQUIST, with whom Justice BRENNAN and Justice STEWART join, dissenting.

"The Court's opinion is curious in at least two salient respects. For all its purported reliance on *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, . . . (1979), the Court fails either to quote or cite the test for preemption which *Hisquierdo* established. In that case the Court began its analysis, after noting that States 'lay on the guiding hand' in marriage law questions, by stating:

> 'On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. *Wetmore v. Markoe,* 196 U.S. 68, 77 [25 S.Ct. 172, 175, . . .] (1904).' *Id.,* at 581, 99 S.Ct. at 808.

"The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the Court cannot, even to its satisfaction, plausibly maintain that Congress has 'positively required by direct enactment' that California's community property law be preempted by provisions governing military retired pay. The most that the Court can advance are vague implications from tangentially-related enactments or Congress' failure to act. The test announced in *Hisquierdo* established that this was not enough and so the critical language from that case must be swept under the rug.

"The other curious aspect of the Court's opinion, related to the first, is the diverting analysis it provides of laws and legislative history having little if anything to do with the case at bar. The opinion, for example, analyzes at great length Congress' actions concerning the attachability of federal pay to enforce alimony and child support awards, *ante,* at 2739-2740. However interesting this subject might be, this case concerns community property rights to alimony or child support, and there has in fact been no effort by appellee to attach appellant's retired pay. To take another example, we learn all about the provisions governing Foreign Service and Civil Service retirement pay, *ante,* at 2740-2741. Whatever may be said of these provisions, it cannot be said that they are 'direct enactments' on the question whether *military retired pay may be treated as community property. The conclusion is inescapable that the Court has no solid support for the conclusion it reaches — certainly no support of the sort required by Hisquierdo* — and accordingly I dissent.

"Both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. *In re Burrus,* 136 U.S. 586, 593-594, 10 S.Ct. 850, 852-853, . . . (1890); *United States v. Yazell,* 382 U.S. 341, 349, 353, 86 S.Ct. 500, 505, 507, . . . (1966). Questions concerning the appropriate disposition of property upon the dissolution of marriage, therefore, such as the question in this case, are particularly within the control of the States, and the authority of the States should not be displaced except pursuant to the clearest direction from Congress. Only in five previous cases has this Court found preemption of community property law. An examination of those cases clearly establishes that there is no precedent supporting admission of this case to the exclusive club.

. . .

"(p. 2748) The very most that the Court establishes, therefore, is that the provisions governing arrearages and annuities preempt California's community property law. There is no support for the leap from this narrow preemption to the conclusion that the community property laws are preempted so far as military retired pay in general is concerned. Such a jump is wholly inconsistent with this Court's previous pronouncements concerning a State's power to determine laws concerning marriage and property in the absence of Congress' 'direct enactment' to the contrary, and I therefore dissent."

McKeiver v. Pennsylvania

403 U.S. 528, 91 S.Ct. 1976 (1971)

JURY TRIAL — ***Trial by jury is not constitutionally required for juveniles.***

"(p. 1979) Mr. Justice BLACKMUN announced the judgments of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice WHITE join.

"These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state Juvenile Court delinquency proceeding.

"The issue arises understandably, for the Court in a series of cases already has emphasized due process factors protective of the juvenile:

"1. *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302, . . . (1948), concerned the admissibility of a confession taken from a 15-year-old boy on trial for first degree murder. It was held that upon the facts there developed, the Due Process Clause barred the use of the confession. Mr. Justice DOUGLAS, in an opinion in which three other Justices joined, said, 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.' 332 U.S. at 601, 68 S.Ct. at 304.

"2. *Gallegos v. Colorado,* 370 U.S. 49, 82 S.Ct. 1209, . . . (1962) where a 14-year-old was on trial, is to the same effect.

"3. *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045, . . . (1966), concerned a 16-year-old charged with housebreaking, robbery, and rape in the District of Columbia. The issue was the propriety of the Juvenile Court's waiver of jurisdiction 'after full investigation,' as permitted by the applicable statute. It was emphasized that the latitude the court possessed within which to determine whether it should retain or waive jurisdiction 'assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a full investigation.' 383 U.S. at 553, 86 S.Ct. at 1053.

"4. *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967), concerned a 15-year-old, already on probation, committed in Arias a delinquent after being apprehended upon complaint of lewd remarks by telephone. Mr. Justice FORTAS, in writing for the Court, reviewed the cases just cited and observed.

> 'Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' 387 U.S. at 13, 87 S.Ct. at 1436.

"The Court focused on 'the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution' and, as to this, said that 'there appears to be little dissent from the proposition that the Due Process Clause has a role to play.' *Ibid. Kent* was adhered to: 'We reiterate this view, here in connection with a Juvenile Court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.' *Id.,* at 30-31, 87 S.Ct. at 1445. Due process, in that proceeding, was held to embrace adequate written notice; advice as to right to counsel, retained or appointed; confrontation; and cross-examination. The privilege against self-incrimination was also held available to the juvenile. The Court refrained from deciding whether a State must provide appellate review in juvenile cases or a transcript or recording of the hearings.

"5. *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, . . . (1969), presented, by state habeas corpus, a challenge to a Nebraska statute providing that Juvenile Court hearings 'shall be conducted by the judge without a jury in an informal manner.' However, because that appellant's hearing had antedated the decisions in *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, . . . (1968), and *Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477, . . . (1968), and because *Duncan* and *Bloom* had been given only prospective application by *DeStefano v. Woods,* 392 U.S. 631, 88 S.Ct. 2093, . . . (1968). DeBacker's case was deemed an inappropriate one for resolution of the jury trial issue. His appeal was therefore dismissed. Mr. Justice BLACK and Mr. Justice DOUGLAS, in separate dissents, took the position that a juvenile is entitled to a jury trial at the adjudication stage. Mr. Justice BLACK described this as 'a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world,' 396 U.S. at 34, 90 S.Ct. at 166 and Mr. Justice DOUGLAS described it as a right required by the Sixth and Fourteenth Amendments 'where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury.' 396 U.S. at 35, 90 S.Ct. at 167.

"6. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . . (1970), concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. The Court held that 'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,' 397 U.S. at 364, 90 S.Ct. at 1073, and then went on to hold, at 368, 90 S.Ct. at 1075, that this standard was applicable, too, 'during the adjudicatory stage of a delinquency proceeding.'

"From these six cases — *Haley, Gallegos, Kent, Gault, DeBacker,* and *Winship* — it is apparent that:

"1. Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation, and to cross-examination, and the privilege against self-incrimination. Included, also, is the standard of proof beyond a reasonable doubt.

"2. The Court, however, has not yet said that all rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding. Indeed, the Court specifically has refrained from going that far:

> 'We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' *Kent,* 383 U.S. at 562, 86 S.Ct. at 1057; *Gault,* 387 U.S. at 30, 87 S.Ct. at 1445.

"3. The Court, although recognizing the high hopes and aspirations of Judge Julian Mack, the leaders of the Jane Addams School and the other supporters of the Juvenile Court concept, has also noted the disappointments of the system's performance and experience and the resulting widespread disaffection. *Kent,* 383 U.S. at 555-556, 86 S.Ct. at 1054-1055; *Gault,* 387 U.S. at 17-19, 87 S.Ct. at 1438-1439. There have been, at one and the same time, both an appreciation for the Juvenile Court judge who is devoted, sympathetic, and conscientious, and a disturbed concern about the judge who is untrained and less than fully imbued with an understanding approach to the complex problems of childhood and adolescence. There has been praise for the system and its purposes, and there has been alarm over its defects.

"4. The Court has insisted that these successive decisions do not spell the doom of the Juvenile Court system or even deprived it if its 'informality, flexibility, or speed.' *Winship,* 397 U.S. at 366, 90 S.Ct. at 1074. On the other hand, a concern precisely to the opposite effect was expresses by two dissenters in *Winship. Id.,* at 375-376, 90 S.Ct. at 1078-1079. "With this substantial background already developed, we turn to the facts of the present cases:

"No. 322. Joseph McKeiver, then age 16, in May 1968 was charged with robbery, larceny, and receiving stolen goods (felonies under Pennsylvania law, Pa. Stat.Ann., Tit. 18, sec. sec. 4704, 4807, and 4817 (1963)) as acts of juvenile delinquency. At the time of the adjudication hearing he was represented by counsel. His request for a jury trial was denied and his case was heard by Judge Theodore S. Gutowicz of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, Pennsylvania. McKeiver was adjudged a delinquent upon findings that he had violated a law of the Commonwealth of Pa. Stat.Ann., Tit. 11, sec. 243(4)

(a) (1965). On appeal, the Superior Court affirmed without opinion. *In re McKeiver,* . . . , 255 A.2d 921 (Pa. 1969).

"Edward Terry, then age 15, in January 1969 was charged with assault and battery on a police officer and conspiracy (misdemeanors under Pennsylvania law, . . .) as acts of juvenile delinquency. His counsel's request for a jury trial was denied and his case was heard by Judge Joseph C. Bruno of the same Juvenile Branch of the Court of Common Pleas of Philadelphia County. Terry was adjudged a delinquent on the charges. This followed an adjudication and commitment in the preceding week for an assault on a teacher. He was committed, as he had been on the earlier charge, to the Youth Development Center at Cornwells Heights. On appeal, the Superior Court affirmed without opinion. *In re Terry,* 215 Pa.Super. 762, 255 A.2d 922 (1969).

"The Supreme Court of Pennsylvania granted leave to appeal in both cases and consolidated them. The single question considered, as phrased by the court, was 'whether there is a constitutional right to a jury trial in Juvenile Court.' The answer, one justice dissenting, was in the negative. *In re Terry,* . . . 265 A.2d 350 (Pa. 1970). We noted probable jurisdiction. 399 U.S. 925, 90 S.Ct. 2271, . . . (1970).

"The details of the *McKeiver* and *Terry* offenses are set forth in Justice Roberts' opinion for the Pennsylvania Court, 438 Pa. at 341-342, n. 1 and 2, 265 A.2d at 351 n.1 and 2, and need not be repeated at any length here. It suffices to say that McKeiver's offense was his participating with 20 or 30 youths who pursued three young teenagers and took 25 cents from them; that McKeiver never before had been arrested and had a record of gainful employment; that the testimony of two of the victims was described by the court as somewhat inconsistent and as 'weak;' and that Terry's offense consisted of hitting a police officer with his fists and with a stick when the officer broke up a boys' fight Terry and others were watching.

"No. 128. Barbara Burrus and approximately 45 other Black children, ranging in age from 11 to 15 years, were the subjects of Juvenile Court summonses issued in Hyde County, North Carolina, in January 1969.

"The charges arose out of a series of demonstrations in the county in late 1968 by Black adults and children protesting school assignments and a school consolidation plan. Petitions were filed by North Carolina state highway patrolmen. Except for one relating to James Lambert Howard, the petitions charged the respective juveniles with willfully impeding traffic. The charge against Howard was that he willfully made riotous noise and was disorderly in the O.A. Peay School in Swan Quarter; interrupted and disturbed the school during its regular sessions; and defaced school furniture. The acts so charged are misdemeanors under North Carolina law. . . .

"The several cases were consolidated into groups for hearing before District Judge Hallet S. Ward, sitting as a Juvenile Court. The same lawyer appeared for all the juveniles. Over counsel's objection, made in all except two of the cases, the general public was excluded. A request for a jury trial in each case was denied.

"The evidence as to the juveniles other than Howard consisted solely of testimony of highway patrolmen. No juvenile took the stand or offered any witness, The testimony was to the effect that on various occasions the juveniles and adults were observed walking along Highway 64 singing, shouting, clapping, and playing basketball. As a result, there was interference with traffic. The marchers were asked to leave the paved portion of the highway and they were warned that they were committing a statutory offense. They either refused or left the roadway and immediately returned. The juveniles and participating adults were taken into custody. Juvenile petitions were then filed with respect to those under the age of 16.

"The evidence as to Howard was that on the morning of December 5, he was in the office of the principal of the O.A. Peay School with 15 other persons while school was in session and was moving furniture around; that the office was in disarray; that as a result the school closed before noon; and that neither he nor any of the others was a student at the school or authorized to enter the principal's office.

"In each case the court found that the juvenile had committed 'an act for which an adult may be punished by law.' A custody order was entered declaring the juvenile a delinquent 'in need of more suitable guardianship' and committing him to the custody of the County Department of Public Welfare for placement in a suitable institution 'until such time as the Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State.' The court, however, suspended these commitments and

placed each juvenile on probation for either one or two years conditioned upon his violating none of the State's laws, upon his reporting monthly to the County Department of Welfare, upon his being home by 11 p.m. each evening, and upon his attending a school approved by the by the Welfare Director. None of the juveniles has been confined on these charges.

"On appeal, the cases were consolidated into two groups. The North Carolina Court of Appeals affirmed. *In re Burrus,* . . . 167 S.E.2d 454 (N.C. 1969); *In re Shelton,* . . . 168 S.E.2d 695 (N.C. 1969). In its turn the Supreme Court of North Carolina deleted that portion of the order in each case relating to commitment, but otherwise affirmed. *In re Burrus,* . . . 169 S.E.2d 879 (N.C. 1969). Two justices dissented without opinion. We granted *certiorari.* . . .

"It is instructive to review, as an illustration, the substance of Justice ROBERTS' opinion for the Pennsylvania court. He observes, 438 Pa. at 343, 254 A.2d at 352, that '[f]or over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the Juvenile Court area;' that *Gault* 'is somewhat of a paradox, being both broad and narrow at the same time;' that it 'is broad in that it evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the Juvenile Court system;' that it is narrow because the court enumerated four due process rights which it held applicable in juvenile proceedings, but declined to rule on two other claimed rights, *id.,* at 344-345, 265 A.2d at 353; that as a consequence the Pennsylvania court was 'confronted with a sweeping rationale and a carefully tailored holding,' *id.,* at 345, 265 A.2d at 353; that the procedural safeguards *Gault* specifically made applicable to Juvenile Courts have already caused a significant 'constitutional domestication' of Juvenile Court proceedings,' *id.,* at 346, 265 A.2d at 354; that those safeguards and other rights, including the reasonable-doubt standard established by *Winship,* 'insure that the Juvenile Court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal and at the same time informal enough to permit the benefits of the juvenile system to operate' (footnote omitted), *id.,* at 347, 265 A.2d. at 354; that the 'proper inquiry, then, is whether the right to a trial by jury is 'fundamental' within the meaning of *Duncan,* in the context of a Juvenile Court which operates with all of the above constitutional safeguards,' *id.,* at 348, 265 A.2d at 354; and that his court's inquiry turned 'upon whether there are elements in the juvenile process which render the right to a trial by jury less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process.' *Ibid.*

"Justice ROBERTS then concluded that such factors do inhere in the Pennsylvania juvenile system: (1) Although realizing that 'faith in the quality of the juvenile bench is not an entirely satisfactory substitute for due process,' *id.,* at 348, 265 A.2d at 355, the judges in the Juvenile Courts 'to take a different view of their role than that taken by their counterparts in the criminal courts.' *Id.,* at 348, 265 A.2d at 354-355. (2) While one regrets its inadequacies, 'the juvenile system has available and utilizes much more fully various diagnostic and rehabilitative services' that are 'far superior to those available in the regular criminal process.' *Id.,* at 348-349, 265 A.2d at 355. (3) Although conceding that the post-adjudication process 'has in many respects fallen far short of its goals, and its reality is far harsher than its theory,' the end result of a declaration of delinquency *'is* significantly different from and less onerous than a finding of criminal guilt' and 'we are not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth.' (4) Finally, 'of all the possible due process rights which could be applied in the Juvenile Courts, the right to trial by jury is the one which would most likely be disruptive of the unique nature of the juvenile process.' It is the jury trial that 'would probably require substantial alteration of the traditional practices.' The other procedural rights held applicable to the juvenile process 'will give the juveniles sufficient protection' and the addition of the trial by jury 'might well destroy the traditional character of juvenile proceedings.' *Id.,* at 349-350, 265 A.2d at 355.

"The court concluded, *id.,* at 350, 265 A.2d at 356, that it was confident 'that a properly structured and fairly administered Juvenile Court system can serve our present societal needs without infringing on individual freedoms.'

"The right to an impartial jury '[i]n all criminal prosecutions' under federal law is guaranteed by the Sixth Amendment. Through the Fourteenth Amendment that requirement has now been imposed upon the States 'in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee.' This is because the Court has said it believes 'that trial by jury in criminal cases is fundamental to the American scheme of

justice.' *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, . . . (1968); *Bloom v. Illinois,* 391 U.S. 194, 210-211, 88 S.Ct. 1477, 1486-1487, . . . (1968).

"This, of course, does not automatically provide the answer to the present jury trial issue, if for no other reason than that the Juvenile Court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label. *Kent,* 383 U.S. at 554, 86 S.Ct. at 1054; *Gault,* 387 U.S. at 17, 49-50, 87 S.Ct. at 1438, 1455-1456; *Winship,* 397 U.S. at 365-366, 90 S.Ct. at 1073-1074.

"Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.' The Court carefully has avoided this wooden approach. Before *Gault* was decided in 1967, the Fifth Amendment's guarantee against self-incrimination had been imposes upon the state criminal trial. *Malloy v. Hogan,* 378 U.S. 84 S.Ct. 1489, . . . (1964). So, too, had the Sixth Amendment's rights of confrontation and cross-examination. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, . . . (1965), and *Douglass v. Alabama,* 380 U.S. 400, 85 S.Ct. 1074, . . . (1965). Yet the Court did not automatically and peremptorily apply those rights to the juvenile proceeding. A reading of *Gault* reveals the opposite. And the same separate approach to the standard-of-proof issue is evident from the carefully separated application of the standard, first to the criminal trial, and then to the juvenile proceeding, displayed in *Winship.* 397 U.S. at 361 and 365, 90 S.Ct. at 1071 and 1073.

"Thus, accepting 'the proposition that the Due Process Clause has a role to play,' *Gault,* 387 U.S. at 13, 87 S.Ct. at 1436, our task here with respect to trial by jury, as it was in *Gault* with respect to other claimed rights, 'is to ascertain the precise impact of the due process requirement.' *Id.,* at 13-14, 87 S.Ct. at 1436.

"The Pennsylvania juveniles' basic argument is that they were tried in proceedings 'substantially similar to a criminal trial.' They say that a delinquency proceeding in their State is initiated by a petition charging a penal code violation in the conclusory language of an indictment; that a juvenile detained prior to trial is held in a building substantially similar to an adult prison; that in Philadelphia juveniles over 16 are, in fact, held in the cells of a prison; that counsel and the prosecution engage in plea bargaining; that motions to suppress are routinely heard and decided; that the usual rules of evidence are applied; that the customary common-law defenses are available; that the press is generally admitted in the Philadelphia Juvenile Courtrooms; that members of the public enter the room; that arrest and prior record may be reported by the press (from police sources, however, rather than from the Juvenile Court records); that, once adjudged delinquent, a juvenile may be confined until his majority in what amounts to a prison (see *In re Bethea,* 215 Pa.Super. 75, 76, 257 A.2d 368, 369 (1969), describing the state correctional institution at Camp Hill as a 'maximum security prison for adjudged delinquents and youthful criminal offenders'); and that the stigma attached upon delinquency adjudication approximated that resulting from conviction in an adult criminal proceeding.

"The North Carolina juveniles particularly urge that the requirement of a jury trial would not operate to deny the supposed benefits of the Juvenile Court system; that the system's primary benefits are its discretionary intake procedure permitting disposition short of adjudication, and its flexible sentencing permitting emphasis on rehabilitation; that realization of these benefits does not depend upon dispensing with the jury; that adjudication of factual issues on the one hand and disposition of the case on the other are very different matters with very different purposes; that the purpose of the former is indistinguishable from that of the criminal trial; that the jury trial provides an independent protective factor; that experience has shown that jury trials in Juvenile Courts are manageable; that no reason exists why protection traditionally accorded in criminal proceedings should be denied young people subject to involuntary incarceration for lengthy periods; and that the Juvenile Courts deserve healthy public scrutiny.

"All the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship,* is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on fact-finding procedures. The requirement of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate fact-finding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have

they been generally used in military trials. In *Duncan* the Court stated, 'We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' 391 U.S. at 158, 88 S.Ct. at 1452. In *DeStefano,* for this reason and others, the Court refrained from retrospective application of *Duncan,* an action it surely would have not taken had it felt that the integrity of the result was seriously at issue. And in *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. at 1893, . . . (1970), the Court saw no particular magic in a 12-man jury for a criminal case, thus revealing that even jury concepts themselves are not inflexible.

"We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the Juvenile Court proponents and early reformers of three generations ago have not been realized. The devastating commentary upon the system's failures as a whole, contained in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 7-9 (1967), reveals the depth of disappointment in what has been accomplished. Too often the Juvenile Court judge falls far short of that stalwart, protective, and communicating figure the system envisaged. The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.

"The Task Force Report, however, also said, *id.,* at 7, 'To say that Juvenile Courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest.'

"Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the Juvenile Court's adjudicative stage is not a constitutional requirement. We so conclude for a number of reasons:

"1. The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposes upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth v. Johnson,* . . . 234 A.2d 9, 15 (Pa. 1967):

> 'It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the Juvenile Court system. It is seeking to reverse the trend [pointed out in *Kent,* 383 U.S. at 556, 86 S.Ct. 1045] whereby 'the child receives the worst of both worlds: ***.'

"2. There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal proceeding.

"3. The Task Force Report, although concededly pre-*Gault,* is notable for its not making any recommendation that the jury trial be imposed upon the Juvenile Court system. This is so despite its vivid description of the system's deficiencies and disappointments. Had the Commission deemed this vital to the integrity of the juvenile process, or to the handling of juveniles, surely a recommendation or suggestion to this effect would have appeared. The intimations, instead, are quite the other way. Task Force Report 38. Further, it expressly recommends against the return of the juvenile to the criminal courts.

"4. The Court specifically has recognized by dictum that a jury is not a necessary part of every criminal process that is fair and equitable. *Duncan v. Louisiana,* 391 U.S. at 149-150, n. 14, and 158, 88 S.Ct. at 1447, and 1452.

"5. The imposition of the jury trial on the Juvenile Court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the Juvenile Court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.

"6. The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its

rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experience further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation.

"7. Of course there have been abuses. The Task Force Report has noted them. We refrain from saying at this point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication rather than to inherent unfairness.

"8. There is, of course, nothing to prevent a Juvenile Court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.

"9. The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, . . . (1934); *Leland v. Oregon,* 343 U.S. 790, 798 72 S.Ct. 1002, 1007, . . . (1952). It therefore is of more than passing interest that at least 28 States and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these. The same result is achieved in other States statutes provide for a jury trial under certain circumstances.

"10. Since *Gault* and since *Duncan* the great majority of States, in addition to Pennsylvania and North Carolina, that have faced the issue have concluded that the considerations that led to the result in those two cases do not compel trial by jury in the Juvenile Court. . . .

"11. Stopping short of proposing the jury trial for juvenile proceedings are the Uniform Juvenile Court Act, sec. 24(a), approved in July 1968 by the National Conference of Commissioners on Uniform State Laws; the Standard Juvenile Court Act, Art. V, sec. 19, proposed by the National Council on Crime and Delinquency (see W. Sheridan, Standards for Juvenile and Family Courts) (73 Dept. of H.E.W., Children's Bureau Pub. No. 437-1966); and the Legislative Guide for Drafting Family and Juvenile Court Acts sec. 29(a) (Dept. of H.E.W., Children's Bureau Pub. No. 472-1969).

"12. If the jury trial were to be injected into the Juvenile Court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial. It is of interest that these very factors were stresses by the District Committee of the Senate when, through Senator Tydings, it recommended, and Congress then approved, as a provision in the District of Columbia Crime Bill, the abolition of the jury trial in the Juvenile Court. S.Rep.No. 91-620, p. 13-14 (1969).

"13. Finally, the arguments advanced by the juveniles here are, of course, the identical arguments that underlie the demand for the jury trial for criminal proceedings. The arguments necessarily equate the juvenile proceeding — or at least the adjudicative phase of it — with the criminal trial. Whether they should be so equated is our issue, concern about the inapplicability of exclusionary and other rules of evidence, about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers — all to the effect that this will create the likelihood of pre-judgment —chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the Juvenile Court system contemplates.

"If the formalities of the criminal adjudicative process are to be superimposed upon the Juvenile Court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

"Affirmed.

"Mr. Justice WHITE, concurring.

"Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations

of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the plurality opinion concluding that the States are not required by that clause to afford jury trials in Juvenile Courts where juveniles are charged with improper acts.

"The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others that they must be punished to deter them and others from crime. Guilty defendants are considered blameworthy they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system.

"For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the State legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the Juvenile Court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.

"Against this background and in light of the distinctive purpose of requiring juries in criminal cases, I am satisfied with the Court's holding. To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the Juvenile Court system to a great extent obviate this important function of the jury. As for the necessity to guard against judicial bias, a system eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice. Nor where juveniles are involved is there the same opportunity for corruption to the juvenile's detriment or the same temptation to use the courts for political ends.

"Not only are those risked that mandate juries in criminal cases of lesser magnitude in juvenile adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt. This is plainly so in theory, and in practice there remains a substantial gulf between criminal guilt and delinquency, whatever the failings of the Juvenile Court in practice may be. Moreover, to the extent that current unhappiness with Juvenile Court performance rests on dissatisfaction with the vague and over-broad grounds for delinquency adjudications, with faulty judicial choice as to disposition after adjudication, or with the record of rehabilitative custody, whether institutional or probationary, these shortcomings are in no way mitigated by providing a jury at the adjudicative stage.

"For me there remain differences of substance between criminal and Juvenile Courts. They are quite enough for me to hold that a jury is not required in the latter. Of course, there are strong arguments that juries are desirable when dealing with the young, and States are free to use juries if they choose. They are also free if they extend criminal court safeguards to Juvenile Court adjudications, frankly to embrace condemnation, punishment, and deterrence as permissible and desirable attributes of the juvenile justice system. But the Due Process Clause neither compels nor invites them to do so.

"Mr. Justice BRENNAN, concurring in the judgment in No. 322 and dissenting in No. 128.

"I agree with the plurality opinion's conclusion that the proceedings below in these cases were not 'criminal prosecutions' within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the 'essentials of due process and fair treatment,' *In re Gault,* 387 U.S. 1, 30, 87 S.Ct. 1428, 1445, . . . (1967), required during the adjudication of a charge of delinquency based upon acts that would constitute a crime if engaged in by an adult. See *In re Winship,* 397 U.S. 358, 359, 90 S.Ct. 1068, 1070, . . . (1970). This does not, however, mean that the interests protected by the Sixth Amendment's guarantee of jury trial in all 'criminal prosecutions' are of no importance in the context of these cases. The Sixth

Amendment, where applicable, commands, not a particular procedure, but only a result: in my Brother BLACKMUN's words, 'fundamental fairness *** [in] fact-finding.' In the context of these and similar juvenile delinquency proceedings, what this means is that the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve.

"In my view, therefore, the due process question cannot be decided upon the basis of general characteristics of juvenile proceedings, but only in terms of the adequacy of a particular state procedure to 'protect the [juvenile] from oppression by the Government,' *Singer v. United States,* 380 U.S. 24, 31, 85 S.Ct. 783, 788, . . . (1965), and to protect him against 'the complaint, biased, or eccentric judge.' *Duncan v. Louisiana,* 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, . . . (1968).

"Examined in this light, I find no defect in the Pennsylvania cases before us. The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case. To some extent, however, a similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation. Of course, the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitution for trial by jury in serious cases. But in the context of juvenile delinquency proceedings, I cannot say that it is beyond the competence of a State to conclude that juveniles who fear that delinquency proceedings will mask judicial oppression may obtain adequate protection by focusing community attention upon the trial of their cases. For, however much the juvenile system may have failed in practice, its very existence as an ostensibly beneficent and noncriminal process for the care and guidance of young persons demonstrates the existence of the community's attention to bear upon a reservoir of public concern unavailable to the adult criminal defendant. In the Pennsylvania cases before us, there appears to be no statutory ban upon admission of the public to juvenile trials. Appellants themselves, without contradiction, assert that 'the press is generally admitted' to juvenile delinquency proceedings in Philadelphia. Most important, the record in these cases is bare of any indication that any person whom appellants sought to have admitted to the courtroom was excluded. In these circumstances, I agree that the judgment in No. 322 must be affirmed.

"The North Carolina cases, however, present a different situation. North Carolina law permits or requires exclusion of the general public from juvenile trials. In the cases before us, the trial judge 'ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing,' *In re Burrus,* 4 N.C.App. 523, 525, 167 S.E.2d 454, 456 (1969), notwithstanding petitioners' repeated demand for a public hearing. The cases themselves, which arise out of a series of demonstration by black adults and juveniles who believed that the Hyde County, North Carolina, school system unlawfully discriminated against Black school children, present a paradigm of the circumstances in which there may be a substantial 'temptation to use the courts to political ends.' Opinion of Mr. Justice WHITE, *ante* at 1990. And finally, neither the opinions supporting the judgment nor the respondent in No. 128 has pointed to any feature of North Carolina's juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process. Cf. *Duncan v. Louisiana,* 391 U.S. 145, 188, 193, 88 S.Ct. 1444, 1469, 1472, . . . (1968) (HARLAN, J., dissenting) (availability of resort to 'the political process' is an alternative permitting States to dispense with jury trial). Accordingly, I would reverse the judgment in No 128.

"Mr. Justice HARLAN, concurring in the judgments.

"If I felt myself constrained to follow *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, . . . (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN's opinion, in holding that the jury trial right does not extend to State juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in *In re Gault,* 387 U.S. 1, 65, 87 S.Ct. 1428, 1463, . . . (1967). If that premise be correct, then I do not see why, given

Duncan, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of *Duncan,* that juvenile delinquency proceedings are beyond the pale of *Duncan.*

"I concur in the judgments in these cases, however, on the ground that criminal jury trials are not constitutionally required of the States either as a matter of Sixth Amendment law or due process. See my concurring and dissenting opinion in *Duncan* and my separate opinion in *Williams v. Florida,* 339 U.S. 78, 118-119, 90 S.Ct. 1893, 1915-1916, . . . (1970).

"Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MARSHALL concur dissenting.

"These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in Juvenile Court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

"In the Pennsylvania cases one of the appellants was charged with robbery . . . , larceny . . . , and receiving stolen goods . . . as acts of juvenile delinquency. . . . He was found delinquent and placed on probation. The other appellant was charged with assault and battery on a police officer . . . and conspiracy. On a finding of delinquency he was committed to a youth center. Despite the fact that the two appellants, aged 15 and 16, would face potential incarceration until their majority, . . . , they were denied a jury trial.

"In the North Carolina cases petitioners are students, from 11 to 15 years of age, who were charged under one of three criminal statutes: (1) 'disorderly conduct' in a public building, . . . ; (2) 'wilful' interruption or disturbance of a public or private school, . . . ; or (3) obstruction the flow of traffic on a highway or street, ...

"Conviction of each of these crimes would subject a person, whether juvenile or adult, to imprisonment in a State institution. In the case of these students the possible term was six to 10 years; it would be computed for the period until an individual reached the age of 21. Each asked for a jury trial which was denied. The trial judge stated that the hearings were juvenile hearings, not criminal trials. But the issue in each case was whether they had violated a State criminal law. The trial judge found in each case that the juvenile had committed 'an act for which an adult may be punished by law' and held in each case that the acts of the juvenile violated one of the criminal statutes cited above. The trial judge thereupon ordered each juvenile to be committed to the state institution for the care of delinquents and then placed each on probation for terms from 12 to 24 months.

"We held in *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . , that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' As we noted in that case, the Juvenile Court movement was designed to avoid procedures to ascertain whether the child was 'guilty' or 'innocent' but to bring to bear on these problems a 'clinical' approach. *Id.,* at 15, 16, 87 S.Ct. at 1437, 1438. It is, of course, not our task to determine as a matter of policy whether a 'clinical' or 'punitive' approach to these problems should be taken by the States. But where a State uses its Juvenile Court proceedings to prosecute a juvenile for a criminal act to order 'confinement' until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitle to the same procedural protection as an adult. As Mr. Justice BLACK said in *In re Gault, supra,* at 51, 87 S.Ct. at 1461 (concurring):

> 'Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be plain denial of equal protection of the laws — an invidious discrimination — to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards.'

"Just as courts have sometimes confused delinquency with crime, so have law enforcement officials treated juveniles not as delinquents but as criminals. As noted in the President's Crime Commission Report:

'In 1965, over 100,000 juveniles were confined in adult institutions. Presumably most of them were there because no separate juvenile detention facilities existed. Nonetheless, it is clearly undesirable that juveniles be confined with adults.' President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society 179 (1967).'

"Even when juveniles are not incarcerated with adults the situation may be no better. One Pennsylvania correctional institution for juveniles is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire, and guard towers. A former juvenile judge described it as 'a maximum security prison for adjudged delinquents.' *In re Bethea,* 215 Pa.Super. 75, 76, 257 A.2d 368, 369.

"In the present cases imprisonment or confinement up to 10 years was possible for one child and each faced at least a possible five-year incarceration. No adult could be denied a jury trial in those circumstances. *Duncan v. Louisiana,* 391 U.S. 145, 162, 88 S.Ct. 1444, 1454. . . . The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to 'any person,' not denial of rights to 'any adult person;' and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to be tried under a standard of proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . .

"In *DeBacker v. Brainard,* 396 U.S. 28, 33, 35, 90 S.Ct. 163, 166, 167, . . . Mr. Justice BLACK and I dissented from a refusal to grant a juvenile, who was charged with forgery, a jury trial merely because the case was tried before *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, . . . , was decided. Mr. Justice BLACK, after noting that a juvenile being charged with a criminal act was entitled to certain constitutional safeguards, viz., notice of the issues, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against him, added:

'I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights and yet denying then a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world.' 396 U.S. at 34, 90 S.Ct. at 166.

"I added that by reason of the Sixth and Fourteenth Amendments the juvenile is entitled to a jury trial

'as a matter of right where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury. Such is this case, for behind the facade of delinquency is the crime of forgery.' *Id.,* at 35, 90 S.Ct. at 167.

"Practical aspects of these problems are urged against allowing a jury trial in these cases.* They have been answered by Judge De Ciantis of the Family Court of Providence, Rhode Island, in a case entitled *In Matter of McCloud,* decided January 15, 1971. A juvenile was charged with rape of a 17-year-old female and Judge De Ciantis granted a motion for a jury trial in an opinion, a part of which I have attached as an appendix to this dissent. He there concludes that 'the real traumatic' experience of incarceration without due process is 'the feeling of being deprived of the basic rights.' He adds:

'The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children who come before the court come from broken homes, from ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be true beginning of the rehabilitative process.'

"Judge De Ciantis goes on to say that '[t]rial by jury will provide the child with a safeguard against being prejudged' by a judge who may well be prejudiced by reports already submitted to

him by the police or caseworkers in the case. Indeed the child, the same as the adult, is in the category of those described in the *Magna Carta:*

> 'No free man may be *** imprisoned *** except by the lawful judgment of his peers, or by the law of the land.'

"These cases should be remanded for trial by jury on the criminal charges filed against these youngsters."

McNeil v. Director, Patuxent Institution

407 U.S. 245, 92 S.Ct. 2083 (1972)

CIVIL COMMITMENT - Contempt - Self-Incrimination — ***A person convicted of a crime and then confined*** **ex parte** *for mental observation cannot beyond for an unreasonable time without a hearing, his refusal to talk to the psychiatrists cannot be treated as contempt without a hearing, and (per the concurring opinion) he can refuse to talk to anyone while appeals are pending in the criminal conviction on self-incrimination grounds.*

"Mr. Justice MARSHALL delivered the opinion of the Court.

"Edward McNeil was convicted of two assaults in 1966, and sentenced to five years' imprisonment. Instead of committing him to prison, the sentencing court referred him to the Patuxent Institution for examination, to determine whether he should be committed to that institution for an indeterminate term under Maryland's Defective Delinquency Law. . . . No such determination has yet been made, his sentence has expired, and his confinement continues. The State contends that he has refused to cooperate with the examining psychiatrists, that they have been unable to make any valid assessment of his condition, and that consequently he may be confined indefinitely until he cooperated and the institution has succeeded in making its evaluation. He claims that when his sentence expired, the State lost its power to hold him, and that his continued detention violates his rights under the Fourteenth Amendment. We agree.

"The Maryland Defective Delinquency Law provides that a person convicted of any felony, or certain misdemeanors, may be committed to the Patuxent Institution for an indeterminate period, if it is judicially determined that he is a 'defective delinquent.' A defective delinquent is defined as:

> 'an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.' Md.Ann.Code, Art. 31B, sec. 5.

"Defective delinquency proceedings are ordinarily instituted immediately after conviction and sentencing; they may also be instituted immediately after conviction and sentencing; they may also be instituted after the defendant has served part of his prison term. . . . In either event, the process begins with a court order committing the prisoner to Patuxent for a psychiatric examination. . . . The institution is required to submit its report to the court within a fixed period of time. . . . If the report recommends commitment, then a hearing must be promptly held, with a jury trial if requested by the prisoner, to determine whether he should be committed as a defective delinquent. . . . If he is so committed, then the commitment operates to suspend the prison sentence previously imposed. . . .

"In *Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 92 S.Ct. 2091, . . . several prisoners who had been committed as defective delinquents sought to challenge various aspects of the criteria and procedures that resulted in their commitment; we granted *certiorari* in that case together with this one, in order to consider together these challenges to the Maryland statutory scheme. For various reasons we decline today to reach those questions, . . . But Edward McNeil presents a much more stark and simple claim. He has never been committed as a defective delinquent, and thus he has no cause to challenge the criteria and procedures that control a defective delinquency hearing. His confinement rests wholly on the order committing

him for examination, in preparation for such a commitment hearing. That order was made, not on the basis of an adversary hearing, but on the basis of an *ex parte* judicial determination that there was 'reasonable cause to believe that the defendant may be a defective delinquent.' Petitioner does not challenge in this Court the power of the sentencing court to issue such an order in the first instance, but he contends that the State's power to hold him in the basis of that order has expired. He filed a petition for state post-conviction relief on this ground, *inter alia,* . . . The trial court denied relief, holding that '[a] person referred to Patuxent . . . for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has expired.' . . . The Court of Appeals of Maryland denied leave to appeal. . . . We granted *certiorari.* . . .

"The State of Maryland asserts the power to confine petitioner indefinitely, without ever obtaining a judicial determination that such confinement is warranted. Respondent advances several distinct arguments in support of that claim.

"A. First, respondent contends that petitioner has been committed merely for observation, and that a commitment for observation need not be surrounded by the procedural safeguards (such as an adversary hearing) that are appropriate for a final determination of defective delinquency. Were the commitment for observation limited in duration to a brief period, the argument might have some force. But petitioner has been committed 'for observation' for six years, and on respondent's theory of his confinement there is no reason to believe it likely that he will ever be released. A confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation.

"We recently rejected a similar argument in *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, . . . (1972), when the State sought to confine indefinitely a defendant who was mentally incompetent to stand trial on his criminal charges. The State sought to characterize the commitment as temporary, and on that basis to justify reduced substantive and procedural safeguards. We held that because the commitment was permanent in its practical effect, it required safeguards commensurate with a long-term commitment. *Id.,* at 723-730, 92 S.Ct. at 1850-1854. The other half of the *Jackson* argument is equally relevant here. If the commitment is properly regarded as a short-term confinement with a limited purpose, as the respondent suggests, then lesser safeguards may be appropriate, but by the same token, the duration of the confinement must be strictly limited. '[D]ue process requires that the nature and duration of confinement bear some reasonable relation to the purpose for which the individual is committed.' *Id.,* at 738, 92 S.Ct. at 1858. Just as that principle limits the permissible length of a commitment on account of incompetence to stand trial, so it also limits the permissible length of a commitment 'for observation.' We need not set a precise time limit here; it is noteworthy, however, that the Maryland statute itself limits the observation period to a maximum of six months. While the State Courts have apparently construed the statute to permit extensions of time, . . . nevertheless the initial legislative judgment provides a useful benchmark. In this case it is sufficient to note that the petitioner has been confined for six years, and there is no basis for anticipating that he will ever be easier to examine than he is today. In these circumstances, it is a denial of due process to continue to hold him on the basis of an *ex parte* order committing him for observation.

"Petitioner claims that he has a right under the Fifth Amendment to withhold cooperation, a claim we need not consider here. But putting that claim to one side, there is nevertheless a fatal flaw in respondent's argument. For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt. At such a hearing it could be ascertained whether petitioner's conduct is willful, or whether it is a manifestation of mental illness, for which he cannot fairly be held responsible. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, . . . (1962). Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply. *Maggio v. Zeitz,* 333 U.S. 56, 68 S.Ct. 401, . . . (1948). Moreover, a hearing would provide the appropriate forum for resolution of petitioner's Fifth Amendment claim. Finally, if the petitioner's confinement were explicitly premised on a finding of contempt, then it would be appropriate to consider what limitations the Due Process Clause places on the contempt power. The precise contours of that power need not be traced here. It is enough to note that petitioner has been confined, potentially for life,

although he has never been determined to be in contempt by a procedure that comports with due process. The contempt analogy cannot justify the State's failure to provide a hearing of any kind.

"C. Finally, respondent suggests that petitioner is probably a defective delinquent, because most non-cooperators are. Hence, it is argued, his confinement rests not only on the purposes of observation, and of penalizing contempt, but also on the underlying purposes of the Defective Delinquency Law. But that argument proves too much. For if the Patuxent staff members were prepared to conclude, on the basis of petitioner's silence and their observations of him over the years, that petitioner is a defective delinquent, then it is not true that he has prevented them from evaluating him. On that theory, they have long been ready to make their report to the court, and the hearing on defective delinquency could have gone forward.

"Petitioner is presently confined in Patuxent without any lawful authority to support that confinement. His sentence having expired, he is no longer within the class of persons eligible for commitment to the Institution as a defective delinquent. Accordingly, he is entitled to be released. The judgment below is reversed, and the mandate shall issue forthwith.

"Reversed.

"Mr. Justice DOUGLAS, concurring.

. . .

"(p. 2089) McNeil's refusal to submit to that questioning is not quixotic; it is based on his Fifth Amendment right to be silent. McNeil remains confined without any hearing whatsoever as to whether he has a propensity toward criminal activity and without any hope of having a hearing unless he surrenders his right against self-incrimination.

"The Fifth Amendment prohibition against compulsory self-incrimination is applicable to the States by reason of the Fourteenth. *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, . . . The protection extends to refusal to answer questions where the person 'has reasonable cause to apprehend danger from a direct answer.' *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, . . . ; see *Spevack v. Klein,* 385 U.S. 479, 486, 71 S.Ct. 625, . . . The questioning of McNeil is in a setting and has a goal pregnant with both potential and immediate danger. To be labeled a 'defective delinquent,' McNeil must have demonstrated a 'persistent aggravated antisocial or criminal behavior' and a propensity toward criminal activity.' . . .

"McNeil was repeatedly interrogated not only about the crime for which he was convicted but for many other alleged antisocial incidents going back to his sophomore year in high school. One staff member after interviewing McNeil reported: 'He adamantly and vehemently denies, despite the police reports, that he was involved in the offense;' 'Further questioning revealed that he had stolen some shoes but he insisted that he did not know that they were stolen; . . . ' 'but in the tenth grade he was caught taking some milk and cookies from the cafeteria;' 'He consistently denied his guilt in all these offenses;' 'He insisted that he was not present at the purse snatching;' 'He was adamant in insisting on this version of the offense despite the police report which was in the brief and which I had available and discussed with him;' 'He continued his denial into a consideration of a juvenile offense . . . ;' 'He denies the use of all drugs and narcotics;' ' . . . I explained to him that it might be of some help to him if we could understand why he did such a thing but this was to no avail.' Brief for Petitioner 36, n. 43.

"Some of the questioning of McNeil was at a time when his conviction was on direct appeal or when he was seeking post-conviction relief. Concessions or confessions obtained might be useful to the State on a retrial or might vitiate post-conviction relief. Moreover, the privilege extends to every 'link in a chain of evidence sufficient to connect' the person with the crime. *Malloy v. Hogan,* 378 U.S. at 13, 84 S.Ct. at 1496. Whether or not a grant of immunity would give the needed protection in this context is irrelevant, because we are advised that there is no such immunity under State laws.

"Finally, the refusal to answer results in severe sanctions, contrary to the constitutional guarantee.

"First, the staff refuses to diagnose him, no matter how much information they may have, unless he talks. The result is that he never receives a hearing and remains at Patuxent indefinitely.

"Second, if he talks and a report is made and he is committed as a 'defective delinquent,' he is no longer confined for any portion of the original sentence. . . . If he does not talk, McNeil's sentence continues to run until it expires and yet he is kept at Patuxent indefinitely. We are indeed advised by the record in the *Murel* case that *20%* of Patuxent inmates at that time were

serving beyond their expired sentences and of those paroled between 1955 and 1965, 46% had served beyond their expired sentences.

"Whatever the Patuxent procedures may be called — whether civil or criminal — the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault,* 387 U.S. 1, 49-50, 87 S.Ct. 1428, 1455-1456, . . . there is the threat of self-incrimination whenever there is 'a deprivation of liberty;' and there is such a deprivation whatever the name of the institution, if a person is held against his will.

"It is elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard. *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . ; *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, ...

"McNeil must be discharged forthwith."

New Jersey v. T.L.O.

469 U.S. 325, 105 S.Ct. 733 (1985)

SEARCH (Schools) — *School officials are subject to the constitutional prohibition against unreasonable searches and seizures.*

"(p. 735) Justice WHITE delivered the opinion of the Court.

"We granted *certiorari* in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

"On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all. Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also notice a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marijuana. Suspecting that a close reexamination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly.The search revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.

"Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marijuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. *State ex rel. T.L.O.,* . . . , 428 A.2d 1327 (N.J. 1980). Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that:

> 'a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.' *Id.,* . . . , 428 A.2d at 1333 (emphasis in original).

"Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of marijuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. *Id.*, . . . , 428 A.2d at 1334. Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

"On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T.L.O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *State ex rel. T.L.O.*, . . . , 448, A.2d 493 (N.J. 1982). T.L.O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T.L.O.'s purse. *State ex rel. T.L.O.*, . . . , 463 A.2d 934 (1983).

"The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that 'if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings.' *Id.*, . . . , 463 A.2d at 939 (footnote omitted).

"With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official 'has reasonable grounds to believe that a student possesses evidence of illegal activity that would interfere with school discipline and order.' *Id.*, . . . , 463 A.2d at 941-942. However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T.L.O.'s purse had no bearing on the accusation against T.L.O., for possession of cigarettes (as opposed to smoking in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T.L.O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T.L.O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive 'rummaging' through T.L.O.'s papers and effects that followed. *Id.*, . . . , 463 A.2d at 942-943.

"We granted the State of New Jersey's petition for *certiorari*. . . . Although the State has argued in the Supreme Court of New Jersey that the search of T.L.O.'s purse did not violate the Fourth Amendment, the petition for *certiorari* raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

"Although we originally granted *certiorari* to decide the issue of the appropriate remedy in Juvenile Court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.

"In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable

searches and seizures applies to searches conducted by public school officials. We hold that it does.

"It is now beyond dispute that 'the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.' *Elkins v. United States,* 364 U.S. 206, 213, 80 S.Ct. 1437, 1442, . . . 1669 (1960); accord, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, . . . (1961); *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, . . . (1949). Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.' *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, . . . (1943).

"These two propositions — that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment — might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.

"It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown. See *United States v. Chadwick,* 433 U.S. 1, 7-8, 97 S.Ct. 2476, 2481, . . . (1977); *Boyd v. United States,* 116 U.S. 616, 624-629, 6 S.Ct. 524, 528-531, . . . (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long-spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action' — that is, 'upon the activities of sovereign authority.' *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, . . . (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities; building inspectors, see *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, . . . (1967); Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's Inc.,* 436 U.S. 307, 312-313, 98 S.Ct. 1816, 1820, . . . (1978); and even firemen entering privately-owned premises to battle a fire, see *Michigan v. Tyler,* 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, . . . (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camera v. Municipal Court, supra,* '[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' 387 U.S. at 528, 87 S.Ct. at 1730. Because the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' *Marshall v. Barlow's Inc., supra,* 436 U.S. at 312-313, 98 S.Ct. at 1820, it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' *Camara v. Municipal Court, supra,* 387 U.S. at 530, 87 S.Ct. at 1732.

"Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over school children. See, e.g., *R.C.M. v. State,* 660 S.W.2d 552 (Tex. App.1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students; their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*

"Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, . . . (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searched of their students. More generally, the Court has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.' *Ingraham v. Wright,* 430 U.S. 651, 662, 97 S.Ct. 1401, 1407, . . . (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. See, e.g., the opinion in *State ex rel. T.L.O.,* . . . , 463 A.2d at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

"To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.' *Camera v. Municipal Court, supra,* 387 U.S. at 536-537, 87 S.Ct. at 1735. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

"We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1881-1882, . . . (1967). We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for 'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.' *United States v. Ross,* 456 U.S. 798, 822-823, 102 S.Ct. 2157, 2171, . . . (1982). A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on a adult, is undoubtedly a severe violation of subjective expectations of privacy.

"Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise 'illegitimate.' See, e.g., *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, . . . (1984); *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, . . . (1980). To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is 'prepared to recognize as legitimate.' *Hudson v. Palmer, supra,* 468 U.S. at 526, 104 S.Ct. at 3200. The State of New Jersey has argued that because of the persuasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

"Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that '[t]he prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of the criminal conviction and incarceration.' *Ingraham v. Wright, supra,* 430 U.S. at 669, 97 S.Ct. at 1411. We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

"Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of

personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, school children may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

"Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools — Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe discipline problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. 'Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.' *Goss v. Lopez,* 419 U.S. at 580, 95 S.Ct. at 739. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.,* at 582-583, 95 S.Ct. at 740; *Ingraham v. Wright,* 430 U.S. at 680-682, 97 S.Ct. at 1417-1418.

"How, then, should we strike the balance between the schoolchild's legitimate expectations or privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment; requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with warrant requirement when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,' *Camera v. Municipal Court,* 387 U.S. at 532-533, 87 S.Ct. at 1733, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

"The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search — even one that may permissibly be carried out without a warrant — must be based upon 'probable cause' to believe that a violation of the law has occurred. See, e.g., *Almeida-Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 2540, . . . (1973); *Sibron v. New York,* 392 U.S. 40, 62-66, 88 S.Ct. 1889, 1902-1904, . . . (1968). However, 'probable cause' is not an incredible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.' *Almeida-Sanchez v. United States, supra,* 412 U.S. at 277, 93 S.Ct. at 2541 (POWELL, J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause. See, e.g., *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, . . . (1968); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, . . . (1975); *Delaware v. Prouse,* 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396, . . . (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, . . . (1976); cf. *Camara v. Municipal Court, supra,* 387 U.S. at 534-539, 87 S.Ct. at 1733-1736. Where a careful balancing of governmental and private interests suggests that the public interest is best served by the Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitates to adopt such a standard.

"We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the

reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the . . . action was justified at its inception.' *Terry v. Ohio,* 392 U.S. at 20, 88 S.Ct. at 1879; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' *Ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

"This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

"There remains the question of the legality of the search in this case. We recognize that the 'reasonable grounds' standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search was in no sense unreasonable for the Fourth Amendment purposes.

"The incident that gave rise to this case actually involved two separate searches, with the first — search for cigarettes — providing the suspicion that gave rise to the second — the search for marijuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marijuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marijuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

"The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have 'no direct bearing on the infraction' of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had 'a good hunch.' 94 N.J. at 347, 463 A.2d at 942.

"Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. has been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that if of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed.Rule Evid. 401. The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary 'nexus' between the item searched for and the infraction under investigation. See *Warden v. Hayden,* 387 U.S. 294, 306-307, 87 S.Ct. 1642, 1649-1650, . . . (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search

was justified despite the fact that the cigarettes, if found, would constitute 'mere evidence' of a violation. *Ibid.*

"Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an 'inchoate and unparticularized suspicion or 'hunch,' *Terry v. Ohio,* 392 U.S. at 27, 88 S.Ct. at 1883; rather, 'it was the sort of common-sense conclusio[n] about human behavior' upon which 'practical people' — including governmental officials — are entitled to rely. *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 695, . . . (1981). Of course, even if the teacher's report were true, T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty; 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ' *Hill v. California,* 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, . . . (1971). Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also inconsistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.

"Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marijuana once the pack of cigarettes was located. The suspicion upon which the search for marijuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marijuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marijuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marijuana, a small quantity of marijuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of 'people who owe me money' as well as two letters, the inference that T.L.O. was involved in marijuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marijuana was unreasonable in any respect.

"Because the search resulting in the discovery of the evidence of marijuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

"Reversed.

"Justice POWELL, with whom Justice O'CONNOR joins, concurring.

"I agree with the Court's decision, and generally with its opinion. I would place greater emphasis, however, on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.

"In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. They spend the school hours in close association with each other, both in the classroom and during recreation periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child. It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally. But for purposes of deciding this case, I can assume that children in school — no less than adults — have privacy interests that society is prepared to recognize as legitimate.

"However one may characterize their privacy expectations, students properly are afforded some constitutional protections. In an often quoted statement, the Court said that students do not 'shed their constitutional rights . . . at the schoolhouse gate.' *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, . . . (1969). The Court also has 'emphasized the need for affirming the comprehensive authority of the states and of school officials . . . to prescribe and control conduct in the schools.' *Id.,* at 507, 89 S.Ct. at 736. See, also, *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, . . . (1968). The Court has balanced the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitles.

"In *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975), the Court recognized a constitutional right to due process, and yet was careful to limit the exercise of this right by a student who challenged a disciplinary suspension. The only process found to be 'due' was notice and a hearing described as 'rudimentary;' it amounted to no more than 'the disciplinarian . . . informally discuss[ing] the alleged misconduct with the student minutes after it has occurred.' *Id.,* at 581-582, 95 S.Ct. at 739-740. In *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, . . . (1977), we declined to extend the Eighth Amendment to prohibit the use of corporal punishment of school children as authorized by Florida law. We emphasized in that opinion that familiar constraints in the school, and also in the community, provide substantial protection against the violation of constitutional rights by school authorities. '[A]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.' *Id.,* at 670, 97 S.Ct. at 1412. The *Ingraham* Court further pointed out that the 'openness of the public school and its supervision by the community afford significant safeguards 'against the violation of constitutional rights. *Ibid.*

"The special relationship between teacher and student also distinguishes the setting within which school children operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

"The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students, and apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

"In sum, although I join the Court's opinion and its holding, my emphasis is somewhat different.

"Justice BLACKMUN, concurring in the judgment.

"I join the judgment of the Court and agree with much that is said in its opinion. I write separately, however, because I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable cause. The Court correctly states that we have recognized limited exceptions to the probable cause requirement '[w]here a careful balancing of governmental and private interests suggests that the public interest is best served' by a lesser standard. *Ante,* at 742. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we were confronted with 'a special law enforcement need for greater flexibility.' *Florida v. Royer,* 460 U.S. 491, 514, 103 S.Ct. 1319, 1333, . . . (1983). . . . I pointed out in *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, . . . (1983):

'While the Fourth Amendment speaks in terms of freedom from unreasonable [searched], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause. See *Texas v. Brown,* 460 U.S. 730, 744-745 [103 S.Ct. 1535, 1544, . . .] (1983) . . . ; *United States v. Rabinowitz,* 339 U.S. 56, 70 [70 S.Ct. 430, 436, . . .] (1950) . . . ' *Id.,* at 722, 103 S.Ct. at 2652 (opinion concurring in judgment). See, also, *Dunaway v. New York,* 442 U.S. 200, 213-214, 99 S.Ct. 2248, 2257-2258, . . . (1979); *United States v. United States District Court,* 407 U.S. 297, 315-316, 92 S.Ct. 2125, 2135-2136, . . . (1972). Only in these exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

"Thus, for example, in determining that police can conduct a limited 'stop and frisk' upon less than probable cause, this Court relied upon the fact that 'as a practical matter' the stop and frisk could not be subjected to a warrant and probable cause requirement, because a law enforcement officer must be able to take immediately steps to assure himself that the person he has stopped to question is not armed with a weapon that could be used against him. *Terry v. Ohio,* 392 U.S. 1, 20-21, 23-24, 88 S.Ct. 1868, 1879-1880, 1881-1882, . . . (1968). Similarly, this Court's holding that a roving Border Patrol may stop a car and briefly question its occupants upon less than probable cause was based in part upon 'the absence of practical alternatives for policing the border.' *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, . . . (1975). See, also, *Michigan v. Long,* 463 U.S. 1032, 1049, n. 14, 103 S.Ct. 3469, 3481, n. 14, . . . (1983); *United States v. Martinez-Fuerte,* 428 U.S. 543, 557, 96 S.Ct. 3074, 3082, . . . (1976); *Camara v. Municipal Court,* 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, . . . (1967).

"The Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case. The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. As Justice POWELL notes, '[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students.' *Ante,* at 747. Maintaining order in the classroom can be a difficult task. A single teacher often must watch over a large number of students, and, as any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly. Every adult remembers from his own school days the havoc a water pistol or a pea-shooter can wreak until it is taken away. Thus, the Court has recognized that '[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective attention.' *Goss v. Lopez,* 419 U.S. 565, 580, 95 S.Ct. 729, 744, . . . (1975). Indeed, because drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.

"Such immediate action obviously would not be possible if a teacher were required to secure a warrant before searching a student. Nor would it be possible if a teacher could not conduct a necessary search until the teacher thought there was probable cause for the search. A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possess, and is ill-equipped to make a quick judgment about the existence of probable cause. The time required for a teacher to ask questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education. A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.

"Education 'is perhaps the most important function' of government, *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, . . . (1954), and government has a heightened obligation to safeguard students whom it compels to attend school. The special need for immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself justifies the Court in excepting school searches from the warrant

and probable cause requirement, and in applying a standard determined by balancing the relevant interests. I agree with the standard the Court has announced, and with its application of the standard to the facts of this case. I therefore concur in its judgment.

"Justice BRENNAN, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

"I fully agree with Part II of the Court's opinion. Teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security. As Justice STEVENS points out, *post,* at 759-760, 766-767, this principle is of particular importance when applied to school teachers, for children learn as much be example as by exposition. It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections. See *Board of Education v. Pico,* 457 U.S. 853, 864-865, 102 S.Ct. 2799, 2806-2807, . . . (1982) (plurality opinion); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, . . . (1943).

"I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a 'reasonableness' standard whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the 'balancing test' it proclaims in this very opinion.

"Three basic principles underlie this Court's Fourth Amendment jurisprudence. First, warrantless searches are *per se* unreasonable, subject only to a few specifically delineated and well-recognized exceptions. See, e.g., *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, . . . (1967); accord, *Welsh v. Wisconsin,* 466 U.S. 740, 748-749, 104 S.Ct. 2091, 2096-2097, . . . (1984); *United States v. Place,* 462, U.S. 696, 701, 103 S.Ct. 2637, 2641, . . . (1983); *Steagald v. United States,* 451 U.S. 204, 211-212, 101 S.Ct. 2408, . . . (1978); *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, . . . (1968); *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, . . . (1948). Second, full-scale searches — whether conducted in accordance with the warrant requirement or pursuant to one of its exceptions — are 'reasonable' in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched. *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, . . . (1964); *Wong Sun v. United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 412, . . . (1963); *Brinegar v. United States,* 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, . . . (1949). Third, categories of intrusions that are substantially less intrusive than full-scale searches or seizures may be justifiable in accordance with a balancing test even absent a warrant or probable cause, provided that the balancing test gives sufficient weight to the privacy interests that will be infringed. *Dunaway v. New York,* 442 U.S. 200, 210, 99 S.Ct. 2248, 2255, . . . (1979); *Terry v. Ohio, supra.*

"Assistant Vice Principal Choplick's thorough excavation of T.L.O.'s purse was undoubtedly a serious intrusion on her privacy. Unlike the searches in *Terry v. Ohio, supra,* or *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, . . . (1972), the search at issue here encompassed a detailed and minute examination of respondent's pocketbook, in which the contents of private papers and letters were thoroughly scrutinized. Wisely, neither petitioner nor the Court today attempts to justify the search of T.L.O.'s pocketbook as a minimally intrusive search in the *Terry* line. To be faithful to the Court's settled doctrine, the inquiry therefore must focus on the warrant and probable cause requirements.

"I agree that school teachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first obtaining a warrant. To agree with the Court on this point is to say that school searches may justifiably be held to that extent to constitute an exception to the Fourth Amendment's warrant requirement. Such an exception, however, is not to be justified, as the Court apparently holds, by assessing net social value through application of an unguided 'balancing test' in which 'the individual's legitimate expectations of privacy and personal security' are weighed against 'the government's

need for effective methods to deal with breaches of public order.' *Ante,* at 740. The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit. It requires that the authorities must obtain a warrant before conducting a full-scale search. The undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement. Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from 'exigency' — that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. See *United States v. Place, supra,* 462 U.S. at 701-702, 103 S.Ct. at 2641-2642; *Mincey v. Arizona, supra,* 437 U.S. at 393-394, 98 S.Ct. at 2413-2414; *Johnson v. United States, supra,* 333 U.S. at 15, 68 S.Ct. at 369. Only after finding an extraordinary governmental interest of this kind do we — or ought we — engage in a balancing test to determine if a warrant should nonetheless be required.

"To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary. Only where the governmental interests at stake exceeded those implicated in any ordinary law enforcement context — that is, only where there is some extraordinary governmental interest involved — is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary.

"In this case, such extraordinary governmental interests do exist and are sufficient to justify an exception to the warrant requirement. Students are necessarily confined for most of the school day in close proximity to each other and to the school staff. I agree with the Court that we can take judicial notice of the serious problems of drugs and violence that plague our schools. As Justice BLACKMUN notes, teachers must not merely 'maintain an environment conducive to learning' among children who 'are inclined to test the outer boundaries of acceptable conduct,' but must also 'protect the very safety of students and school personnel.' *Ante,* at 748. A teacher or principal could neither carry out essential teaching functions nor adequately protect students' safety if required to wait for a warrant before conducting a necessary search.

"I emphatically disagree with the Court's decision to cast aside the constitutional probable cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable cause standard — the only standard that finds support in the text of the Fourth Amendment — on the basis of its Rorschach-like 'balancing test.' Use of such a 'balancing test' to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result the Court's conclusory analysis reaches today. Therefore, because I believe that the balancing test used by the Court today is flawed both in its inception and in its execution, I respectfully dissent.

"An unbroken line of cases in this Court have held that probable cause is a prerequisite for a full-scale search. In *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 283, . . . (1925), the Court held that '[o]n reason and authority the true rule is that if the search and seizure . . . are made upon probable causes, . . . the search and seizure are valid.' Under our past decisions, probable cause — which exists where 'the facts and circumstances within [the officials'] knowledge and which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man a reasonable caution in the belief 'that a criminal offense had occurred and the evidence would be found in the suspected place, *id.,* at 162, 45 S.Ct. at 288 — is the constitutional minimum for justifying a full-scale search, regardless of whether it is conducted pursuant to a warrant or, as in *Carroll,* within one of the exceptions to the warrant requirement. *Henry v. United States,* 361 U.S. 98, 104, 80 S.Ct. 168, 172, . . . (1959) *(Carroll* 'merely relaxed

the requirements for a warrant on grounds of practicality,' but 'did not dispense with the need for probable cause'); accord, *Chambers v. Maroney,* 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, . . . (1970) ('In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution').

"Our holdings that probable cause is a prerequisite to a full-scale search are based on the relationship between the two Clauses of the Fourth Amendment. The first Clause ('The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ') states the purpose of the Amendment and its coverage. The second Clause (' . . . and no Warrants shall issue but upon probable cause . . . ') gives content to the word 'unreasonable' in the first clause. 'For all but . . . narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.' *Dunaway v. New York,* 442 U.S. at 214, 99 S.Ct. at 2257.

"I therefore fully agree with the Court that 'the underlying command of the Fourth Amendment is always that searches and seizures be reasonable.' *Ante,* at 740. But this 'underlying command' is not directly interpreted in each category of cases by some amorphous 'balancing test.' Rather, the provisions of the Warrant Clause — a warrant and probable cause — provide the yardstick against which official searches and seizures are to be measured. The Fourth Amendment neither requires nor authorizes the conceptual free-for-all that ensues when an unguided balancing test is used to assess specific categories of searches. If the search in question is more than a minimally intrusive *Terry* stop, the constitutional probable cause standard determines its validity.

"To be sure, the Court recognizes that probable cause 'ordinarily' is required to justify a full-scale search and that the existence of probable cause 'bears on' validity of the search. *Ante,* at 742. Yet the Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause. The line of cases begun by *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, . . . (1968), provides no support, for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. The search in *Terry* itself, for instance, was a 'limited search of the outer clothing.' *Id.,* at 30, 88 S.Ct. at 1884. The type of border stop at issue in *United States v. Brignoni-Ponce,* 422 U.S. 873, 880, 95 S.Ct. 2574, 2579, . . . (1975), usually 'consume[d] no more than a minute;' the Court explicitly noted that 'any further detention . . . must be based on consent or probable cause.' *Id.,* at 882, 95 S.Ct. at 2580. See, also, *United States v. Hensley,* 469 U.S. 221, 224, 105 S.Ct. 675, 678, . . . (1985) (momentary stop); *United States v. Place,* 462 U.S. at 706-707, 103 S.Ct. at 2644-2645 (brief detention of luggage for canine 'sniff'); *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, . . . (1977) *(per curiam)* (brief frisk after stop for traffic violation); *United States v. Martinez-Fuerte,* 428 U.S. 543, 560, 96 S.Ct. 3074, 3084, . . . (1976) (characterizing intrusion as 'minimal'); *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, . . . (1972) (stop and frisk). In short, all of these cases involved 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test.' *Dunaway, supra,* 442 U.S. at 210, 99 S.Ct. at 2255.

"Nor do the 'administrative search' cases provide any comfort for the Court. In *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, . . . (1967), the Court held that the probable cause standard governed even administrative searches. Although the *Camara* Court recognized that probable cause standards themselves may have to be somewhat modified to take into account the special nature of administrative searches, the Court did so only after noting that 'because [housing code] inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.' *Id.,* at 537, 87 S.Ct. at 1735. Subsequent administrative search cases have similarly recognized that such searches intrude upon areas whose owners harbor a significantly decreased expectation of privacy, see, e.g., *Donovan v. Dewey,* 452 U.S. 594, 598-599, 101 S.Ct. 2534, 2537-2538, . . . (1981), thus circumscribing the injury to Fourth Amendment interests caused by the search.

"Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause — that is, where the official does not know of 'facts and circumstances [that] warrant a prudent man in believing that the offense has been committed.' *Henry v. United States,*

361 U.S. at 102, 80 S.Ct. at 171; see also *id.*, at 100-101, 80 S.Ct. at 169-170 (discussing history of probable cause standard). The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the 'reasonable' requirements of the probable cause standard were met. Moved by whatever momentary evil has aroused their fears, officials — perhaps even supported by a majority of citizens — may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, . . . (1928) (BRANDIS, J., dissenting). That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term 'probable cause.' I cannot agree with the Court's assertions today that a 'balancing test' can replace the constitutional threshold with one that is more convenient for those enforcing the laws but less protective of the citizens' liberty; the Fourth Amendment's protections should not be defaced by 'a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure.' *United States v. Martinez-Fuerte, supra,* 428 U.S. at 570, 96 S.Ct. at 3088 (BRENNAN, J., dissenting).

"I thus do not accept the majority's premise that '[t]o hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches.' *Ante,* at 740. For me, the finding that the Fourth Amendment applies, coupled with observation that what is at issue is a full-scale search, is the end of the inquiry. But even if I believed that a 'balancing test' appropriately replaces the judgment of the Framers of the Fourth Amendment, I would nonetheless object to the cursory and shortsighted 'test' that the Court employs to justify its predictable weakening of Fourth Amendment protections. In particular, the test employed by the Court vastly overstates the social costs that a probable cause standard entails and, though it plausibly articulates the serious privacy interests at stake, inexplicably fails to accord them adequate weight in striking the balance.

"The Court begins to articulate its 'balancing test' by observing that 'the government's need for effective methods to deal with breaches of public order' is to be weighed on one side of the balance. *Ibid.* Of course, this is not correct. It is not the government's need for effective enforcement methods that should weigh in the balance, for ordinary Fourth Amendment standards — including probable cause — may well permit methods for maintaining the public order that are perfectly effective. If that were the case, the governmental interest in having effective standards would carry no weight at all as a justification for *departing* from the probable cause standard. Rather, it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government's side.

"In order to tote up the costs of applying the probable cause standard, it is thus necessary first to take into account the nature and content of that standard, and the likelihood that it would hamper achievement of the goal — vital not just to 'teachers and administrators,' see *ante,* at 741 — of maintaining an effective educational setting in the public schools. The seminal statement concerning the nature of the probable cause standard is found in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, . . . (1925). *Carroll* held that law enforcement authorities have probable cause to search where 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that a criminal offense had occurred. *Id.,* at 162, 45 S.Ct. at 288. In *Brinegar v. United States,* 338 U.S. 160 U.S. 160, 69 S.Ct. 1302, . . . (1949), the Court amplified this requirement, holding that probable cause depends upon 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Id.,* at 175, 69 S.Ct. at 1310.

"Two terms ago, in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, . . . (1983), this Court expounded at some length its view of the probable cause standard. Among the adjectives used to describe the standard were 'practical,' 'fluid,' flexible,' 'easily applied,' and 'nontechnical.' See *id.,* at 232, 236, 239, 103 S.Ct. at 2329, 2331, 2332. The probable cause standard was to be seen as a 'common-sense' test whose application depended on an evaluation of the 'totality of the circumstances.' *Id.,* at 238, 103 S.Ct. at 2332.

"Ignoring what *Gates* took such great pains to emphasize, the Court today holds that a new 'reasonableness' standard is appropriate because it 'will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common-sense.' *Ante,* at 743. I had never thought that our pre-*Gates* understanding of probable cause defied either reason or common-sense. But after *Gates,* I would have thought that there could be no doubt that this 'nontechnical, practical, and easily applied' concept was eminently serviceable in a context like a school, where teachers require the flexibility to respond quickly and decisively to emergencies.

"A consideration of the likely operation of the probable cause standard reinforces this conclusion. Discussing the issue of school searches, Professor LaFave has noted that the cases that have reached the appellate courts' strongly suggest that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test.' 3 W. LaFave, Search and Seizure sec. 10.11, p. 459-460 (1978). The problems that have caused this Court difficulty in interpreting the probable cause standard have largely involved informants, see, e.g., *Illinois v. Gates, supra; Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, . . . (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, . . . (1964); *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, . . . (1959). However, three factors make it likely that problems involving informants will not make it difficult for teachers and school administrators to make probable cause decisions. This Court's decision in *Gates* applying a 'totality of the circumstances' test to determine whether an informant's tip can constitute probable cause renders the test easy for teachers to apply. The fact that students and teachers interact daily in the school building makes it more likely that teachers will get to know students who supply information; the problem of informants who remain anonymous even to the teachers — and who are therefore unavailable for verification or further questioning is unlikely to arise. Finally, teachers can observe the behavior of students under suspicion to corroborate any doubtful tips they do receive.

"As compared with the relative ease with which teachers can apply the probable cause standard, the amorphous 'reasonableness under all the circumstances' standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators. Of course, as this Court should know, an essential purpose of developing and articulating legal norms is to enable individuals to conform their conduct to those norms. A school system conscientiously attempting to obey the Fourth Amendment's dictates under a probable cause standard could, for example, consult decisions and other legal materials and prepare a booklet expounding the rough outlines of the concept. Such a booklet could be distributed to teachers to provide them with guidance as to when a search may be lawfully conducted. I cannot but believe that the same school system faced with interpreting what is permitted under the Court's new 'reasonableness' standard would be hopelessly adrift as to when a search may be permissible. The sad result of this uncertainty may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the constitutional probable cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students.

"One further point should be taken into account when considering the desirability of replacing the constitutional probable cause standard. The question facing the Court is not whether the probable cause standard should be replaced by a test of 'reasonableness under all the circumstances.' Rather, it is whether traditional Fourth Amendment standards should recede before the Court's new standard. Thus, although the Court today paints with a broad brush and holds its undefined 'reasonableness' standard applicable to *all* school searches, I would approach the question with considerably more reserve. I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable cause standard to *all* searches and seizures. For instance, just as police officers may conduct a brief stop and frisk on something less than probable cause, so too should teachers be permitted the same flexibility. A teacher or administrator who had reasonable suspicion that a student was carrying a gun would no doubt have authority under ordinary Fourth Amendment doctrine to conduct a limited search of the student to determine whether the threat was genuine. The 'costs' of applying the traditional probable cause standard must therefore be discounted by the fact that, where additional flexibility is necessary and where the intrusion is minor,

traditional Fourth Amendment jurisprudence itself displaces probable cause when it determines the validity of a search.

"Applying the constitutional probable cause standard to the facts of this case, I would find that Mr. Choplick's search violated T.L.O.'s Fourth Amendment rights. After escorting T.L.O. into his private office, Mr. Choplick demanded to see her purse. He then opened the purse to find evidence of whether she had been smoking in the bathroom. When he opened the purse, he discovered the pack of cigarettes. At this point, his search for evidence of the smoking violation was complete.

"Mr. Choplick then noticed, below the cigarettes, a pack of cigarette rolling papers. Believing that such papers were 'associated,' see *ante,* at 736, with the use of marijuana, he proceeded to conduct a detailed examination of the contents of her purse, in which he found some marijuana, a pipe, some money, an index card, and some private letters indicating that T.L.O. has sold marijuana to other students. The State sought to introduce this latter material in evidence at a criminal proceeding, and the issue before the Court is whether it should have been suppressed.

"On my view of the case, we need not decide whether the initial search conducted by Mr. Choplick — the search for evidence of the smoking violation that was completed when Mr. Choplick found the pack of cigarettes — was valid. For Mr. Choplick at that point did not have probable cause to continue to rummage through T.L.O.'s purse. Mr. Choplick's suspicion of marijuana possession at this time was based *solely* on the presence of the package of cigarette papers. The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marijuana and that evidence of that violation would be found in her purse. Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T.L.O. based on the mere presence of a package of cigarette papers. Therefore, the fruits of this illegal search must be excluded and the judgment of the New Jersey Supreme Court affirmed.

"In the past several terms, the Court has produced a succession of Fourth Amendment opinions in which 'balancing tests' have been applied to resolve various questions concerning the proper scope of official searches. The Court has begun to apply a 'balancing test' to determine whether a particular category of searches intrudes upon expectations of privacy that merit Fourth Amendment protection. See *Hudson v. Palmer,* 468 U.S. 517, 527, 104 S.Ct. 3194, 3200, . . . (1984) ('Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests'). It applies a 'balancing test' to determine whether a warrant is necessary to conduct a search. See *ante,* at 742; *United States v. Martinez-Fuerte,* 428 U.S. at 564-566. 96 S.Ct. at 3085-3087. In today's opinion, it employs a 'balancing test' to determine what standard should govern the constitutionality of a given category of searches. See *ante,* at 742. Should a search turn out to be unreasonable after application of all of these 'balancing tests,' the Court then applies an additional 'balancing test' to decide whether the evidence resulting from the search must be excluded. See *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, . . . (1984).

"All of these 'balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally-destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences. Compare *ante,* p. 735 . . . , with *ante,* p. 746 . . . , and *ante,* p. 747 . . . And it may be that the real force underlying today's decision is the belief that the Court purports to reject — the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.

"On my view, the presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. I do not pretend that our

traditional Fourth Amendment doctrine automatically answers all of the difficult legal questions that occasionally arise. I do contend, however, that this Court has an obligation to provide some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a 'balancing test.' The Fourth Amendment itself supplies that framework and, because the Court today fails to heed its message, I must respectfully dissent.

"Justice STEVENS, with whom Justice MARSHALL joins, and with whom Justice BRENNAN joins as to Part I, concurring in part and dissenting in part.

"Assistant Vice Principal Choplick searched T.L.O.'s purse for evidence that she was smoking in the girls' restroom. Because T.L.O.'s suspected misconduct was not illegal and did not pose a serious threat to school discipline, the New Jersey Supreme Court held that Choplick's search of her purse was an unreasonable invasion of her privacy and that the evidence which he seized could not be used against her in criminal proceedings. The New Jersey Court's holding was a careful response to the case it was required to decide.

"The State of New Jersey sought review in this Court, first arguing that the exclusionary rule is wholly inapplicable to searches conducted by school officials, and then contending that the Fourth Amendment itself provides no protection at all to the student's privacy. The Court has accepted neither of these frontal assaults on the Fourth Amendment. It has, however, seized upon this 'no smoking' case to announce 'the proper standard' that should govern searches by school officials who are confronted with disciplinary problems far more severe than smoking in the restroom. Although I join Part II of the Court's opinion, I continue to believe that the Court has unnecessarily and inappropriately reached out to decide a constitutional question. See 468 U.S. 1214, 104 S.Ct. 3583, . . . (1984) . . . More importantly, I fear that the concerns that motivated the Court's activism have produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.

"The question the Court decides today — whether Mr. Choplick's search of T.L.O.'s purse violated the Fourth Amendment — was not raised by the State's petition for *certiorari.* That petition only raised one question: 'Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school.' The State quite properly declined to submit the former question because '[it] did not wish to present what might appear to be solely a factual dispute to this Court.' Since this Court has twice had the threshold question argued, I believe that it should expressly consider the merits of the New Jersey Supreme Court's ruling that the exclusionary rule applies.

"The New Jersey Supreme Court's holding on this question is plainly correct. As the state court noted, this case does not involve the use of evidence in a school disciplinary proceeding; the juvenile proceedings brought against T.L.O. involved a charge that would have been a criminal offense if committed by an adult. Accordingly, the exclusionary rule issue decided by that court and later presented to this Court concerned only the use in a criminal proceeding of evidence obtained in a search conducted by a public school administrator.

"Having confined the issue to the law enforcement context, the New Jersey court then reasoned that this Court's cases have made it quite clear that the exclusionary rule is equally applicable 'whether the public official who illegally obtained the evidence was a municipal inspector, *See v. Seattle,* 387 U.S. 541, [87 S.Ct. 1737, . . .] [1967]; *Camara [v. Municipal Court,]* 387 U.S. 523, [87 S.Ct. 1727, . . .] [1967]; a firefighter, *Michigan v. Tyler,* 436 U.S. 499, 506, [98 S.Ct. 1942, 1948, . . .] [1978]; or a school administrator or law enforcement official.' It correctly concluded 'that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings.'

"When a defendant in a criminal proceeding alleges that she was the victim of an illegal search by a school administrator, the application of the exclusionary rule is a simple corollary of the principle that 'all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court.' *Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, . . . (1961). The practical basis for this principle is, in [art, its deterrent effect, see *id.,* at 656, 81 S.Ct. at 1692, and as a general matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating the Fourth Amendment by sharply reducing their incentive to do so. In the case of evidence obtained in school searches, the 'overall educative effect' of the exclusionary rule adds important symbolic force to this utilitarian judgment.

"Justice BRANDIS was both a great student and a great teacher. It was he who wrote:

'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breed contempt for law; it invites every man to become a law unto himself; it invites anarchy.' *Olmstead v. United States,* 277 U.S. 438, 485, 48 S.Ct. 564, 575, . . . (1928) (dissenting opinion).

"Those of us who revere the flag and the ideals for which it stands believe in the power of symbols. We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.

"Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that 'our society attaches serious consequences to a violation of constitutional rights,' and that this is a principle of 'liberty and justice for all.'

"Thus, the simple and correct answer to the question presented by the State's petition for *certiorari* would have required affirmance of a state court's judgment suppressing evidence. That result would have been dramatically out of character for a Court that not only grants prosecutors relief from suppression orders with distressing regularity, but also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion. In characteristic disregard of the doctrine of judicial restraint, the Court avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide. Because judicial activism undermines the Court's power to perform its central mission in a legitimate way, I dissented from the reargument order. See 468 U.S. 1214, 104 S.Ct. 3583, . . . (1984). I have not modified the views expressed in that dissent, but since the majority has brought the question before us, I shall explain why I believe the Court has misapplied the standard of reasonableness embodied in the Fourth Amendment.

"The search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy. A purse 'is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy.' *Arkansas v. Sanders,* 442 U.S. 753, 762, 99 S.Ct. 2586, 2592, . . . (1979). Although such expectations must sometimes yield to the legitimate requirements of government, in assessing the constitutionality of a warrantless search, our decision must be guided by the language of the Fourth Amendment: 'The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ' In order to evaluate the reasonableness of such searches, 'it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Terry v. Ohio,* 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879-1880, . . . (1968) (quoting *Camara v. Municipal Court,* 387 U.S. 523, 528, 534-537, 87 S.Ct. 1727, 1730, 1733-1735, . . . (1967)).

"The 'limited search for weapons' in *Terry* was justified by the 'immediate interest of the police officer in taking steps to assure himself that the person with whom he was dealing was not armed with a weapon that could be unexpectedly and fatally be used against him.' 392 U.S. at 23, 25, 88 S.Ct. at 1881, 1882. When viewed from the institutional perspective, 'the substantial need of teachers and administrators for freedom to maintain order in the schools,' *ante,* at 742 (majority opinion), is no less acute. Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of educating young people and preparing them for citizenship. When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.

"Thus, warrantless searches of students by school administrators are reasonable when undertaken for those purposes. But the majority's statement of the standard for evaluating the reasonableness of such searches is not suitably adapted to that end. The majority holds that 'a

search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence *that the student has violated or is violating* either the law *or the rules of the school.' Ante,* at 743. This standard will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior. The Court's standard for deciding whether a search is justified 'at its inception' treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

"The majority, however, does not contend that school administrators have a compelling need to search students in order to achieve optimum enforcement of minor school regulations. To the contrary, when minor violations are involved, there is every indication that the informal school disciplinary process, with only minimum requirements of due process, can function effectively without the power to search for enough evidence to prove a criminal case. In arguing that teachers and school administrators need the power to search students based on a lessened standard, the United States as *amicus curiae* relies heavily on empirical evidence of a contemporary crisis of violence and unlawful behavior that is seriously undermining the process of education in American school. A standard better attuned to this concern would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover *evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.*

"This standard is properly directed at '[t]he sole justification for the [warrantless] search.' In addition, a standard that varies the extent of the permissible intrusion with the gravity of the suspected offense is also more consistent with common-law experience and this Court's precedent. Criminal law has traditionally recognized a distinction between essentially regulatory offenses and serious violations of the peace, and graduated the response of the criminal justice system depending on the character of the violation. The application of a similar distinction in evaluating the reasonableness of warrantless searches and seizures 'is not a novel idea.' *Welsh v. Wisconsin,* 466 U.S. 740, 750, 104 S.Ct. 2091, 2098, . . . (1984).

"In *Welsh,* the police officers arrived at the scene of a traffic accident and obtained information indicating that the driver of the automobile involved was guilty of a first offense of driving while intoxicated — a civil violation with a maximum fine of $200. The driver had left the scene of the accident, and the officers followed the suspect to his home where they arrested him without a warrant. Absent exigent circumstances, the warrantless invasion of the home was a clear violation of *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, . . . (1980). In holding that the warrantless arrest for the 'noncriminal, traffic offense' in *Welch* was unconstitutional, the Court noted that 'application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.' 466 U.S. at 753, 104 S.Ct. at 2099.

"The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument. In order to justify the serious intrusion on the persons and privacy of young people that New Jersey asks this Court to approve, the State must identify 'some real immediate and serious consequences.' *McDonald v. United States,* 335 U.S. 451, 460, 69 S.Ct. 191, 195, . . . (1948) (JACKSON, J., concurring, joined by FRANKFURTER, J.). While school administrators have entirely legitimate reasons for adopting school regulations and guidelines for student behavior, the authorization of searches to enforce them 'displays a shocking lack of all sense of proportion.' *Id.,* 459, 69 S.Ct. at 195.

"The majority offers weak deference to these principles of balance and decency by announcing that school searches will only be reasonable in scope 'when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student *and the nature of the infraction.' Ante,* at 643 (emphasis added). The majority offers no explanation why a two-part standard is necessary to evaluate the reasonableness of the ordinary school search. Significantly, in the balance of its opinion the Court pretermits any discussion of the nature of T.L.O.'s infraction of the 'no smoking' rule.

"The 'rider' to the Court's standard for evaluating the reasonableness of the initial intrusion apparently is the Court's perception that its standard is overly generous and does not, by itself, achieve a fair balance between the administrator's right to search and the student's reasonable

expectations of privacy. The Court's standard for evaluating the 'scope' of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses. The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter. Moreover, the majority's application of its standard in this case — permit a male administrator to rummage through the purse of a female high school student in order to obtain evidence that she was smoking in a bathroom — raises grave doubts in my mind whether its effort will be effective. Unlike the Court, I believe the nature of the suspected infraction is a matter of first importance in deciding whether *any* invasion of privacy is permissible.

"The Court embraces the standard applied by the New Jersey Supreme Court as equivalent to its own, and then deprecates the State Court's application of the standard as reflecting 'a somewhat crabbed notion of reasonableness.' *Ante,* at 744. There is no mystery, however, in the State Court's finding that the search in this case was unconstitutional; the decision below was not based on a manipulation of reasonable suspicion, but on the trivial character of the activity that promoted the official search. The New Jersey Supreme Court wrote:

> 'We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of *illegal activity or activity that would interfere with school discipline and order,* the school official has the right to conduct a reasonable search for such evidence.
> 'In determining whether the school official has reasonable grounds, courts should consider 'the child's age, history, and school record, *the prevalence and seriousness of the problem in the school to which the search was directed,* the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.'

The emphasized language in the State Court's opinion focuses on the character of the rule infraction that is to be the object of the search.

"In the view of the State Court, there is a quite obvious and material difference between a search for evidence relating to violent or disruptive activity, and a search for evidence of a smoking rule violation. This distinction does not imply that a no-smoking rule is a matter of minor importance. Rather, like a rule that prohibits a student from being tardy, its occasional violation in a context that poses no threat of disrupting school order and discipline offers no reason to believe that an immediate search is necessary to avoid unlawful conduct, violence, or a serious impairment of the educational process.

"A correct understanding of the New Jersey Court's standard explains why that court concluded in T.L.O.'s case that 'the assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that *would seriously interfere with school discipline or order.*' The importance of the nature of the rule infraction to the New Jersey Supreme Court's holding is evident from its brief explanation of the principal basis for its decision:

> 'A student has an expectation of privacy in the contents of her purse. Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.
> 'The assistant principal's desire, legal in itself, to gather evidence to impeach the student's credibility at a hearing on the disciplinary infraction does not validate the search.'

Like the New Jersey Supreme Court, I would view this case differently if the Assistant Vice Principal had reason to believe T.L.O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any assumption — not even a 'hunch.'

"In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction — a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building. It is, of course, true that he actually found evidence of serious wrongdoing by T.L.O., but no one claims that the prior search may be justified by his unexpected discovery. As far as the smoking infraction is concerned, the search for cigarettes merely tended to corroborate a

teacher's eyewitness account of T.L.O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations. Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception.

"A review of the sampling of school search cases relied on by the Court demonstrates how different this case is from those in which there was indeed a valid justification for intruding on a student's privacy. In most of them the student was suspected of a criminal violation; in the remainder either violence or substantial disruption of school order or the integrity of the academic process was at stake. Few involved matters as trivial as the no-smoking rule violated by T.L.O. The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context. Although I agree that school administrators must have broad latitude to maintain order and discipline in our classrooms, that authority is not unlimited.

"The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. Although the search of T.L.O.'s purse does not trouble today's majority, I submit that we are not dealing with 'matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.' *West Virginia State Board of Education v. Barnett,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, . . . (1943).

"I respectfully dissent."

O'Connor v. Donaldson

422 U.S. 563, 95 S.Ct. 2486 (1975)

CIVIL COMMITMENT (Limits on Confinement) — ***A nondangerous person who can survive in society cannot be confined in a mental institution to give him a better standard of living or to save him from embarrassment or public intolerance.***

"Mr. Justice STEWART delivered the opinion of the Court.

"The respondent, Kenneth Donaldson, was civilly committed to confinement as a mental patient in the Florida State Hospital at Chattahoochee in January 1957. He was kept in custody there against his will for nearly 15 years. The petitioner, Dr. J. B. O'Connor, was the hospital's superintendent during most of this period. Throughout his confinement Donaldson repeatedly, unsuccessfully, demanded his release, claiming that he was dangerous to no one, that he was not mentally ill, and that, at any rate, the hospital was not providing treatment for his supposed illness. Finally, in February 1971, Donaldson brought this lawsuit under 42 U.S.C. sec. 1983, in the United States District Court for the Northern District of Florida, alleging that O'Connor, and other members of the hospital staff named as defendants, had intentionally and maliciously deprived him of his constitutional right to liberty. After a four-day trial, the jury returned a verdict assessing both compensatory and punitive damages against O'Connor and a co-defendant. The Court of Appeals for the Fifth Circuit affirmed the judgment, 493 F.2d 507. . . .

"Donaldson's commitment was initiated by his father, who thought that his son was suffering from 'delusions.' After hearings before a county judge of Pinellas County, Fla., Donaldson was found to be suffering from 'paranoid schizophrenia' and was committed for 'care, maintenance, and treatment' pursuant to Florida statutory provisions that have since been repealed. The State law was less than clear in specifying the grounds necessary for commitment, and the record is scanty as to Donaldson's condition at the time of the judicial hearing. These matters are, however, irrelevant, for this case involves no challenge to the initial commitment, but is focused, instead, upon the nearly 15 years of confinement that followed.

"The evidence at the trial showed that the hospital staff had the power to release a patient, not dangerous to himself or others, even if he remained mentally ill and had been lawfully committed. Despite many requests, O'Connor refused to allow that power to be exercised in Donaldson's case. At the trial, O'Connor indicated that he had believed that Donaldson would have been unable to make a 'successful adjustment outside the institution,' but could not recall the basis for that conclusion. O'Connor retired as superintendent shortly before this suit was filed. A few months thereafter, and before the trial, Donaldson secured his release and a judicial restoration of competency, with support of the hospital staff.

"The testimony at the trial demonstrated, without contradiction, that Donaldson had posed no danger to others during his long confinement, or indeed at any point in his life. O'Connor himself conceded that he had no personal or second-hand knowledge that Donaldson had ever committed a dangerous act. There was no evidence that Donaldson had ever been suicidal or been thought likely to inflict injury upon himself. One of O'Connor's co-defendants acknowledged that Donaldson could have earned his own living outside the hospital. He has done so for some 14 years before his commitment, and immediately upon his release he secured a responsible job in hotel administration.

"Furthermore, Donaldson's frequent requests for release had been supported by responsible persons willing to provide him any care he might need on release. In 1963, for example, a representative of Helping Hands, Inc., a halfway house for mental patients, wrote O'Connor asking him to release Donaldson to its care. The request was accompanied by a supporting letter from the Minneapolis Clinic of Psychiatry and Neurology, which a co-defendant conceded was a

'good clinic.' O'Connor rejected the offer, replying that Donaldson could only be released to his parents. That rule was apparently of O'Connor's own making. At the time, Donaldson was 55 years old, and, as O'Connor knew, Donaldson's parents were too elderly and infirmed to take responsibility for him. Moreover, in his continuing correspondence with Donaldson's parents, O'Connor never informed them of the Helping Hands offer. In addition, on four separate occasions between 1964 and 1968, John Lemboke, a college classmate of Donaldson's and a longtime family friend, asked O'Connor to release Donaldson to his care. On each occasion O'Connor refused. The record shows that Lemboke was a serious and responsible person, who was willing and able to assume responsibility for Donaldson's welfare.

"The evidence showed that Donaldson's confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness. Numerous witnesses, including one of O'Connor's co-defendants, testified that Donaldson had received nothing but custodial care while at the hospital. O'Connor described Donaldson's treatment as 'milieu therapy.' But witnesses from the hospital staff conceded that, in the context of this case, 'milieu therapy' was a euphemism for confinement in the 'milieu' of a mental hospital. For substantial periods, Donaldson was simply kept in a large room that housed 60 patients, many of whom were under criminal commitment. Donaldson's requests for ground privileges, occupational training, and an opportunity to discuss his case with O'Connor or other staff members were repeatedly denied.

. . .

"(p. 2492) The Court of Appeals affirmed the judgment of the District Court in a broad opinion dealing with 'the far-reaching question whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to State mental hospitals.' 493 F.2d at 508. The Appellate Court held that when, as in Donaldson's case, the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided. *Id.,* at 521. The Court further expresses the view that, regardless of the grounds for involuntary civil commitment, a person confined against his will at a State mental institution has 'a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.' *Id.,* at 520. Conversely, the Court's opinion implied that it is constitutionally permissible for a State to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness renders him dangerous to himself or others. See *id.,* at 522-527.

"We have concluded that the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsory confine a nondangerous, mentally ill individual for the purpose of treatment. As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty.

"The jury found that Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment. That verdict, based on abundant evidence, makes the issue before the Court a narrow one. We need not to decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person — to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness. See *Jackson v. Indiana,* 406 U.S. 715, 736-737, 92 S.Ct. 1845, 1857-1858, . . . ; *Humphrey v. Cady,* 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, . . . For the jury found that none of the above grounds for continued confinement was present in Donaldson's case.

"Given the jury's findings, what was left as justification for keeping Donaldson in continued confinement? The fact that State law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. See *Jackson v. Indiana, supra,* 406 U.S. at 720-723, 92 S.Ct. at 1849-1851; *McNeil v. Director, Patuxent Institution,* 407 U.S. 245, 248-250, 92 S.Ct. 2083, 2086-2087, . . . Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it

could not constitutionally continue after that basis no longer existed. *Jackson v. Indiana, supra,* 406 U.S. at 738, 92 S.Ct. at 1858; *McNeil v. Director, Patuxent Institution, supra.*

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

"May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. See *Shelton v. Tucker,* 364 U.S. 479, 488-490, 81 S.Ct. 247, 252-253, . . .

"May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. See, e.g., *Cohen v. California,* 403 U.S. 15, 24-26, 91 S.Ct. 1780, 1787-1789, . . . 284; *Coates v. City of Cincinnati,* 402 U.S. 611, 615, 91 S.Ct. 1686, 1689, . . . ; *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 1365-1366, . . . ; cf. *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 2825-2826, . . .

"In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Connor violated Donaldson's constitutional right to freedom.

. . .

"Vacated and remanded.

"Mr. Chief Justice BURGER, concurring.

"Although I join the Court's opinion and judgment in this case, it seems to me that several factors merit more emphasis than it gives them. I therefore add the following remarks.

. . .

"(p. 2496) There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht v. Patterson,* 386 U.S. 605, 608, 87 S.Ct. 1209, 1211, . . . (1967). Cf. *In re Gault,* 387 U.S. 1, 12-13, 87 S.Ct. 1428, 1435-1436, . . . (1967). Commitment must be justified on the basis of a legitimate State interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. See *McNeil v. Director, Patuxent Institution,* 407 U.S. 245, 249-250, 92 S.Ct. 2083, 2086-2087, . . . (1972); *Jackson v. Indiana,* 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, . . . (1972).

"The Court of Appeals purported to be applying these principles in developing the first of its theories supporting a constitutional right to treatment. It first identified what it perceived to be the traditional basis for civil commitment — physical dangerousness to oneself or others, or a need for treatment — and stated:

> '[W]here, as in Donaldson's case, the rationale for confinement is the *'parens patriae'* rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided. . . . 'To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.' 493 F.2d at 521.

"The Court of Appeals did not explain its conclusion that the rationale for respondent's commitment was that he needed treatment. The Florida statutes in effect during the period of his confinement did not require that a person who had been adjudicated incompetent and ordered

committed either be provided with psychiatric treatment or released, and there was no such condition in respondent's order of commitment. Cf. *Rouse v. Cameron,* . . . , 373 F.2d 451 (D.C.App. 1967). More important, the instructions which the Court of Appeals read as establishing an absolute constitutional right to treatment did not require the jury to make any findings regarding the specific reasons for respondent's confinement or to focus upon any rights he may have had under State law. Thus, the premise of the Court of Appeals' first theory must have been that, at least with respect to persons who are not physically dangerous, a State has no power to confine the mentally ill except for the purpose of providing them with treatment.

"That proposition is surely not descriptive of the power traditionally exercised by the States in this area. Historically, and for a considerable period of time, subsidized custodial care in private foster homes or boarding houses was the most benign form of care provided incompetent or mentally ill persons for whom the States assumed responsibility. Until well into the 19th century the vast majority of such persons were simply restrained in poor houses, alms houses, or jails. See A. Deutsch, The Mentally Ill in America 38-54, 114-131 (2d ed. 1949). The few States that established institutions for the mentally ill during this early period were concerned primarily with providing a more humane place of confinement and only secondarily with 'curing' the persons sent there. See *id.,* at 98-113.

"As the trend toward State care of the mentally ill expanded, eventually leading to the present statutory schemes for protecting such persons, the dual functions of institutionalization continued to be recognized. While one of the goals of this movement was to provide medical treatment to those who could benefit from it, it was acknowledged that this could not be done in all cases and that there was a large range of mental illness for which no known 'cure' existed. In time, providing places for the custodial confinement of the so-called 'dependent insane' again emerged as the major goal of the States' programs in this area and remained so well into this century. See *id.,* at 228-272; D. Rothman, The Discovery of the Asylum 264-295 (1971).

"In short, the idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin, and there is no historical basis for imposing such a limitation on State power. Analysis of the sources of the civil commitment power likewise lends no support to that notion. There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease. Cf. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County,* 309 U.S. 270, 60 S.Ct. 523, . . . (1940); *Jacobson v. Massachusetts,* 197 U.S. 11, 25-29, 25 S.Ct. 358, 360-362, . . . (1905). Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.' *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 257, 92 S.Ct. 885, 888, . . . (1972). See, also, *Mormon Church v. United States,* 136 U.S. 1, 56-58, 10 S.Ct. 792, 807-808, . . . (1890). The classic example of this role is when a State undertakes to act as 'the general guardian of all infants, idiots, and lunatics.' *Hawaii v. Standard Oil Co., supra,* 405 U.S. at 257, 92 S.Ct. at 888, quoting 3 W. Blackstone, Commentaries *47.

"Of course, an inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately. At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves. Cf. *Mormon Church v. United States, supra.* Moreover, the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another. Cf. *Jackson v. Indiana,* 406 U.S. at 737-738, 92 S.Ct. at 1857-1858. See, also, American Bar Foundation, The Mentally Disabled and the Law 254-255 (S. Brakel & R. Rock ed., 1971).

"However, the existence of some due process limitations on the *parens patriae* power does not justify the further conclusion that it may be exercised to confine a mentally ill person only if the purpose of the confinement is treatment. Despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low. See Schwitzgebel, The Right to

Effective Mental Treatment, 62 Calif.L.Rev. 936, 941-948 (1974). There can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.' *Greenwood v. United States,* 350 U.S. at 375, 76 S.Ct. at 415. See, also, Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif.L.Rev. 693, 697-719 (1974). Similarly, as previously observed, it is universally recognized as fundamental to effective therapy that the patient acknowledge his illness and cooperate with those attempting to give treatment; yet the failure of a large proportion of mentally ill persons to do so is a common phenomenon. See *Katz, supra,* 36 U.Chi.L.Rev., at 768-769. It may be that some persons in either of these categories, and there may be others, are unable to function in society and will suffer real harm to themselves unless provided with care in a sheltered environment. See, e.g., *Lake v. Cameroon,* 124 U.S.App.D.C. 264, 270-271, 364 F.2d 657, 663-664 (1966) (dissenting opinion). At the very least, I am not able to say that a State legislature is powerless to make that kind of judgment. See *Greenwood v. United States, supra.*

"Alternatively, it has been argued that a Fourteenth Amendment right to treatment for involuntarily confined mental patients derives from the fact that many of the safeguards of the criminal process are not present in civil commitment. The Court of Appeals described this theory as follows:

> '[A] due process right to treatment is based on the principle that when the three central limitations on the government's power to detain — that detention be in retribution for a specific offense; that it be permitted after a proceeding where the fundamental procedural safeguards are observed — are absent, there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment.' 493 F.2d at 552.

To the extent that this theory may be read to permit a State to confine an individual simply because it is willing to provide treatment, regardless of the subject's ability to function in society, it raises the gravest of constitutional problems, and I have no doubt the Court of Appeals would agree on this score. As a justification for a constitutional right to such treatment, the *quid pro quo* theory suffers from equally serious defects.

"It is too well-established to require extended discussion that due process is not an inflexible concept. Rather, its requirements are determined in particular instances by identifying and accommodating the interests of the individual and society. See, e.g., *Morrissey v. Brewer,* 408 U.S. 471, 480-484, 92 S.Ct. 2593, 2599-2601, . . . (1972); *McNeil v. Director, Patuxent Institution,* 407 U.S. at 249-250, 92 S.Ct. at 1086-1087; *McKeiver v. Pennsylvania,* 403 U.S. 528, 545-555, 91 S.Ct. 1976, 1986-1991, . . . (1971) (plurality opinion). Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be candidly appraised.' *In re Gault,* 387 U.S. at 21, 27-29, 87 S.Ct. at 1440, 1443-1445. However, in so doing judges are not free to read their private notions of public policy or public health into the Constitution. *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n,* 313 U.S. 236, 246-247, 61 S.Ct. 862, 965-866, . . . (1941).

"The *quid pro quo* theory is a sharp departure from, and cannot coexist with, due process principles. As an initial matter, the theory presupposes that essentially the same interests are involved in every situation where a State seeks to confine an individual; that assumption, however, is incorrect. It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment. See *Powell v. Texas,* 392 U.S. 514, 542-544, 88 S.Ct. 2145, 2158-2160, . . . (1968) (opinion of BLACK, J.). But it would be incongruous, for example, to apply the same limitation when quarantine is imposed by the State to protect the public from a highly communicable disease. See *Jacobson v. Massachusetts,* 197 U.S. at 29-30, 25 S.Ct. at 362-363.

"A more troublesome feature of the *quid pro quo* theory is that it would elevate a concern for essentially procedural safeguards into a new substantive constitutional right. Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards but insists that the State provide benefits which, in the view of a court, are adequate 'compensation' for confinement. In light of the wide divergence of medical opinion regarding the diagnosis of and

proper therapy for mental abnormalities, that prospect is especially troubling in this area and cannot be squared with the principle that 'courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected.' *In re Gault,* 387 U.S. at 71, 87 S.Ct. at 1466 (HARLAN, J., concurring and dissenting). Of course, questions regarding the adequacy of procedure and the power of a State to continue particular confinements are ultimately for the courts, aided by expert opinion to the extent that is found helpful. But I am not persuaded that we should abandon the traditional limitations on the scope of judicial review.

"In sum, I cannot accept the reasoning of the Court of Appeals and can discern no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due process of law with a constitutional right the *treatment.* Given the present state of medical knowledge regarding abnormal human behavior and its treatment, few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of 'such treatment as will give [them] a realistic opportunity to be cured.' Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a 'trade-off.' Because the Court of Appeals' analysis could be read as authorizing those results, it should not be followed."

Oklahoma Publishing Co. v. District Court In & For Oklahoma City

480 U.S. 308, 97 S.Ct. 1045 (1977)

CONFIDENTIALITY — ***The press may report Juvenile Court proceedings unless the court orders otherwise.***

"(p. 1045) PER CURIAM.

"A pretrial order entered by the District Court of Oklahoma County enjoined members of the news media from 'publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child' in connection with a juvenile proceeding involving that child then pending in that court. On application for prohibition and mandamus challenging the order as a prior restraint on the press violative of the First and Fourteenth Amendments, the Supreme Court of the State of Oklahoma sustained the order. This Court entered a stay pending the timely filing and disposition of a petition for *certiorari.* . . . We now grant the petition for *certiorari* and reverse the decision below.

"A railroad switchman was fatally shot on July 26, 1976. On July 29, 1976, and 11-year-old boy, Larry Donnell Brewer, appeared at a detention hearing in Oklahoma County Juvenile Court on charges filed by State juvenile authorities alleging delinquency by second-degree murder in the shooting of this switchman. Reporters, including one from petitioner's newspapers, were present in the courtroom during the hearing and learned the juvenile's name. As the boy was escorted from the courthouse to a vehicle, one of petitioner's photographers took his picture. Thereafter, a number of stories using the boy's name and photograph were printed in newspapers within the county, including petitioner's three newspapers in Oklahoma City; radio stations broadcast his name and television stations showed film footage of him and identified him by name.

"On August 3, 1976, the juvenile was arraigned at a closed hearing, at which the judge entered the pretrial order involved in this case. Additional news reports identifying the juvenile appeared on August 4 and 5. On August 16, the District Court denied petitioner's motion to quash the order. The Oklahoma Supreme Court then denied petitioner's writ of prohibition and mandamus, relying on Oklahoma statutes providing that juvenile proceedings are to be held in private 'unless specifically ordered by the judge to be conducted in public,' and that juvenile records are open to public inspection 'only by order of the court to persons having a legitimate interest therein.' Okla.Stat.Ann., Tit. 10, sec. 1111, 1125 (Supp. 1976).

"As we noted in entering our stay of the pretrial order, petitioner does not challenge the constitutionality of the Oklahoma statutes relied on by the court below. Petitioner asks us only to hold that the First and Fourteenth Amendments will not permit a State Court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public. We think this result is compelled by our recent decisions in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, . . . (1976), and *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, . . . (1975).

"In *Cox Broadcasting* the Court held that a State could not impose sanctions on the accurate publication of the name of a rape victim 'which was publicly revealed in connection with the prosecution of the crime.' *Id.,* at 471, 95 S.Ct. at 1034. There, a reporter learned the identity of the victim from an examination of indictments made available by a clerk for his inspection in the courtroom during a recess of court proceedings against the alleged rapists. The Court expressly refrained from intimating a view on any constitutional questions arising from a State policy of denying the public or the press access to official records of juvenile proceedings, *id.,* at 496, n. 26, 95 S.Ct. at 1047, but made clear that the press may not be prohibited from 'truthfully publishing information released to the public in official court records.' *Id.,* at 496, 95 S.Ct. at 1047.

"This principle was reaffirmed last term in *Nebraska Press Assn. v. Stuart, supra,* which held unconstitutional an order prohibiting the press from publishing certain information tending to show the guilt of a defendant in an impending criminal trial. In Part VI-D of its opinion, the court focused on the information covered by the order that had been adduced as evidence in a preliminary hearing open to the public and the press; we concluded that, to the extent the order prohibited the publication of such evidence, 'it plainly violated settled principles,' 427 U.S. at 568, 96 S.Ct. at 2807, citing *Cox Broadcasting Corp. v. Cohn, supra; Sheppard v. Maxwell,* 384 U.S. 333, 362-363, 86 S.Ct. 1507, 1522, . . . (1966) ('[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom'); and *Craig v. Harney,* 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, . . . ('those who see and hear what transpired [in the courtroom] can report it with impunity'). The Court noted that under State law the trial court was permitted in certain circumstances to close pretrial proceedings to the public, but indicated that such an option did not allow the trial judge to suppress publication of information from the hearing if the public was allowed to attend: '[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint.' 427 U.S. at 568, 96 S.Ct. at 2807.

"The court below found the rationale of these decisions to be inapplicable here because a State statute provided for closed juvenile hearings unless specifically opened to the public by court order and because 'there is no indication that the judge distinctly and expressly ordered the hearing to be public.' We think *Cox* and *Nebraska Press* are controlling nonetheless. Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were 'publicly revealed in connection with the prosecution of the crime,' 420 U.S. at 471, 95 S.Ct. at 1034, much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain. Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.

"The petition for *certiorari* is granted, and the judgment is

"Reversed."

Orr v. Orr

440 U.S. 268, 99 S.Ct. 1102 (1979)

ALIMONY - Sex Discrimination — ***It is unconstitutional to require husbands to pay alimony but not, in appropriate cases, to require wives to pay.***

"(p. 1107) Mr. Justice BRENNAN delivered the opinion of the Court.

"The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.

"On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That decree directed appellant, Mr. Orr, to pay appellee, Mrs. Orr, $1240 per month in alimony. On July 28, 1976, Mrs. Orr initiated a contempt proceeding in the Circuit Court of Lee County, Ala., alleging that Mr. Orr was in arrears in his alimony payments. On August 19, 1976, at the hearing on Mrs. Orr's petition, Mr. Orr submitted in his defense a motion requesting that Alabama's alimony statutes be declared unconstitutional because they authorize courts to place an obligation of alimony upon husbands but never upon wives. The Circuit Court denied Mr. Orr's motion and entered judgment against him for $5524, covering back alimony and attorney fees. Relying solely upon his federal constitutional claim, Mr. Orr appealed the judgment. On March 16, 1977, the Court of Civil Appeals of Alabama sustained the constitutionality of the Alabama statutes, 351 So.2d 904. On May 24, the Supreme Court of Alabama granted Mr. Orr's petition for a writ of *certiorari,* but on November 10, without court opinion, quashed the writ as improvidently granted. 351 So.2d 906. We noted probable jurisdiction, 436 U.S. 924, 98 S.Ct. 2817, . . . (1978). We now hold the challenged Alabama statutes as unconstitutional and reverse.

. . .

"(p. 1111) In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme 'provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause,' *Reed v. Reed,* 404 U.S. 71, 75, 92 S.Ct. 251, 253, . . . (1971). The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, . . . (1976). 'To withstand scrutiny' under the Equal Protection Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' *Califano v. Webster,* 430 U.S. 313, 316-317, 97 S.Ct. 1192, 1194, . . . (1977). We shall, therefore, examine the three governmental objectives that might arguably be served by Alabama's statutory scheme.

"Appellant views the Alabama alimony statutes as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens. Cf. *Stern v. Stern,* 165 Conn. 190, 332 A.2d 78 (1973). We agree, as he urges, that prior cases settled that this purpose cannot sustain the statutes. *Stanton v. Stanton,* 421 U.S. 7, 10, 95 S.Ct. 1373, 1376, . . . (1975), held that the 'old notio[n]' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas,' *id.,* at 14-15, 95 S.Ct. at 1378. See, also, *Craig v. Boren, supra,* 429 U.S. at 198, 97 S.Ct. at 457. If the statute is to survive constitutional attack, therefore, it must be validated on some other basis.

"The opinion of the Alabama Court of Civil Appeals suggests other purposes that the statute may serve. Its opinion states that the Alabama statutes were 'designed' for 'the wife of a broken marriage who need financial assistance,' 351 So.2d at 905. This may be read as asserting

either of two legislative objectives. One is a legislative purpose to provide help for needy spouses, using sex as a proxy for the need. The other is a goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce. We concede, of course, that assisting needy spouses is a legitimate and important governmental objective. We have also recognized '[r]education of the disparity in economic condition between men and women caused by the long history of discrimination against women . . . as . . . an important governmental objective,' *Califano v. Webster, supra,* 430 U.S. at 317, 97 S.Ct. at 1194. It only remains, therefore, the determine whether the classification at issue here is 'substantially related to achievement of those objectives.' *Ibid.*

"Ordinary, we would begin the analysis of the 'needy spouse' objective by considering whether sex is a sufficiently 'accurate proxy,' *Craig v. Boren, supra,* 429 U.S. at 204, 97 S.Ct. at 460, for dependency to establish that the gender classification rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation,' *Reed v. Reed, supra,* 404 U.S. at 76, 92 S.Ct. at 254. Similarly, we would initially approach the 'compensation' rationale by asking whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification, leaving the sexes 'not similarly situated with respect to opportunities' in that sphere, *Schelesinger v. Ballard,* 419 U.S. 498, 508, 95 S.Ct. 572, 577, . . . (1975). Compare *Califano v. Webster, supra,* 430 U.S. at 318, 97 S.Ct. at 1195, and *Kahn v. Shevin,* 416 U.S. 351, 353, 94 S.Ct. 1734, 1736, . . . (1974), with *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, . . . (1975).

"But in this case, even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would 'not adequately justify the salient features of' Alabama's statutory scheme, *Craig v. Boren, supra,* 429 U.S. at 202-203, 97 S.Ct. at 459-460. Under the statute, individualized hearings at which the parties' relative financial circumstances are considered *already* occur. See *Russell v. Russell,* 247 Ala. 284, 286, 24 So.2d 124, 126 (1945); *Ortman v. Ortman,* 203 Ala. 167, 82 So. 417 (1919). There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any burden on the State. In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy. Similarly, since individualized hearings can determine which women were in fact discriminated against vis-a-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may by effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex. 'Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids,' *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 653, 95 S.Ct. at 1236, and the effort to help those women would not in any way be compromised.

"Moreover, use of a gender classification actually produces perverse results in this case. As compare to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation. Thus, '[t]he [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands,' *Califano v. Goldfarb,* 430 U.S. 199, 221, 97 S.Ct. 1021, 1034, . . . (1977) (STEVENS, J., concurring in judgment). They are precisely those who are not 'needy spouses' and who are 'least likely to have been victims of . . . discrimination,' *ibid.,* by the institution of marriage. A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.

"Legislative classification which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection. Cf. *United Jewish Organization v. Carey,* 430 U.S. 144, 173-174, 97 S.Ct. 996, 1013-1014, . . . (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served

by a gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound — if only indirectly — to the benefit of those without need for special solicitude.

"Having found Alabama's alimony statutes unconstitutional, we reverse the judgment below and remand the cause for further proceedings not inconsistent with this opinion. That disposition, of course, leaves the State Courts free to decide any questions of substantive State law not yet passed upon in this litigation. *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 109, 58 S.Ct. 443, 450, . . . (1938); C. Wright, Federal Courts, at 544. . . . Therefore, it is open to the Alabama courts on remand to consider whether Mr. Orr's stipulated agreement to pay alimony, or other grounds of gender-neutral State law, bind him to continue his alimony payments.

"Reversed and remanded.

"Mr. Justice BLACKMUN, concurring.

"On the assumption that the Court's language concerning discrimination 'in the sphere' of the relevant preference statute, *ante,* at 1112, does not imply that society-wide discrimination is always irrelevant, and of the further assumption that language in no way cuts back on the Court's decision in *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734, . . . (1974), I join the opinion and judgment of the Court.

"Mr. Justice STEVENS, concurring.

. . .

"Mr. Justice POWELL, dissenting. "I agree with Mr. Justice REHNQUIST that the Court, in its desire to reach the equal protection issue in this case, has dealt too casually with the difficult Art. III problems which confront us. Rather than assume the answer to questions of State law on which the resolution of the Art. III issue should depend, and which well may moot the equal protection question in this case, I would abstain from reaching either of the constitutional questions at the present time.

"This Court repeatedly has observed:

> '[W]hen a federal constitutional claim premises on an unsettled question of State law, the federal court should stay its hand in order to provide the State Courts an opportunity to settle the underlying State law question and thus avoid the possibility of unnecessarily deciding a constitutional question.' *Harris County Comm'rs Court v. Moore,* 420 U.S. 77, 83, 95 S.Ct. 870, 875, . . . (1975).

. . .

"(p. 1117) Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

"In Alabama only wives may be awarded alimony upon divorce. In Part I of its opinion, the Court holds that Alabama's alimony statutes may be challenged in this Court by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife and did so without objection for over two years. I think the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the 'case and controversy' requirement of Art. III of the Constitution.

"The architects of our constitutional form of government, to assure that courts exercising the 'judicial power of the United States' would not trench upon the authority committed to the other branches of government, consciously limiting the Judicial Branch's 'right of expounding the Constitution' to 'cases and controversies' between genuinely adverse parties. Central to this Art. III limitation on federal judicial power is the concept of standing. The standing inquiry focuses on the party before the Court asking whether he has 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, . . . (1975) (emphasis in original), quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, . . . (1962). Implicit in the concept of standing, are the requirements of injury in fact and causation. To demonstrate the 'personal stake' in the litigation necessary to satisfy Art. III, the party must suffer 'a distinct and palpable injury,' *Warth v. Seldin, supra,* 422 U.S. at 501, 95 S.Ct. at 2206, that bears a 'fairly traceable' causal connection' to the challenged governmental

action. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, . . . (1978), . . .

. . .

"Second, the challenged statute may saddle members of one sex with a burden not borne by similarly situated members of the other sex. Standing to attack such a statute lies in those who labor under its burden. For example, *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, . . . (1977), this Court sustained a widower's equal protection challenge to a provision of the Social Security Act that burdened widowers but not widows with the task of proving dependency upon the deceased spouse in order to qualify for survivor's benefits. A similar statue was invalidated in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, . . . (1973), at the instance of a female member of the uniformed services who, unlike her male counterparts, was required to prove her spouse's dependency in order to obtain increased quarter allowances and health benefits.

"The statutes at issue here differ from those discussed above in that the benefit flowing to divorced wives derives from a burden imposed on divorced husbands. Thus, Alabama's alimony statutes in effect create two gender classifications: that between needy wives, who can be awarded alimony under the statutes, and needy husbands, who cannot; and that between financially secure husbands, who can be required to pay alimony under the statutes, and financially secure wives, who cannot. Appellant Orr's standing to raise his equal protection claim must therefore be analyzed in terms of both of these classifications.

"This Court has long held that in order to satisfy the injury-in-fact requirement of Art. III standing, a party claiming that a statute unconstitutionally withholds a particular benefit must be in line to receive the benefit if the suit is successful. . . .

. . .

"(p. 1122) Much as 'Caesar had his Brutus; Charles the First his Cromwell,' Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it. While our 'right of expounding the Constitution' is confined to 'cases of a Judiciary Nature,' we are empowered to determine for ourselves when the requirements of Art. III are satisfied. Thus, 'the only check upon our own exercise of power is our own sense of self-restraint.' *United States v. Butler,* 297 U.S. 1, 79, 56 S.Ct. 312, 325, . . . (1936) (STONE, J., dissenting). I do not think the Court, in deciding the merits of appellant's constitutional claim, has exercised the self-restraint that Art. III requires in this case. I would therefore dismiss Mr. Orr's appeal . . . "

Palmore v. Sidoti

466 U.S. 429, 104 S.Ct. 1879 (1984)

CUSTODY - Race-Prejudice — ***A mother cannot be deprived of custody because she marries a man of a different race.***

"(p. 1880) Chief Justice BURGER delivered the opinion of the Court.

"We granted *certiorari* to review a judgment of a State Court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

"When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their 3-year-old daughter.

"In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditioned. The change was that the child's mother was then cohabitating with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

"After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that 'there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent.' App. to Pet. for Cert. 24.

"The court then addressed the recommendations of the court counselor, who had made an earlier report 'in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. *Niles v. Niles,* 299 So.2d 162,' *Id.,* at 25. From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because '[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice.' Record 84 (emphasis added).

"The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

> 'The father's evident resentment of the mother's choice of a Black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.'* App. to Pet. for Cert. 26-27 (emphasis added).

"The Second District Court of Appeal affirmed without opinion, 426 So.2d 34 (1982), thus denying the Florida Supreme Court jurisdiction to review the case. . . . *Jenkins v. State,* 385 So.2d 1356 (Fla. 1980). We granted *certiorari,* 464 U.S. 913, 104 S.Ct. 271, . . . (1983), and we reverse.

"The judgment of a State Court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the 'father's evident resentment of the mother's choice of a Black partner is not sufficient' to

deprive her of custody, there turns to what it regarded as the damaging impact on the child from remaining in a racially-mixed household. App. to Pet. for Cert. 26. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

"The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that 'there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent.' *Id.,* at 24. This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child.

"The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race. See *Strauder v. West Virginia,* 100 U.S. 303, 307-308, 310, . . . (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, . . . (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose, *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S.Ct. 283, 290, . . . (1964). See *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, . . . (1967).

"The State, of course, has a duty to the highest order to protect the interests of minor children, particularly those of tender years. In common with most State, Florida law mandates that custody determinations be made in the best interests of the children involved. . . . The goal of granting custody is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

"It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

"The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.' *Palmer v. Thompson,* 403 U.S. 217, 260-261, 91 S.Ct. 1940, 1962-1963, . . . (1971). . . .

"This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct.16, . . . (1917), for example, this Court invalidated a Kentucky law forbidding Negroes to buy homes in White neighborhoods.

> 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Id.,* at 81, 38 S.Ct. at 20.

"Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

"The judgment of the District Court of Appeal is reversed.

"It is so ordered."

Pennhurst State Sch. & Hosp. v. Halderman

451 U.S. 1, 101 S.Ct. 1531 (1980)

CIVIL COMMITMENT (Federal Intervention) (Patients Rights) — *Unless Congress specifically so states in applying conditions, such as a Patients' Bill of Rights, appropriate treatment, and least restrictive alternative, to a bill granting money to the States, it will be deemed that the arrangement is contractual and that the conditions are therefore not compulsory under the Fourteenth Amendment nor are not the conditions required under the arrangement unless also so stated.*

"(p. 1534) Justice REHNQUIST delivered the opinion of the Court.

"At issue in these cases is the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, . . . The Court of Appeals for the Third Circuit held that the Act created substantive rights in favor of the mentally retarded, that those rights were judicially enforceable, and that conditions at the Pennhurst State School and Hospital (Pennhurst), a facility for the care and treatment of the mentally retarded, violated those rights. For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cases for further proceedings.

"The Commonwealth of Pennsylvania owns and operated Pennhurst. Pennhurst is a large institution, housing approximately 1,200 residents. Seventy-five percent of the residents are either 'severely' or 'profoundly' retarded — that is, with an IQ of less than 35 and a number of the residents are also physically handicapped. About half of its residents were committed there by court order and half by a parent or other guardian.

"In 1974, respondent Terri Lee Halderman, a minor retarded resident of Pennhurst, filed suit in the District Court for the Eastern District of Pennsylvania on behalf of herself and all other Pennhurst residents against Pennhurst, its superintendent, and various officials of the Commonwealth of Pennsylvania responsible for the operation of Pennhurst (hereafter petitioners). The additional respondents (hereinafter with respondent Halderman, referred to as respondents) in these cases — other mentally retarded persons, the United States, and the Pennsylvania Association for Retarded Citizens (PARC) — subsequently intervened as plaintiffs. PARC added several surrounding counties as defendants, alleging that they were responsible for the commitment of persons to Pennhurst.

"As amended in 1975, the complaint alleged, *inter alia,* that conditions at Pennhurst were unsanitary, inhumane, and dangerous. Specifically, the complaint averred that these conditions denied the class members due process and equal protection of the law in violation of the Eight and Fourteenth Amendments, and denied them certain rights conferred by the Rehabilitation Act . . . the Developmentally Disabled Assistance and Bill Rights Act. . . . In addition to seeking injunctive and monetary relief, the complaint urged that Pennhurst be closed and that 'community living arrangements' be established for its residents.

"The District Court certified a class consisting of all persons who have been or may have been or may become residents of Pennhurst. After a 32 day trial, it issued an opinion, reported at 446 F.Supp. 1295 (1977), making findings of fact and conclusions of law with respect to the conditions at Pennhurst. Its findings of fact are undisputed: Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst. *Id.,* at 1308-1310.

"The District Court went on to hold that the mentally retarded have a federal constitutional right to be provided with 'minimally adequate habilitation' in the 'least restrictive

environment,' regardless of whether they were voluntarily or involuntarily committed. *Id.,* at 1314-1320. The court also held that there existed a constitutional right to 'be free from harm' under the Eighth Amendment, and to be provided with 'nondiscriminatory habilitation' under the Equal Protection Clause. *Id.,* at 1320-1322. In addition, it found that sec. 504 of the Rehabilitation Act . . . of the Pennsylvania Mental Health and Mental Retardation Act of 1966, . . . provided a right to minimally adequate habilitation in the least restrictive environment.

"Each of these rights was found to have been violated by the conditions existing at Pennhurst. Indeed, the court held that a large institution such as Pennhurst could not provide adequate habilitation. 446 F.Supp. at 1318. It thus ordered that Pennhurst eventually be closed, that suitable 'community living arrangements' be made for all Pennhurst residents, that plans for the removal of residents from Pennhurst be submitted to the court, that individual treatment plans be developed for each resident with the participation of his or her family, and that conditions at Pennhurst be improved in the interim. The court appointed a Special Master to supervise the implementation of this order. *Id.,* at 1326-1329.

"The Court of Appeals for the Third Circuit substantially affirmed the District Court's remedial order. 612 F.2d 84 (1979) *(en banc).* Unlike the District Court, however, the Court of Appeals sought to avoid the constitutional claims raised by respondents and instead rested its order on a construction of the Developmentally Disabled Assistance and Bill of Rights Act. . . . It found that . . . (the) 'bill of rights' provision, granted to mentally retarded persons a right to 'appropriate treatment, services, and habilitation' in 'the setting that is least restrictive of . . . personal liberty.' The court further held that under the test articulated in *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, . . . (1975), mentally retarded persons have implied cause of action to enforce that right. 612 F.2d at 97. Because the court found that Congress enacted the statute pursuant to both sec. 5 of the Fourteenth Amendment and the spending power, it declined to consider whether a statue enacted pursuant to the spending power alone 'could ever provide the predicate for private substantive rights.' *Id.,* at 98. As an alternative ground, the court affirmed the District Court's holding that Pennhurst residents have a State statutory right to adequate 'habilitation.'

"The court concluded that the conditions at Pennhurst violated these federal and State statutory rights. As to relief, it affirmed the order of the District Court except insofar as it ordered Pennhurst to be closed. Although the court concluded that 'deinstitutionalization is the favored approach to habilitation' in the least restrictive environment, it did not construe the Act to require the closing of a large institution like Pennhurst. *Id.,* at 115. The court thus remanded the case to the District Court for 'individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient' and instructed the District Court or the Master to 'engage in a presumption in favor of placing individuals in [community living arrangements].' *Id.,* at 114-115.

"Three judges dissented. Although they assumed that the majority was correct in holding that Pennhurst residents have a right to treatment under the Act and an implied cause of action under the Act to enforce that right, they disagreed that the Act imposed a duty on the defendants to provide the 'least restrictive treatment' possible. The dissent stated that 'the language and structure of the Act, the relevant regulations, and the legislative history all indicate that the States may consider their own resources in providing less restrictive treatment.' *Id.,* at 119. It did not believe that the general findings and declarations contained in a funding statute designed to encourage a course of conduct could be used by the federal courts to create absolute obligations on the States.

"We granted *certiorari* to consider petitioners' several challenges to the decision below. 447 U.S. 904, 100 S.Ct. 2984, . . . Petitioner first contends that 42 U.S.C. sec. 6010 does not create in favor of the mentally retarded any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or sec. 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual

habilitation plans for the mentally retarded. Because we agree with petitioners' first contention — that sec. 6010 simply does not create substantive rights — we find it unnecessary to address the remaining issues.

"We turn to a brief review of the general structure of the Act. It is a federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled. Like other federal-state cooperative programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. . . . The Commonwealth of Pennsylvania has elected to participate in the program. The Secretary of the Department of Health and Human Services (HHS), the agency responsible for administering the Act, has approved Pennsylvania's State Plan and in 1976 disbursed to Pennsylvania approximately $1.6 million. Pennhurst itself receives no federal funds from Pennsylvania's allotment under the Act, though it does receive approximately $6 million per year in Medicaid funds.

. . .

"(p. 1538) As support for its broad remedial order, the Court of Appeals found that 42 U.S.C. sec. 6010 created substantive rights in favor of the disabled and imposed an obligation on the States to provide, at their own expense, certain kinds of treatment. The initial question before us, then, is one of statutory construction: Did Congress intend in sec. 6010 to create enforceable rights and obligations?

"In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds. Although the court below held the Congress acted under both powers, the respondents themselves disagree on this point. The Halderman respondents argue that sec. 6010 was enacted pursuant to sec. 5 of the Fourteenth Amendment. Accordingly, they assert that sec. 6010 is mandatory on the States, regardless of their receipt of federal funds. The Solicitor General, in contrast, concedes that Congress acted pursuant to its spending power alone. . . . Thus, in his view, sec. 6010 only applies to those States which accept federal funds.

"Although the Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724, . . . (1966); *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, . . . (1970); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, . . . (1975), we have little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees. Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional State authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to sec. 5. See *Katzenbach v. Morgan, supra,* (intent expressly stated in the Voting Rights Act in 1965); *Oregon v. Mitchell, supra,* (intent expressly stated in the Voting Rights Act Amendments of 1970); *Fitzpatrick v. Bitzer, supra,* (intent expressly stated in both the House and Senate Reports of the 1972 Amendments to the Civil Rights Act of 1964); cf. *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, . . . (1966) (intent to enforce the Fifteenth Amendment expressly stated in the Voting Rights Act of 1965). Those cases, moreover, involved statutes which simply prohibited certain kinds of State conduct. The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume to impose massive financial obligations on the States.

"Turning to Congress' power to legislate pursuant to the spending power, our cases have long-recognized that Congress may fix the terms on which it shall disburse federal money to the States. See, e.g., *Oklahoma v. CSC,* 330 U.S. 127, 67 S.Ct. 544, . . . (1946); *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128, . . . (1968); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, . . . (1970). Unlike legislation enacted under sec. 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests in whether the State voluntarily and knowingly accepts the terms of the 'contract.' See *Steward Machine Co. v. Davis,* 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, . . . (1937); *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, . . . (1980). . . .

. . .

"(p. 1540) Applying those principles to these cases, we find nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens.

"There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstrate that it is a mere federal-state funding statute. The explicit purposes of the Act are simply 'to assist' the States through the use of federal grants to improve the care and treatment of the mentally retarded. . . . Nothing in either the 'overall or specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights. Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States.

"Respondents nonetheless insist that the fact that sec. 6010 speaks in terms of 'rights' supports their view. Their reliance is misplaced. 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *Philbrook v. Glodgett,* 421 U.S. 707, 712, 95 S.Ct. 1893, 1898, . . . (1975), quoting *United States v. Heirs of Boisdore,* 8 How. 113, 122, . . . (1849). See *District of Columbia v. Carter,* 409 U.S. 418, 420, 93 S.Ct. 602, 604, . . . (1973). Contrary to respondents' assertion, the specific language and the legislative history of sec. 6010 are ambiguous. We are persuaded that sec. 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it by the court below. . . .

. . .

"(p. 1542) There remains the contention of the Solicitor General that Congress, acting pursuant to its spending power, conditioned the grant of federal money on the State's agreeing to underwrite the obligations the Court of Appeals read into sec. 6010. We find that contention wholly without merit. As amply demonstrated above, the 'findings' in sec. 6010, when viewed in the context of the more specific provisions of the act, represent general statements of federal policy, not newly created legal duties.

"The 'plain language' of sec. 6010 also refutes the Solicitor General's contention. When Congress intended to impose conditions on the grant of federal funds, . . . it proved capable of doing so in clear terms. Section 6010, in marked contrast, in no way suggests that the grant of federal funds is 'conditioned' on a State's funding the rights described therein. The existence of explicit conditions throughout the Act, and the absence of conditional language in sec. 6010, manifest the limited meaning of sec. 6010. . . .

"(p. 1543) Our conclusion is also buttressed by the rule of statutory construction established above, that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds. That canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. It is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have known it would be bound to provide such treatment. The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with sec. 6010. . . .

. . .

"(p. 1544) And third, the court below held that sec. 6010 mandated deinstitutionalization for most, if not all, mentally retarded persons. As originally enacted in 1975, however, the Act required only that each State use not less than 30 percent of its allotment 'for the purpose of assisting it in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities.' . . . Three years later, Congress relieved the States of even that modest duty. Instead of requiring the States to use a certain portion of their allotment to support deinstitutionalization, Congress required the States to

concentrate their efforts in at least one of four areas, only one of which was 'community living arrangements.' . . . Had sec. 6010 created a right to deinstitutionalization, the policy choices contemplated by both the 1975 and 1978 provisions would be meaningless.

. . .

"(p. 1546) After finding that federal law imposed an obligation on the States to provide treatment, the court below examined State law and found that it too imposed such a requirement. 612 F.2d at 100-103. The court looked to sec. 4201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, which provides in pertinent part:

'The department of [public welfare] shall have power, and its duty shall be:

'(1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, national origin, settlement, residence, or economic or social status.' . . .

"Respondents contend that, even if we conclude that relief is unavailable under federal law, State law adequately supports the relief ordered by the Court of Appeals. There are, however, two difficulties with that argument. First, the lower court's finding that State law provides a right to treatment may well have been colored by its holding with respect to sec. 6010. Second, the court held that there is a right to 'treatment,' not that there is a State right to treatment in the 'least restrictive' environment. As such, it is unclear whether State law provides an independent and adequate ground which can support the court's remedial order. Accordingly, we remand the State law issue for reconsideration in light of our decision here.

"For similar reasons, we also remand to the Court of Appeals those issues it did not address, namely, respondents' federal constitutional claims and their claims under sec. 504 of the Rehabilitation Act.

"Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded. The Developmentally Disabled Assistance and Bill of Rights Act is one such law. It establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so. But the Act does no more than that. We would be attributing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment. Accordingly, we reverse the principal holding of the Court of Appeals and remand for further proceedings consistent with this opinion.

"Reversed and remanded.

"Justice BLACKMUN, concurring in part and concurring in judgment.

"Although I agree that the judgment of the Court of Appeals must be reversed, and although I am in accord with much of what the Court says about the meaning of this confused and confusing legislation, see *ante,* at 1536-1545, I do not join the Court's advisory discussion in Part IV of its opinion. In that Part, the Court properly and correctly notes, *ante,* at 1546, that it leaves open for consideration on remand whether, and in what form, secs. 6011 and 6063 create rights that are enforceable by private parties like those that make up these plaintiff classes. The Court, however, seems to me strongly to intimate that it will not view kindly any future positive holding in that direction. I agree that this specific question was not presented and is not today decided, but I decline to join what appears to be a negative attitude on the part of the Court to what is a possible construction of the Act.

"It seems plain to me that Congress, in enacting sec. 6010, intended to do more than merely set out politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of State and federal authorities. A perfectly reasonable judicial interpretation of sec. 6010, which avoid the odd and perhaps dangerous precedent of ascribing no meaning to a congressional enactment, would observe and give effect to the linkage between sec. 6010 and sec. 6063. As the Court points out, *ante,* at 1537, a State that accepts funds under the Act becomes legally obligated to submit a State plan containing 'assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 . . . '

"That private parties, the intended beneficiaries of the Act, should have the power to enforce the modest legal content of sec. 6063 would not be unusual application of our precedents,

even for a legislative scheme that involves federal regulatory supervision of State operations. See, e.g., *Cannon v. University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, . . . (1979); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, . . . (1970). See, also, *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502, . . . (1980).

"Finally, I have difficulty with the Court's suggestion, *ante,* at 1545-1546, that Pennhurst should be free of the Act's requirements because it does not directly receive funds under the Act. The Commonwealth's program for the institutionalized developmentally disabled is unified in one administration. To restrict the definition of 'program assisted' in sec. 6063 to specific institutions within a unified program would allow a State to insulate substandard institutions from federal requirements merely by allocating federal funds to acceptable premises and State funds to substandard ones.

"Justice WHITE, with whom Justice BRENNAN and Justice MARSHALL join, dissenting in part.

"Pennhurst is a residential institution for the retarded operated by the Commonwealth of Pennsylvania and serving a five county area. Roughly half of its 1,200 residents were admitted upon application of their parents or guardians while the remainder were committed pursuant to court order. After extensive discovery and a lengthy trial, the District Court held that the conditions of confinement of its residents under the Eighth and Fourteenth Amendments of the United States Constitution, State law, and the Rehabilitation Act of 1973, . . . and entered a detailed remedial order requiring the eventual closing of Pennhurst in favor of community living arrangements for Pennhurst's displaced residents. 446 F.Supp. 1295 (ED Pa. 1978). On appeal, the Court of Appeals for the Third Circuit determined that the result reached by the District Court was proper under the Developmentally Disabled Assistance and Bill of Rights Act, . . . although relief under that statute had not initially been raised in that court. 612 F.2d 84 (1979) *(en banc).* The Court of Appeals determined that the Act created judicially cognizable rights to treatment and to receipt of care in the least restrictive environment, and that the right to treatment was also supported by State law. The court essentially affirmed the remedial order entered by the District Court with one significant exception. Finding that the legislative history did not require the abandonment of large institutional facilities, the Court of Appeals held that the District Court erred in ordering Pennhurst to be closed. Rather, the Court of Appeals required that each resident of Pennhurst be afforded an individual hearing before a Special Master to determine the appropriate level of institutionalization with a presumption established that community-based living arrangements were proper.

"In essence, the Court concludes that the so-called 'Bill of Rights' section of the Act, 42 U.S.C. sec. 6010, merely serves to establish guidelines which States should endeavor to fulfill, but which have no real effect except to the extent that the Secretary of Health and Human Services chooses to use the criteria established by sec. 6010 in determining funding under the Act. In my view, this reading misconceives the important purposes Congress intended sec. 6010 to serve. That section, as confirmed by its legislative history, was intended by Congress to establish requirements which participating States had to meet in providing care to the developmentally disabled. The fact that Congress spoke in generalized terms rather than the language of regulatory minutia cannot make nugatory actions so carefully undertaken.

"As an initial matter, I agree that sec. 6010 was enacted pursuant to Congress' spending power, and not pursuant to its punder sec. 5 of the Fourteenth Amendment. Accordingly, I agree that the Act was not intended to place duties on States independent of their participation in the program established by the Act. The Court of Appeals, in the section of its opinion concerning the exercise of a private cause of action, determined that sec. 6010 was passed pursuant to sec. 5, reasoning that since the Fourteenth Amendment included a right 'to be free from, and to obtain judicial relief for, unjustified intrusions on personal security,' 612 F.2d at 98, quoting *Ingraham v. Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, . . . (1977), congressional passage of sec. 6010 indicated its desire to enforce this interest. Congressional action under the Enforcement Clause of the Fourteenth Amendment, however, has very significant consequences, see *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, . . . (1976), and given these ramifications, it should not be lightly assumed that Congress acted pursuant to its power under sec. 5 in passing the Act.

"Here, there is no conclusive basis for determining that Congress acted pursuant to sec. 5. Nothing in the statutory language refers to the Fourteenth Amendment. Section 6010 was but one part of a bill whose underlying purpose was to extend and modify an existing federal-state

grant program. The initial program was unquestionably passed pursuant to Congress' spending power. Moreover, sec. 6010(3) is by its express terms a limitation on federal and State spending. The rights articulated in sec. 6010 are also cross-references in sec. 6063 (1976 ed. and Supp. III), which details the operation of the grant program. Thus, all objective considerations connected with sec. 6010 and its operation suggest that Congress enacted it pursuant to its Spending Clause powers.

"Of course, resolution of the sec, 5 issue does not determine the issue whether sec. 6010 was intended by Congress to have substantive consequences as part of a statute enacted under Art. I, sec. 8, cl. 1, and in my view, the majority makes far too much of the fact that sec. 6010 was not passed pursuant to the Fourteenth Amendment. While this conclusion has significant ramifications for the appropriate remedy for violations of the Act, it does not follow that sec. 6010 was to have no impact or effect besides the mere 'encouragement' of State action and created no obligations on participating States and no rights in those being served by programs maintained by a State in cooperation with the Federal Government.

"The language and scheme of the Act make it plain enough to me that Congress intended sec. 6010, although couched in terms of rights, to serve as requirements that the participating States must observe in receiving federal funds under the provisions of the Act. That Congress was deadly serious in stating that the developmentally disabled had entitlements which a State must respect if it were to participate in a program can hardly be doubted.

"Federal involvement in State provision of health care to those persons with developmental disabilities began in 1963 with the passage of the Mental Retardation Facilities Construction Act, . . . That statute provided funds for the construction of health care facilities and specifically encouraged the development of community-based programs. The Developmentally Disabled Act, technically and amendment to the Mental Retardation and Facilities Construction Act, was passed in light of Congress' continued concern about the quality of health care being provided to the developmentally disabled and that federal support for improved care should be increased. A central expression of this concern was sec. 6010, which declares by way of four congressional 'findings' that:

> '1. Persons with developmental disabilities have a 'right to appropriate treatment, services, and habilitation.'
>
> '2. Treatment should be designed to maximize an individual's potential and should 'in setting that is least restrictive of the person's personal liberty.'
>
> '3. The State and Federal Governments have an obligation to assure that public funds are not provided to institutions or programs that do not provide 'appropriate treatment, services, and habilitation' or do not meet minimum standards of care in six specific respects such as diet, dental care, and the use of force or chemical restraints.'
>
> '4. Rehabilitative programs should meet standards designed to assure the most favorable possible outcome for patients, and these standards should be appropriate to the needs of those being served, depending on the type of institution involved.'

"As clearly as words can, sec. 6010(1) declares that the developmentally disabled have the right to appropriate treatment, services, and habilitation. The ensuing parts of sec. 6010 implement this basic declaration. Section 6010(3), for example, *obligates* the Federal and State Governments not to spend the public funds on programs that do not carry out the basic requirement of sec. 6010(1) and, more specifically, do not meet minimum standards with respect to certain aspects of treatment and custody. Sections 6010(2) and (4) are phrased in less mandatory terms, but the former unmistakably states a preference for treatment in the least restrictive environment and the latter for establishing standards for assuring the appropriate care of the developmentally disabled in relation to the type of institution involved. Both sections, by delineating in some respects the meaning of 'appropriate' treatment, services, and habilitation, implement the basic rights that the developmentally disabled must be afforded for the purpose of the programs envisioned by the Act. Hence, neither section could be ignored by the Secretary in carrying out his duties under that statute.

"Standing on its own bottom, therefore, sec. 6010 cannot be treated as only wishful

thinking on the part of Congress or as playing some fanciful role in the implementation of the Act. The section clearly states rights which the developmentally disabled are to be provided as against a participating State. But sec. 6010 does not stand in isolation. Other provisions of the Act confirm the view that participating States must take account of sec. 6010 and that the section is an integral part of an Act cast in the pattern of extending aid conditioned on State compliance with specified conditions. Section 6063(a) required that for a State to take advantage of the Act, it must have a 'plan submitted to and approved by the Secretary . . . .' Section 6063(d) (1976 ed., Supp. III), which is entitles 'Conditions for Approval,' state that '[i]n order to be approved by the Secretary under this section, a State plan for the provision of services and facilities for persons with developmental disabilities must' be filed; and in its original form, sec. 6063 required the plan to satisfy the conditions stated in some 30 numbered paragraphs. The 24th specification was that the plan must 'contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected.' Any doubts that the human rights referred to in sec. 6063(b)(24) corresponded to those specified in sec. 6010 were removed in 1978 when sec. 6063(b) was amended to restate the conditions which a plan must satisfy. Section 6063(b)(5)(C) (1976 ed., Supp. III) now provides:

> 'The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to the rights of the developmentally disabled).'

"Pennsylvania has submitted a plan under sec. 6063, that is, a plan providing services for the developmentally disabled in Pennsylvania. The Court states that the plan has been approved and that funds have been allocated to the State. These funds will necessarily be supporting Pennsylvania's 'programs' for treatment, services, or habilitation within the meaning of sec. 6063(b)(5)(C); and under the express terms of that section, Pennsylvania is required to respect the sec. 6010 rights of the developmentally disabled in its State institutions, including Pennhurst, and to give the Secretary adequate assurances in this respect. This is true whether or not Pennhurst itself directly receives any share of the State's allocation. It should also be noted that sec. 6063(b)(3)(A) (1976 ed., Supp. III) provides that 'funds paid to the State under sec. 6062 of this title will be used to make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State.' Thus, funds received under the Act were intended to result in the improvement of care at institutions like Pennhurst.

"The legislative history of sec. 6010 confirms the view that Congress intended sec. 6010 to have substantive significance. Both the initial House of Representatives and Senate versions of the Act contained provisions indicating congressional concern with the character and quality of care for the developmentally disabled. The House bill, H.R. 4005, 94th Cong., 1st Sess. (1975), did not have a bill of rights section akin to sec. 6010. It did, however, have a provision that required States to spend at least 10% of the irrespective allotments 'for the purpose of assisting . . . in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities.' Sec. 5(b)(4). Debate in the House of Representatives indicated that the spending restriction was designed to promote community-based facilities to counteract the unfortunate practice of widespread institutionalization of developmentally disabled persons.

"The Senate version of the Act, S. 462, 94th Cong., 1st Sess. (1975), contained a separate Title II, called the 'Bill of Rights for Mentally Retarded and Other Persons with Developmental Disabilities,' setting forth in extensive detail specific standards which state programs and facilities were required to meet. The impetus behind the Senate's 'Bill of Rights' was the recognition by several Senators of the tragic conditions of confinement faced by many residents of large institutions. An often repeated purpose of the Bill of Rights was to foster the development of community-based facilities as well as to encourage overall better care and treatment for the mentally disabled. At the same time, there was the realization that institutions still had a significant role to play in the treatment of the mentally disabled.

"The Senate's version of Title II provided two methods for the States to comply with the requirements of the Act. First, a State wishing to participate could opt to follow guidelines to be established by the Secretary under Part B of Title II, sec. 210(a). Alternatively, a State could decide to meet the extensive standards specified in Parts C and D relating to residential and community facilities respectively. Under the Senate bill, it was clear that the standards encompassed by the alternative procedures were not merely hortatory. That bill provided that within one year after the enactment, a State desiring funding must provide assurances to the Secretary that 'each such facility or agency has established a plan for achieving compliance no later than 5 years after the date of enactment . . . ' sec. 203(a). After the 5-year period, 'no residential facility or program of community care for individuals with developmental disabilities shall be eligible to receive payments either directly or indirectly under any Federal law, unless such residential facility meets the standards promulgated under parts C or D of this title or has demonstrated to the Secretary for a reasonable period of time that it has actively implemented the requirements of part B,' sec. 206(a).

"Following Senate and House passage, the different bills came to a Conference Committee. The resulting compromise kept the House 10% spending restriction which the Conference Report noted was 'designed to eliminate inappropriate placement in institutions of persons with developmental disabilities . . . ' H.R.Conf.Rep.No. 94-473, p. 33, 1975), U.S.Code Cong. & Admin.News 1975, p. 952. The Senate's detailed Bill of Rights was replaced by sec. 6010, a comparatively brief statement of the developmentally disabled's rights expressed in general terms. The specific mechanism of alternative compliance standards was omitted. The Conference Report set forth the following as the statement of purpose of the Conference version of the Senate's Title II.

> "'The conference substitute contains a compromise which enumerates Congressional findings respecting the rights of persons with developmental disabilities. These include findings that the developmentally disabled have a right to appropriate treatment, services and habilitation; that such treatment, services and habilitation should be designed to maximize the developmental potential of the person and be provided in the setting that is least restrictive to his personal liberty; that the Federal government and the States have an obligation to assure that public funds are not provided in programs which do not provide appropriate treatment, service and habilitation or do not meet minimum standards respecting diet, medical and dental services, use of restraints, visiting hours and compliance with fire and safety codes; and that programs for the developmentally disabled should meet appropriate standards including standards adjusted for the size of the institutions. . . .
>
> "'These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.' H.R.Conf.Rep.No. 94-473, *supra,* at 41-42 U.S.Code Cong. & Admin.News 1975, p. 961.

Following the Conference Report, the Act was passed with minimal debate.

"The Senate's version of the Bill of Rights was hundreds of pages long and constituted an attempt to define the standards and conditions of State participation with precision and in great detail. The Conference Report makes clear that the detailed version was rejected, not to substitute a merely advisory section for an extended statement of conditions, but rather to substitute a generalized statement of entitlements that a participating State must respect and that would adequately meet congressional concerns without encountering the inflexibility of legislatively prescribed conditions of treatment and care. There is no basis for considering the shortened statement as intended to play a qualitatively lesser role in the scheme of the Act. Rather, the compromise is best understood as a rejection of either the need or the ability of Congress to specify the required standards in a manner resembling administrative regulations.

"As previously stated, sec. 6010 should be understood to require a State receiving funds under the Act to observe the rights established by the provision. None of the concerns expressed

by the Court present sufficient reason to avoid or overcome the statutory mandate.

"It is true that the terms 'treatment, services, and habilitation' to which sec. 6010 declares an entitlement are not self-defining. But it does not follow that the participating States are free to ignore them. Under sec. 6010(3)(A), as already indicated, the State has an 'obligation' not to spend public funds on any institutional or other residential facility that 'does not provide treatment, services, and habilitation which is appropriate to the needs of such persons.' If federal funds are used to support a program, the program must (1) provide for the sec. 6010 rights to appropriate treatment, services, and habilitation; (2) observe the direction in sec. 6010(2) that treatment, services, and habilitation be furnished in the least restrictive setting; (3) satisfy the minimum standards referred to in sec. 6010(3)(B); and (4) follow the provisions of sec. 6010(4), which offers further guidance for the participating State in furnishing the treatment, services, and habilitation to which the developmentally disabled are entitled.

"Furthermore, before approving a State plan, the Secretary must assure himself that the rights identified under sec. 6010 will be adequately protected by the participating State. Why the language of an express 'condition,' which sec. 6010 lacks, should be the only touchstone for identifying a State's obligation is difficult to fathom. Indeed, identifying 'rights' and requiring the participating State to observe them seems a far stronger indication of congressional intent than a mere statement of
'conditions.'

"To argue that Congress could not have intended to obligate the States under sec. 6010 because those obligations would be large and for the most part unknown is also unpersuasive. Section 6010 calls for appropriate treatment, services, and habilitation; and, as already detailed, the remaining sections spell out, some in more detail than others, the scope of that requirement. Beyond this, however, the content and reach of the federal requirements will, as a practical matter, emerge from the process of preparing a State plan and securing its approval by the Secretary. The State plan must undertake to provide services and facilities pursuant to 'standards' prescribed by the Secretary; and, as will become evident, the State's option to terminate its statutory duties must be respected by the courts. In any event, there is no indication in the record before us that the cost of compliance with sec. 6010 would be 'massive.' The District Court found that noninstitutional facilities located in the communities would be significantly less expensive to operate than facilities like Pennhurst. 446 F.Supp. at 1312. At best, the cost of compliance with sec. 6010 is indeterminate.

"It is apparently suggested that sec. 6010 is reduced to a mere statement of hope by the absence of an express provision requiring the Secretary to cut off funds in the event he determines that a State is not observing the rights set out in sec. 6010. But it is clear that the Secretary may not approve a plan in the first place without being assured that those rights will be protected, and it is difficult to believe that the Secretary must continue to fund a program that is failing to live up to the assurances that the State has given the Secretary.

"It is also a matter of substantial moment that sec. 6012 (1976 ed., Supp. III) expressly conditions the approval of a plan on the State's providing 'a system to protect and advocate the rights of persons with developmental disabilities,' and that the system must 'have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of rights of such persons.' Sec. 6012(a)(2)(A). Section 6012 goes on to provide federal aid in establishing such systems, and it seems rather plain that the Act contemplates not only ongoing oversight by the Secretary but also enforcement of the rights of persons receiving treatment through judicial action or otherwise.

"It is thus not of determinative significance that the Secretary was once of the view that noncompliance with sec. 6010 did not provide sufficient reason to cut off funds under the Act. As the Court recognizes, the 1978 amendments have convinced him that sec. 6010 rights must be respected; but if the Secretary's original view was correct, and I do not think it was, this would not foreclose judicial remedies sought by or on behalf of developmentally disabled persons injured by the State's failure to observe sec. 6010 rights. Moreover, the Solicitor General, who is the legal representative of the United States, is of the view that the Act does create enforceable rights. In any event, this Court, as it is permitted to do, has disagreed on occasion with the administrative determination of the Secretary. See, e.g., *Philbrook v. Glodgett,* 421 U.S. 707, 715, and n. 11, 95 S.Ct. 1893, 1899, and n. 11, . . . (1975); . . .

"Given my view that Congress intended sec. 6010 to do more than suggest that the States act in a particular manner, I find it necessary to reach the question whether these rights can be enforced in federal courts in a suit brought by the developmentally disabled. This action was brought under 42 U.S.C. sec. 1983, and directly under the Developmentally Disabled Act. The Court of Appeals determined that under the factors enunciated in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, . . . (1975), an implied private cause of action existed under the Act. Subsequently, however, we held that 'the sec. 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.' *Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, . . . (1980). It is acknowledged by all parties that it is appropriate to consider the cause-of-action question in light of the intervening decision in *Thiboutot.*

"We have often found federal court jurisdiction to enforce statutory safeguards in grant programs in suits brought by injured recipients. See, e.g., *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, . . . (1970); *Shea v. Vialpando,* 416 U.S. 251, 94 S.Ct. 1746, . . . (1974); *Carleson v. Remillard, supra.* In essence, *Thiboutot* creates a presumption that a federal statute creating federal rights may be enforced in a sec. 1983 action. To be sure, Congress may explicitly direct otherwise, such as if the 'governing statute provides an exclusive remedy for violations of its terms.' *Thiboutot, supra,* at 22, n. 11, 100 S.Ct. at 2513, n. 11 . . . . See, generally, *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 672, 99 S.Ct. 1905, 1944, . . . (1979) (sec. 1983 protections apply to all rights secured by federal statutes 'unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a sec. 1983 action is inconsistent with congressional intention') . . . Thus, in *Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, . . . (1973), we held that sec. 1983 did not provide a basis for relief since federal habeas corpus proceedings constituted the sole remedy for challenging the fact or duration of confinement. See *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 150, n. 5, 90 S.Ct. 1598, 1604, n. 5, . . . (1970). Attempting to fit within the exception, the Pennhurst petitioners suggest that Congress intended the sole remedy for violations of the terms of the Act to be the power of the Secretary to disapprove a State's plan. See 42 U.S.C. sec 6063(c). According to these petitioners, imposition of a private remedy would be incompatible with the overall scheme of the Act, especially given the amorphous quality of the asserted rights.

"As a general matter, it is clear that the fact that a federal administrative agency has the power to oversee a cooperative state-federal venture does not mean that Congress intended such oversight to be the exclusive remedy for enforcing statutory rights. This Court is 'most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program[s]' even if the agency has the statutory power to cut of federal funds for noncompliance. *Rosado v. Wyman, supra,* at 420, 90 S.Ct. at 1222. In part, this reluctance is founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act. Cf. *Cannon v. University of Chicago,* 441 U.S. 677, 708, n. 42, 99 S.Ct. 1946, 1963, n. 42, . . . (1979). In this litigation, there is no indication that Congress intended the funds cutoff, which, as the Court notes, the Secretary believed was not within the power of the agency, to be the sole remedy for correcting violations of sec. 6010. Indeed, sec. 6012 and the legislative history of the Act reveal that Congress intended judicial enforcement of sec. 6010. See *supra,* at p. 1554; H.R.Conf.Rep.No. 94-473, p. 42 (1975) (the statutory rights established by sec. 6010 'should be protected and assured by the Congress and the courts'). Accordingly, I would hold that jurisdiction under sec. 1983 was properly invoked in these cases under *Thiboutot.*

"I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings. This litigation does not involve the exercise of congressional power to enforce the Fourteenth Amendment as the Court of Appeals held, but is an exercise of the spending power. What an appropriate remedy might be where the State officials fail to observe the limits of their power under the United States Constitution or fail to perform an ongoing statutory duty imposed by a federal statute enacted under the commerce power or the Fourteenth Amendment is not necessarily the measure of a federal court's authority where it is found that a State has failed to perform its obligations undertaken pursuant to a statute enacted under the spending power. The State's duties in the latter situation do not arise until and unless the State chooses to receive federal funds. Furthermore, the State may terminate such statutory obligations, except those already accrued, by withdrawing from the program and terminating its receipt of federal

funds. It is settled that administrative oversight and termination of federal funding in the event of a State's failure to perform its statutory duties is not the sole remedy in Spending Clause cases. 'It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field that in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.' *Rosado v. Wyman, supra,* 422-423, 90 S.Ct. at 1222-1223. It is equally clear, however, that the courts in such cases must take account of the State's privilege to withdraw and terminate its duties under the federal law. Although the court may enjoin the enforcement of a discrete State statutory provision or regulation or may order State officials prospectively to perform their duties incident to the receipt of federal funds, the prospective force of such injunctions cannot survive the State's decision to terminate its participation in the program. Furthermore, there are cases in which there is no identifiable statutory provision whose enforcement can be prohibited. *Rosado v. Wyman,* was such a case, and there, after finding that the State was not complying with the provisions of the Social Security Act, we remanded the case to the District Court to 'afford [the State] an opportunity to revise its program in accordance with [federal requirements]' as we had construed them to be, but to retain jurisdiction 'to review . . . any revised program adopted by the State, or, should [the State] choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies . . . ' 397 U.S. at 421-422, 90 S.Ct. at 1222-1223; see *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, . . . (1974).

"It is my view that the Court of Appeals should have adopted the *Rosado* approach in these cases. It found the State to be in noncompliance with the federal statute in major respects and proceeded to impose a far-reaching remedy, approving the appointment of a Special Master to decide which of the Pennhurst inmates should remain and which should be moved to community-based facilities. More properly, the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. If it did not, it should propose a plan for achieving compliance, in which event, if it did not, it should propose a plan for achieving compliance, in which event, if it satisfied the court, a decree incorporating the plan could be entered and if the plan was unsatisfactory, the further use of federal funds could be enjoined. In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed. As we recently recognized in *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, . . . (1979): 'The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted.' *Id.,* at 607-608, 00 S.Ct. at 2506. Cf. *Addington v. Texas,* 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, . . . (1979) (commitment depends 'on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists'). In enacting sec. 6010, Congress eschewed creating any specific guidelines on the proper level of institutionalization, leaving the question to the States to determine in the first instance. A court-appointed Special Master is inconsistent with this approach.

"Accordingly, I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings."

Parham v. J.R.

442 U.S. 584, 99 S.Ct. 2463 (1979)

CIVIL COMMITMENT -(Juveniles) — ***Parents have a basic right to commit their children to mental hospitals, but the children have a right to have an independent but not necessarily law-trained fact-finder decide whether the statutory requirements and medical standards for admission have been met with the power to refuse admission if they have not been. The child has a further right to periodic review.***

"Mr. Chief Justice BURGER delivered the opinion of the Court.

"The question presented in this appeal is what process is constitutionally due a minor child whose parents or guardian seek state administered institutional mental health care for the child and specifically whether an adversary proceeding is required prior to or after the commitment.

"(a) Appellee J.R., a child being treated in a Georgia State Mental Hospital, was a plaintiff in this class action based on 42 U.S.C. sec. 1983, in the District Court for the Middle District of Georgia. Appellants are the State's Commissioner of the Department of Human Resources, the Director of the Mental Health Division of the Department of Human Resources, and the Chief Medical officer at the hospital where appellee was being treated. Appellee sought a declaratory judgment that Georgia's voluntary commitment procedures for children under the age of 18, . . . violated the Due Process Clause of the Fourteenth Amendment and requested an injunction against their future enforcement.

"A three-judge District Court was convened . . . After considering expert and lay testimony and extensive exhibits and after visiting two of the State's regional mental health hospitals, the District Court held that Georgia's statutory scheme was unconstitutional because it failed to protect adequately the appellees' due process rights. *J.L. v. Parham,* 412 F.Supp. 112, 139 (1976).

"To remedy this violation, the court enjoined future commitments based on the procedures in the Georgia statute. It also commands Georgia to appropriate and expend whatever amount was 'reasonably necessary' to provide nonhospital facilities deemed by the appellant state officials to be the most appropriate for the treatment of those members of plaintiffs' class, n. 2, *supra,* who could be treated in a less drastic, nonhospital environment. 412 F.Supp. at 139.

"Appellants challenged all aspects of the District Court's judgment. We noted probable jurisdiction, . . . and heard argument during the 1977 term. The case was then consolidated with *Secretary of Public Welfare v. Institutionalized Juveniles,* 442 U.S. 640, 99 S.Ct. 2523, . . . and reargued this term.

"(b) J.L., a plaintiff before the District Court who is now deceased, was admitted in 1970 at the age of 6 years to Central State Regional Hospital in Milledgeville, Ga. Prior to his admission, J.L. had received outpatient treatment at the hospital for over two months. J.L.'s mother then requested the hospital to admit him indefinitely.

"The admitting physician interviewed J.L. and his parents. He learned the J.L.'s natural parents had divorced and his mother had remarried. He also learned that J.L. had been expelled from school because he was uncontrollable. He accepted the parents' representation that the boy had been extremely aggressive and diagnosed the child as having a 'hyperkinetic reaction to childhood.'

"J.L.'s mother and stepfather agreed to participate in family therapy during the time their son was hospitalized. Under this program, J.L. was permitted to go home for short stays. Apparently his behavior during these visits was erratic. After several months, the parents requested discontinuance of the program.

"In 1972, the child was returned to his mother and stepfather on a furlough basis, *i.e.,* he would live at home but go to school at the hospital. The parents found they were unable to

control J.L. to their satisfaction, and this created family stress. Within two months, they requested his readmission to Central State. J.L.'s parents relinquished their parental rights to the county in 1974.

"Although several hospital employees recommended that J.L. should be placed in a special foster home with 'a warm, supporting, truly involved couple,' the Department of Family and Children Services was unable to place him in such a setting. On October 24, 1975, J.L. (with J.R.) filed this suit requesting an order of the court placing him in a less drastic environment suitable to his needs.

"(c) Appellee J.R. was declared a neglected child by the county and removed from his natural parents when he was three months old. He was placed in seven different foster homes in succession prior to his admission to Central State Hospital at the age of 7.

"Immediately preceding his hospitalization, J.R. received outpatient treatment at a county mental health center for several months. He then began attending school where he was so disruptive and incorrigible that he could not conform to normal behavior. J.R.'s seventh set of foster parents requested his removal from their home. The Department of Family and Children Services then sought his admission at Central State. The agency provided the hospital with a complete sociomedical history at the time of his admission. In addition, three separate interviews were conducted with J.R. by the admission team of the hospital.

"It was determined that he was borderline retarded, and suffered an 'unsocialized, aggressive reaction of childhood.' It was recommended unanimously that he would 'benefit from the structured environment' of the hospital and would enjoy living and playing with boys of the same age.'

"J.R.'s progress was re-examined periodically. In addition, unsuccessful efforts were made by the Department of Family and Children Services during his stay at the hospital to place J.R. in various foster homes. On October 24, 1975, J.R. (with J.L.) filed this suit requesting an order of the court placing him in a less drastic environment suitable to his needs.

"(d) Georgia Code . . . provides for the voluntary admission to a state regional hospital of children such as J.L. and J.R. Under that provision, admission begins with an application for hospitalization signed by a 'parent or guardian.' Upon application, the superintendent of each hospital is given the power to admit temporarily any child for 'observation and diagnosis.' If, after observation, the superintendent finds 'evidence of mental illness' and that the child is 'suitable for treatment' in the hospital, then the child may be admitted 'for such period and under such conditions as may be authorized by law.'

"Georgia's mental health statute also provides for the discharge of voluntary patients. Any child who has been hospitalized for more that five days may be discharged at the request of a parent or guardian. . . . Even without a request for discharge, however, the superintendent of each regional hospital has an affirmative duty to release any child 'who has recovered from his mental illness or who has sufficiently improved that the superintendent determined that hospitalization of the patient is no longer desirable.' . . .

"Georgia's Mental Health Director has not published any statewide regulations defining what specific procedures each superintendent must employ when admitting a child under 18. Instead, each regional hospital's superintendent is responsible for the procedures in his or her facility. There is substantial variation among the institutions with regard to their admission procedures and their procedures for review of patients after they have been admitted. A brief description of the different hospitals' procedures will demonstrate the variety of approaches taken by the regional hospitals throughout the State.

"Southwestern Hospital in Thomasville, Ga., was built in 1966. Its children and adolescent program was instituted in 1974. The children and adolescent unit in the hospital has a maximum capacity of 20 beds, but at the time of suit only 10 children were being treated there.

"The Southwestern superintendent testified that the hospital has never admitted a voluntary child-patient who was not treated previously by a community mental health clinic. If a mental health professional at the community clinic determines that hospital treatment may be helpful for a child, then clinic staff and hospital staff jointly evaluate the need for hospitalization, the proper treatment during hospitalization, and a likely release date. The initial admission decision thus is not made at the hospital.

"After a child is admitted, the hospital has weekly reviews of his condition performed by its internal medical and professional staff. There also are monthly reviews of each child by a group

composed of hospital staff not involved in the weekly reviews and by community clinic staff people. The average stay for each child who was being treated at Southwestern in 1975 was 100 days.

"Atlanta Regional Hospital was opened in 1968. At the time of the hearing before the District Court, 17 children and 21 adolescents were being treated in the hospital's children and adolescent unit.

"The hospital is affiliated with nine community mental health centers and has an agreement with them that 'persons will be treated in the comprehensive community mental health centers in every possible instance, rather than being hospitalized.' The admission criteria at Atlanta Regional for voluntary and involuntary patients are the same. It has a formal policy not to admit a voluntary patient unless the patient is found to be a threat to himself or others. The record discloses that approximately 25% of all referrals from the community centers are rejected by the hospital admissions staff.

"After admission, the staff reviews the condition of each child every week. In addition, there are monthly utilization reviews by nonstaff mental health professionals; this review considers a random sample of children's cases. The average length of each child's stay in 1975 was 161 days.

"The Georgia Mental Health Institute (GMHI) in Decatur, Ga., was built in 1965. Its children and adolescent unit housed 26 children at the time this suit was brought.

"The hospital has a formal affiliation with four community mental health centers. Those centers may refer patients to the hospital only if they certify that 'no appropriate alternative resources are available within the client's geographic area.' For the year prior to the trial in this case, no child was admitted except through a referral from a clinic. Although the hospital has a policy of accepting for 24 hours all referrals from a community clinic, it has a team of staff members who review each admission. If the team finds 'no reason not to treat in the community' and the deputy superintendent of the hospital agrees, then it will release the applicant to his home.

"After a child is admitted, there must be a review of the admission decision within 30 days. There is also a nonspecified periodic review of each child's need for hospitalization by a team of staff members. The average stay for the children who were at GMHI in 1975 was 346 days.

"Augusta Regional Hospital was opened in 1969 and is affiliated with 10 community mental health clinics. Its children and adolescent unit housed 14 children in December 1975.

"Approximately 90% of the children admitted to the hospital have first received treatment in the community, but not all of them were admitted based on a specific referral from a clinic. The admission criterion is whether 'the child needs hospitalization,' and that decision must be approved by two psychiatrists. There is also an informal practice of not admitting a child if his parents refuse to participate in a family therapy program.

"The admission decision is reviewed within 10 days by a team of staff physicians and mental health professional; thereafter each child is reviewed every week. In addition, every child's condition is reviewed by a team of clinic staff members every 100 days. The average stay at Augusta in December 1975 was 92 days.

"Savannah Regional Hospital was built in 1970, and housed 16 children at the time of this suit. The hospital staff members are also directors of the community mental health clinics.

"It is the policy of the hospital that any child seeking admission on a nonemergency basis must be referred by a community clinic. The admission decision must be made by a staff psychiatrist, and it is based on the materials provided by the community clinic, and interview with the applicant, and an interview with the parents, if any, of the child.

"Within three weeks after admission of a child, there is review by a group composed of hospital and clinic staff members and people from the community, such as Juvenile Court Judges. Thereafter, the hospital staff reviews each child weekly. If the staff concludes that a child is ready to be released, then the community committee reviews the child's case to assist in placement. The average stay of the children being treated at Savannah in December 1975 was 127 days.

"West Central Hospital in Columbus, Ga., was opened in December 1974, and was organized for budgetary purposes with several community mental health clinics. The hospital itself has only 20 beds for children and adolescents, 16 of which were occupied at the time this suit was filed.

"There is a formal policy that all children seeking admission to the hospital must be referred by a community clinic. The hospital is regarded by the staff as 'the last resort in treating a child;' 50% of the children referred are turned away by the admissions team at the hospital.

"After admission, there are staff meetings daily to discuss problem cases. The hospital has a practicing child psychiatrist who reviews cases once a week. Depending on the nature of the problems, the consultant reviews between 1 and 20 cases. The average stay of the children who were at West Central in December 1975 was 71 days.

"The children's unit at Central State Regional Hospital in Milledgeville, Ga., was added to the existing structure during the 1970s. It can accommodate 40 children. The hospital also can house 40 adolescents. At the time of the suit, the hospital housed 37 children under 18, including both named plaintiffs.

"Although Central State is affiliated with community clinics, it seems to have a higher percentage of nonreferral admissions than any of the other hospitals. The admission decision is made by an 'admissions evaluator' and the 'admitting physician.' The evaluator is a Ph.D. in psychology, a social worker, or a mental-health-trained nurse. The admitting physician is a psychiatrist. The standard for admission is 'whether or not hospitalization is the more appropriate treatment' for the child. From April 1974 to November 1975, 9 of 29 children applicants screened for admission were referred to noninstitutional settings.

"All children who are temporarily admitted are sent to the children and adolescent unit for testing and development of a treatment plan. Generally, seven days after the admission, members of the hospital staff review all of the information complied about a patient 'to determine the need for continued hospitalization.' Thereafter, there is an informal review of the patient approximately every 60 days. The patients who were at Central State in December 1975 had been there, on the average, 456 days. There is no explanation in the record for this large variation from the average length of hospitalization at the other institutions.

"Although most of the focus of the District Court was on the State's mental hospitals, it is relevant to note that Georgia presently funds over 50 community mental health clinics and 13 specialized foster care homes. The State has built seven new regional hospitals within the past 15 years, and it has added a new children's unit to its oldest hospital. The state budget in fiscal 1976 was almost $150 million for mental health care. Georgia ranks 22nd among the states in per capita expenditures for mental health and 15th on total expenditures.

"The District Court nonetheless rejected the State's entire system of providing mental health care on both procedural and substantive grounds. The District Court found that 46 children could be 'optimally cared for in another, less restrictive, nonhospital setting if it were available.' 412 F.Supp. at 124-125. These 'optimal' settings included group homes, therapeutic camps, and home-care services. The Governor of Georgia and the chairmen of the two Appropriations Committees of its legislature, testifying in the District Court, expressed confidence in the Georgia program and informed the court that the State could not justify enlarging its budget during fiscal year 1977 to provide the specialized treatment settings urged by appellees in addition to those then available.

"Having described the factual background of Georgia's mental health program and its treatment of the named plaintiffs, we turn now to examine the legal basis for the District Court's judgment.

"In holding unconstitutional Georgia's statutory procedure for voluntary commitment of juvenile, the District Court first determined that commitment to any of the eight regional hospitals constitutes a severe deprivation of a child's liberty. The court defined this liberty interest in terms of both freedom from bodily restraint and freedom from the 'emotional and psychic harm' caused by the institutionalization. Having determined that a liberty interest is implicated by a child's admission to a mental hospital, the court considered what process is required to protect that interest. It held that the process due 'includes at least the right after notice to be heard before an impartial tribunal.' 412 F.Supp. at 137.

"In requiring the prescribed hearing, the court rejected Georgia's argument that no adversary-type hearing was required since the State was merely assisting parents who could not afford private care by making available treatment similar to that offered in private hospitals and by private physicians. The court acknowledged that most parents who seek to have their children admitted to a state mental hospital do so in good faith. It, however, relied on one of the

appellees' witnesses who expressed an opinion that 'some still look upon mental hospitals as a 'dumping ground.' *Id.,* at 138. No specific evidence of such 'dumping,' however, can be found in the record.

"The District Court also rejected the argument that review by the superintendents of the hospitals and their staffs was sufficient to protect the child's liberty interest. The court held that the inexactness of psychiatry, coupled with the possibility that the sources of information used to make the commitment decision may not always be reliable, made the superintendent's decision too arbitrary to satisfy due process. The court then shifted its focus drastically from what was clearly a procedural due process analysis and condemned Georgia's 'officialdom' for its failure, in the face of a state-funded 1973 report outlining the 'need' for additional resources to be spent on nonhospital treatment, to provide more resources for noninstitutional mental health care. The court concluded that there was a causal relationship between this intransigence and the State's ability to provide any 'flexible due process' to the appellees. The District Court therefore ordered the State to appropriate and expend such resources as would be necessary to provide nonhospital treatment to those members of appellees' class who would benefit from it.

"In an earlier day, the problems inherent in coping with children afflicted with mental or emotional abnormalities were dealt with largely within the family. See S. Brakel & R. Rock, The Mentally Disabled and the Law 4 (1971). Sometimes parents were aided by teachers or a family doctor. While some parents no doubt were able to deal with their disturbed children without specialized assistance, others, especially those of limited means and education, were not. Increasingly, they turned for assistance to local, public sources or private charities. Until recently, most states do little more than provide custodial institutions for the confinement of persons who were considered dangerous. *Id.,* at 5-6; Slovenko, Criminal Justice Procedures in Civil Commitment, 24 Wayne L.Rev. 1, 3 (1977) (hereinafter Slovenko).

"As medical knowledge about the mentally ill and public concern for their condition expanded, the states, aided substantially by federal grants, have sought to ameliorate the human tragedies of seriously disturbed children. Ironically, as most state have expanded their efforts to assist the mentally ill, their actions have been subjected to increasing litigation and heightened constitutional scrutiny. Courts have been required to resolve the thorny constitutional attacks on state programs and procedures with limited procedural guidance. In this case, appellees have challenged Georgia's procedural and substantive balance of the individual, family, and social interests at stake in the voluntary commitment of a child to one of its regional mental hospitals.

"The parties agree that our prior holdings have set out a general approach for testing challenged state procedures under a due process claim. Assuming the existence of a protectible property or liberty interest, the Court has required a balancing of a number of factors:

> 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976), quoted in *Smith v. Organization of Foster Families,*431 U.S. 816, 848-849, 97 S.Ct. 2094, 2111-2112, . . . (1977).

"In applying these criteria, we must consider first the child's interest in not being committed. Normally, however, since this interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns. Next, we must examine the State's interest in the procedures it has adopted for commitment and treatment of children. Finally, we must consider how well Georgia's procedures protect against arbitrariness in the decision to commit a child to a state mental hospital.

"(a) It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment. See *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, . . . (1979); *In re Gault,* 387 U.S. 1, 27, 87 S.Ct. 1428, 1443, . . . (1967); *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . (1967). We also

recognized that commitment sometimes produces adverse social consequences for the child because of the reaction of some to the discovery that the child has received psychiatric care. Cf. *Addington v. Texas, supra,* 441 U.S. at 425-426,99 S.Ct. at 1809.

"This reaction, however, need not be equated with the community response resulting from being labeled by the state as delinquent, criminal, or mentally ill and possibly dangerous. See *ibid.; In re Gault, supra,* 387 U.S. at 23, 87 S.Ct. 1441; *Paul v. Davis,* 424 U.S. 693, 711-712, 96 S.Ct. 1155, 1165-1166, . . . (1976). The state through its voluntary commitment procedures does not 'label' the child; it provides a diagnosis and treatment that medical specialists conclude the child requires. In terms of public reaction, the child who exhibits abnormal behavior may be seriously injured by an erroneous decision not to commit. Appellees overlook a significant source of the public reaction to the mentally ill, for what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness, *Addington v. Texas, supra,* 441 U.S. at 429, 99 S.Ct. at 1811. See, also, Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Archives of General Psychiatry 329 (1974). The pattern of untreated, abnormal behavior — even if nondangerous — arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder.

"However, we need not decide what effect these factors might have in a different case. For purposes of this decision, we assume that a child has a protectible interest not only in being free of unnecessary bodily restraints but also in not being labeled erroneously by some persons because of an improper decision by the state hospital superintendent.

"(b) We next deal with the interest of the parents who have decided, on the basis of their observations and independent professional recommendations, that their child needs institutional care. Appellees argue that the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.

"Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573, . . . (1925). See, also, *Wisconsin v. Yoder,* 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, . . . (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944); *Meyer v. Nebraska,* 262 U.S. 390, 400, 43 S.Ct. 625, 627, . . . (1923). Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children, 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

"As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents 'may at times be acting against the interests of their children' as was stated in *Bartley v. Kremens,* 402 F.Supp. 1039, 1047-1048 (ED Pa. 1975), vacated and remanded, 431 U.S. 119, 97 S.Ct. 1709, . . . (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock 348-349. The static notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

"Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized. See *Wisconsin v. Yoder, supra,* 406 U.S. at 230, 92 S.Ct. at 1540; *Prince v. Massachusetts, supra,* 321 U.S. at 166, 64 S.Ct. at 442. Moreover, the Court recently declared unconstitutional a state statute that granted parents an absolute veto over a minor child's decision to have an abortion. *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, . . . (1976).

Appellees urge that these precedents limiting the traditional rights of parents, if viewed in the context of the liberty interest of the child and the likelihood of parental abuse, require us to hold that the parents' decision to have a child admitted to a mental hospital must be subjected to an exacting constitutional scrutiny, including a formal, adversary, pre-admission hearing.

"Appellees' argument, however, sweeps too broadly. Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments. Here, there is no finding by the District Court of even a single instance of bad faith by any parent of any member of appellees' class. We cannot assume that the result in *Meyer v. Nebraska, supra,* and *Pierce v. Society of Sisters, supra,* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. See generally Goldstein, Medical Case for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J. 645, 664-668 (1977); Bennett, Allocation of Child Medical Care Decision-making Authority: A Suggested Interest Analysis, 62 Va. L.Rev. 285, 308 (1976). Neither state officials nor federal courts are equipped to review such parental decisions.

"Appellees place particular reliance on *Planned Parenthood,* arguing that its holding indicates how little deference to parents is appropriate when the child is exercising a constitutional right. The basic situation in that case, however, was very different; *Planned Parenthood* involved an absolute parental veto over the child's ability to obtain an abortion. Parents in Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgement as to the child's need for confinement. See *supra,* at 2498.

"In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of negect or abuse, and that the traditional presumption the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

"(c) The State obviously has a significant interest in confining the use of its costly mental health facilities to cases of genuine need. The Georgia program seeks first to determine whether the patient seeking admission has an illness that calls for inpatient treatment. To accomplish this purpose, the State has charged the superintendent of each regional hospital with the responsibility for determining, before authorizing an admission, whether a prospective patient is mentally ill and whether the patient will likely benefit from hospital care. In addition, the State has imposed a continuing duty on hospital superintendents to release any patient who has recovered to the point where hospitalization is no longer needed.

"The State in performing its voluntarily assumed mission also has a significant interest in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance. The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing, or too contentious. It is surely not idle to speculate as to how many parents who believe they are acting in good faith would forgo state-provided hospital care if such care is contingent on an adversary proceeding designed to probe their motives and other private family matters in seeking the voluntary admission.

"The State also has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedure minuets before admission. One factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in

hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients.

"The *amici* brief of the American Psychiatric Association et al. points out at page 20 that the average staff psychiatrist in a hospital presently is able to devote only 47% of his time to direct patient care. One consequence of increasing the procedures the state must provide prior to a child's voluntary admission will be that mental health professionals will be diverted even more from the treatment of patients in order to travel to and participate in — and wait for — what could be hundreds — or even thousands — of hearings each year. Obviously the cost of these procedures would come from the public monies the legislature intended for mental health care. See Slovenko 34-35.

"(d) We now turn to consideration of what process protects adequately the child's constitutional rights by reducing risks of error without unduly trenching on traditional parental authority and without undercutting 'efforts to further the legitimate interests of both the state and the patient that are served by' voluntary commitments. *Addington v. Texas,* 441 U.S. at 430, 99 S.Ct. at 1811. See, also, *Mathews v. Eldridge,* 424 U.S. at 335, 96 S.Ct. at 903. We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral fact-finder' to determine whether the statutory requirements for admission are satisfied. See *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1001, 1022, . . . (1970); *Morrissey v. Brewer,* 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, . . . (1972). That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decision-maker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.

"We are satisfied that such procedures will protect the child from an erroneous admission decision in a way that neither unduly burdens the States nor inhibits parental decisions to seek State help.

"Due Process has never been thought to require that the neutral and detached trier of fact of law-trained or a judicial or administrative officer. See *Goldberg v. Kelly, supra,* 397 U.S. at 271, 90 S.Ct. at 1022; *Morrissey v. Brewer, supra,* 408 U.S. at 489, 92 S.Ct. at 2604. Surely, this is the case as to medical decisions, for 'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.' *In re Roger S.,* 19 Cal.3d 921, 942, 141 Cal.Rptr. 298, 311, 569 P.2d 1286, 1299 (1977) (CLARK, J., dissenting). Thus, a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment.

"It is not necessary that the deciding physician conduct a formal or quasi-formal hearing. A state is free to require such a hearing, but due process is not violated by use of informal traditional medical investigative techniques. Since well-established medical procedures already exist, we do not undertake to outline with specificity precisely what this investigation must involve. The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more that emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted.

"What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Not every determination by state officers can be made most effectively by use of 'the procedural tools of judicial or administrative decision-making.' *Board of Curators of Univ. of Missouri v. Horowitz,* 435 U.S. 78, 90, 98 S.Ct. 948, 955, . . . (1978). See, also, *Greenholt v. Nebraska Penal Inmates,* 442 U.S. 1, 13-14, 99 S.Ct. 2100, 2106, . . . ; *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, . . . (1961).

"Here, the questions are essentially medical in character: whether the child is mentally or emotionally ill and whether he can benefit from the treatment that is provided by the State. While facts are plainly necessary for a proper resolution of those questions, they are only a first step in the process. In an opinion for a unanimous Court, we recently state in *Addington v. Texas,* 441 U.S. at 429, 99 S.Ct. at 1811, that the determination of 'whether [a person] is mentally

ill turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.'

"Although we acknowledge the fallibility of medical and psychiatric diagnosis, see *O'Connor v. Donaldson,* 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, . . . (1975) (concurring opinion), we do not accept the notion that the shortcoming of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decision-maker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real. See Albers, Pasewark, & Meyer, Involuntary Hospitalization and Psychiatric Testimony: the Fallibility of the Doctrine of Immaculate Perception, 6 Cap.U.L.Rev. 11, 15 (1976).

"Another problem with requiring a formalized, fact-finding hearing lies in the danger it poses for significant intrusion into the parent-child relationship. Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint; it is wholly different matter to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests.

"Moreover, it is appropriate to inquire into how such a hearing would contribute to the successful long-range treatment of the patient. Surely, there is a risk that it would exacerbate whatever tensions already exist between the child and the parents. Since the parents can and usually do play a significant role in the treatment while the child is hospitalized and even more so after release, there is a serious risk that an adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital. Moreover, it will make his subsequent return home difficult. These unfortunate results are especially critical with an emotionally disturbed child; they seem likely to occur in the context of an adversary hearing in which the parents testify. A confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child would be greater.

"It has been suggested that a hearing conducted by someone other than the admitting physician is necessary in order to detect instances where parents are 'guilty of railroading their children into asylums' or are using 'voluntary commitment procedures in order to sanction behavior of which they disapprov[e].' Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 52 Calif.L.Rev. 840, 850-851 (1974). See, also, *J.L. v. Parham,* 412 F.Supp. at 133; Brief for Appellees 38. Curiously, it seems to be taken for granted that parents who seek to 'dump' their children on the State will inevitably be able to conceal their motives and thus deceive the admitting psychiatrists and the other mental health professionals who make and review the admission decision. It is elementary that one early diagnostic inquiry into the cause of an emotional disturbance of a child is an examination into the environment of the child. It is unlikely, if not inconceivable, that a decision to abandon an emotionally normal, healthy child and thrust him into an institution will be a discrete act leaving no trail of circumstances. Evidence of such conflicts will emerge either in the interviews or from secondary sources. It is unrealistic to believe that trained psychiatrists, skilled in eliciting responses, sorting medically-relevant facts, and sensing motivational nuances will often be deceived about the family situation surrounding a child's emotional disturbance. Surely a lay, or even law-trained, fact-finder would be no more skilled in this process than the professional.

"By expressing some confidence in the medical decision-making process, we are by no means suggesting it is error free. On the occasion, parents may initially mislead an admitting physician or a physician may erroneously diagnose the child as needing institutional care either because of negligence or an over-abundance of caution. That there may be no risks of error in the process affords no rational predicate for holding unconstitutional an entire statutory and administrative scheme that is generally followed in more than 30 States. '[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.' *Mathews v. Eldridge,* 424 U.S. at 344, 96 S.Ct. at 907. In general, we are satisfied that an independent medical decision-making process, which

includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; we do not believe the risks of error in that process would be significantly reduced by a more formal, judicial-type hearing. The issue remains whether the Georgia practices, as described in the record before us, comport with these minimum due process requirements.

"(e) Georgia's statute envisions a careful diagnostic medical inquiry to be conducted by the admitting physician at each regional hospital. The *amicus* brief for the United States explains, at pages 7-8:

> '[I]n every instance the decision whether or not to accept the child for treatment is made by a physician employed by the State . . .
> 'That decision is based on interviews and recommendations by the hospital or community health center staff. The staff interviews the child and the parent or guardian who brings the child to the facility . . . [and] attempts are made to communicate with other possible sources of information about the child . . . '

"Focusing primarily on what it saw as the absence of any formal mechanism for the review of the physician's initial decision, the District Court unaccountably saw the medical decision as an exercise of 'unbridled discretion.' 412 F.Supp. at 136. But extravagant characterizations are no substitute for careful analysis, and we must examine the Georgia process in its setting to determine if, indeed, any one person exercises such discretion.

"In the typical case, the parents of a child initially conclude from the child's behavior that there is some emotional problem — in short, that 'something is wrong.' They may respond to the problem in various ways, but generally the first contact with the State occurs when they bring the child to be examined by a psychologist or psychiatrist at a community mental health clinic.

"Most often, the examination is followed by outpatient treatment at the community clinic. In addition, the child's parents are encouraged, and sometimes required, to participate in a family therapy program to obtain a better insight into the problem. In most instances, this is all the care a child requires. However, if, after a period of outpatient care, the child's abnormal emotional condition persists, he may be referred by the local clinic staff to an affiliated regional mental hospital.

"At the regional hospital an admissions team composed of a psychiatrist and at least one other mental health professional examines and interviews the child — privately in most instance. This team then examines the medical records provided by the clinic staff and interviews the parents. Based on this information, and any additional background that can obtained, the admissions team makes a diagnosis and determines whether the child will likely benefit from institutional care. If the team finds either condition not met, admission is refused.

"If the team admits a child as suited for hospitalization, the child's condition and continuing need for hospital care are reviewed periodically by at least one independent, medical review group. For the most part, the reviews are as frequent as weekly, but none are less often than once every two months. Moreover, as we noted earlier, the superintendent of each hospital is charged with an affirmative statutory duty to discharge any child who is no longer mentally ill or in need of therapy.

"As with most medical procedures, Georgia's are not totally free from risk or error in the sense that they give total or absolute assurance that every child admitted to a hospital has a mental illness optimally suitable for institutionalized treatment. But it bears repeating that 'procedural due process rules are shaped by the risk or error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.' *Mathews v. Eldridge, supra,* 424 U.S. at 344, 96 S.Ct. at 907.

"Georgia's procedures are not arbitrary in the sense that a single physician or other professional has the 'unbridled discretion' the District Court saw to commit a child to a regional hospital. To so find on this record would require us to assume that the physicians, psychologists, and mental health professionals who participate in the admission decision and who review each other's conclusions as to the continuing validity of the initial decision are either oblivious or indifferent to the child's welfare — or that they are incompetent. We note, however, the District Court found to the contrary; it was 'impressed by the conscientious, dedicated State-employed

psychiatrists who, with the help of equally conscientious, dedicated State-employed psychologists and social workers, faithfully care for the plaintiff children . . . ' 412 F.Supp. at 138.

"We are satisfied that the voluminous record as a whole supports the conclusion that the admissions staff of the hospitals have acted in a neutral and detached fashion in making medical judgments in the best interests of the children. The State, through its mental health programs, provides the authority for trained professionals to assist parents in examining, diagnosing, and treating emotionally disturbed children. Through its hiring practices, it provides well-staffed and well-equipped hospitals and — as the District Court found —conscientious public employees to implement the State's beneficent purposes.

"Although our review of the record in this case satisfies us that Georgia's general administrative and statutory scheme for the voluntary commitment of children is not *per se* unconstitutional, we cannot decide on this record, whether every child in appellees' class received an adequate, independent diagnosis of his emotional condition and need for confinement under the standards announced earlier in this opinion. On remand, the District Court is free to and should consider any individual claims that initial admissions did not meet the standards we have described in this opinion.

"In addition, we note that appellees' original complaint alleged that the State had failed to provide adequate periodic review of their need for institutional care and claimed that this was an additional due process violation. Since the District Court held that the appellees' original confinement was unconstitutional, it had no reason to consider this separate claim. Similarly, we have no basis for determining whether the review procedures of the various hospitals are adequate to provide the process called for or what process might be required if a child contests his confinement by requesting a release. These matters require factual findings not present in the District Court's opinion. We have held that the periodic reviews described in the record reduce the risk of error in the initial admission and thus they are necessary. Whether they are sufficient to justify continuing a voluntary commitment is an issue for the District Court on remand. The District Court is free to require additional evidence on this issue.

"(a) Our discussion in Part III was directed at the situation where a child's natural parents request his admission to a state mental hospital. Some members of appellees' class, including J.R., were wards of the State of Georgia at the time of their admission. Obviously their situation differs from those members of the class who have natural parents. While the determination of what process is due varies somewhat when the State, rather than a natural parent, makes the request for commitment, we conclude that the differences in the two situations do not justify requiring different procedures at the time of the child's initial admission to the hospital.

"For a ward of the State, there may well be no adult who knows him thoroughly and who cares for him deeply. Unlike with natural parents where there is a presumed natural affection to guide their action, 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190, the presumption that the State will protect a child's general welfare stems from a specific State statute. Ga.Code sec. 24A-101 (1978). Contrary to the suggestion of the dissent, however, we cannot assume that when the State of Georgia has custody of a child it acts so differently from a natural parent in seeking medical assistance for the child. No one has questioned the validity of the statutory presumption that the State acts in the child's best interest. Nor could such a challenge be mounted on the record before us. There is no evidence that the State, acting as guardian, attempted to admit any child for reasons unrelated to the child's need for treatment. Indeed, neither the District Court nor the appellees have suggested that wards of the State should receive any constitutional treatment different from children with natural parents.

"Once we accept that the State's application for a child's admission to a hospital is made in good faith, then the question is whether the medical decision-making approach of the admitting physician is adequate to satisfy due process. We have already recognized that an independent medical judgment made from the perspective of the best interests of the child after a careful investigation is an acceptable means of justifying a voluntary commitment. We do not believe that the soundness of this decision-making is any the less reasonable in this setting.

"Indeed, if anything, the decision with regard to wards of the State may well be even more reasonable in light of the extensive written records that are compiled about each child while in the State's custody. In J.R.'s case, the admitting physician had a complete social and medical

history of the child before even beginning the diagnosis. After carefully interviewing him and reviewing his extensive files, three physicians independently concluded that institutional care was in his best interests. See *supra,* at 2498.

"Since the State agency having custody and control of the child *in loco parentis* has a duty to consider the best interests of the child with respect to a decision on commitment to a mental hospital, the State may constitutionally allow that custodial agency to speak for the child, subject, of course, to the restriction governing natural parents. On this record, we cannot declare unconstitutional Georgia's admission procedures for wards of the State.

"(b) It is possible that the procedures required in reviewing a ward's need for continuing care should be different from those used to review the need of a child with natural parents. As we have suggested earlier, the issue of what process is due to justify continuing a voluntary commitment must be considered by the District Court on remand. In making that inquiry, the District Court might well consider whether wards of the State should be treated with respect to continuing therapy differently from children with natural parents.

"The absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital. We noted in *Addington v. Texas,* 141 U.S. at 428-429, 99 S.Ct. at 1811, that 'the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.' For a child without natural parents, we must acknowledge the risk of being 'lost in the shuffle.' Moreover, there is at least some indication that J.R.'s commitment was prolonged because the Department of Family and Children Services had difficulty finding a foster home for him. Whether wards of the State generally have received less protection than children with natural parents, and, if so, what should be done about it, however, are matters that must be decided in the first instance by the District Court on remand, if the court concludes the issue is still alive.

"It is important that we remember the purpose of Georgia's comprehensive mental health program. It seeks substantively and at great cost to provide care for those who cannot afford to obtain private treatment and procedurally to screen carefully all applicants to assure that institutional care is suited to the particular patient. The State resists the complex procedures ordered by the District Court because in its view they are unnecessary to protect the child's rights, they divert public resources from the central objective of administering health care, they risk aggravating the tensions inherent in the family situation, and they erect barriers that may discourage parents from seeking medical aid for a disturbed child.

"On this record, we are satisfied that Georgia's medical fact-finding processes are reasonable and consistent with constitutional guarantees. Accordingly, it was error to hold unconstitutional the State's procedures for admitting a child for treatment to a State mental hospital. The judgment is therefore reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

"Reversed and remanded.

"Mr. Justice STEWART, concurring in the judgment.

"For centuries it has been a canon of the common-law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it. *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . ; *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . In ironic contrast, the District Court in this case has said that the Constitution requires the State of Georgia to disregard this established principle. I cannot agree.

"There can be no doubt that commitment to a mental institution results in a 'massive curtailment of liberty,' *Humphrey v. Cady,* 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, . . . In addition to the physical confinement involved, *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, . . . , a person's liberty is also substantially by the stigma attached to treatment in a mental hospital. But not every loss of liberty, and it is only the latter that invokes the Due Process Clause of the Fourteenth Amendment.

. . .

"Clearly, if the appellees in this case were adults who had voluntarily chosen to commit themselves to a State mental hospital, they could not claim that the State had thereby deprived them of liberty in violation of the Fourteenth Amendment. Just as clearly, I think, children on whose behalf their parents have invoked these voluntary procedures can make no such claim.

"The Georgia statute recognizes the power of a party to act on behalf of another person under the voluntary commitment procedures in two situations: when the other person is a minor not over 17 years of age and the party is that person's parent or guardian, and when the other person has been 'legally adjudged incompetent' and the party is that person's guardian. In both instances two conditions are present. First, the person being committed is presumptively incapable of making the voluntary commitment decision for himself. And second, the parent or guardian is presumed to be acting in that person's best interests. In the case of guardians, these presumptions are grounded in statutes whose validity nobody has questioned in this case. . . . In the case of parent's the presumptions are grounded in a statutory embodiment of long-established principles of common-law.

"Thus, the basic question in this case is whether the Constitution requires Georgia to ignore basic principles so long accepted by our society. For only if the State in this setting is constitutionally compelled always to intervene between parent and child can there be any question as to the constitutionally required extent of that intervention. I believe this basic question must be answered in the negative.

"Under our law, parents constantly make decisions for their minor children that deprive the children of liberty, and sometimes even of life itself. Yet surely the Fourteenth Amendment is not invoked when an informed parent decides upon major surgery for his child, even in a State hospital. I can perceive no basic constitutional differences between commitment to a mental hospital and other parental decisions that result in a child's loss of liberty.

"I realize, of course, that a parent's decision to commit his child to a State mental institution results in a far greater loss of liberty than does his decision to have an appendectomy performed upon the child in a State hospital. But if, contrary to my belief, this factual difference rises to the level of a constitutional difference, then I believe that the objective checks upon the parents' commitment decision, embodied in Georgia law and thoroughly discussed, *ante,* at 2509-2511, are more than constitutionally sufficient.

"To be sure, the presumption that a parent is acting in the best interests of his child must be a rebuttable one, since certainly not all parents are actuated by the unselfish motive the law presumes. Some parents are simply unfit parents. But Georgia clearly provides that an unfit parent can be stripped of his parental authority under laws dealing with neglect and abuse of children.

"This is not an easy case. Issues involving the family and issues concerning mental illness are among the most difficult that courts have to face, involving as they often do serious problems of policy disguised as questions of constitutional law. But when a State legislature makes a reasonable definition of the age of minority, and creates a rebuttable presumption that in invoking the statutory procedures for voluntary commitment a parent is acting in the best interests of his minor child, I cannot believes that the Fourteenth Amendment is violated. This is not to say that in this area the Constitution compels a State to respect the traditional authority of a parent, as in *Meyer* and *Pierce* cases. I believe, as in *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, . . . , that the Constitution would tolerate intervention is constitutionally compelled.

"For these reasons I concur in the judgment.

"Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice STEVENS join, concurring in part and dissenting in part.

"I agree with the Court that the commitment of juveniles to State mental hospitals by their parents or by State officials acting *in loco parentis* involves State action that impacts upon constitutionally protected interests and therefore must be accomplished through procedures consistent with the constitutional mandate of due process of law. I agree also that the District Court erred in interpreting the Due Process clause to require pre-confinement commitment hearings in all cases in which parents wish to hospitalize their children. I disagree, however, with the Court's decision to pretermit questions concerning the post-admission procedures due Georgia's institutionalized juveniles. While the question of the frequency of post-admission review hearings may properly be deferred, the right to at least one post-admission hearing can and should be affirmed now. I also disagree with the Court's conclusion concerning the procedures due juvenile wards of the State of Georgia. I believe that the Georgia statute is unconstitutional in that it fails to accord pre-confinement hearings to juvenile wards of the State committed by the State acting *in loco parentis.*

" . . . Persons incarcerated in mental hospitals are not only deprived of their physical liberty, they are also deprived of friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity. Such treatment modalities may include forced administration of psychotropic medication, aversive conditioning, convulsive therapy, and even psychosurgery. Furthermore, as the Court recognizes, see *ante,* at 2503, persons confined in mental institutions are stigmatized as sick and abnormal during confinement and, in some cases, even after release.

"Because of these considerations, our cases have made clear that commitment to a mental hospital 'is a deprivation of liberty which the State cannot accomplish without due process of law.' *O'Connor v. Donaldson,* 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, . . . See, e.g., *McNeil v. Director, Patuxent Institution,* 407 U.S. 245, 92 S.Ct. 2083, . . . (1972) (defective delinquent commitment following expiration of prison term); *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, . . . (1967) (sex offender commitment following criminal conviction); *Chaloner v. Sherman,* 242 U.S. 455, 461, 37 S.Ct. 136, 137, . . . (1917) (incompetence inquiry). In the absence of a voluntary, knowing, and intelligent waiver, adults facing commitment to mental institutions are entitles to full and fair adversary hearings in which the necessity for their commitment is established to the satisfaction of a neutral tribunal. At such hearings they must be accorded the right to 'be present with counsel, have an opportunity to be heard, be confronted with witnesses against [them], have the right to cross-examine, and to offer evidence of [their] own.' *Specht v. Patterson, supra,* at 610, 87 S.Ct. at 1212.

"These principles also govern the commitment of children. 'Constitutional rights do not mature and come into being magically only when one attains the State-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, e.g., *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, . . . (1975); *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975); *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 89 S.Ct. 733, . . . 1969); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967).' *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, . . . (1976).

"Indeed, it may well be argued that children are entitled to more protection than adults. The consequences of an erroneous commitment decision are more tragic where children are involved. Children, on the average, are confined for longer periods than are adults. Moreover, childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives. Furthermore, the provision of satisfactory institutionalized mental care for children generally requires a substantial financial commitment that too often has not been forthcoming. Decisions of the lower courts have chronicled the inadequacies of existing mental health facilities for children. See, e.g., *New York State Assn. for Retarded Children v. Rockefeller,* 357 F.Supp. 752, 756 (EDNY 1973) (conditions at Willowbrook School for the Mentally Retarded are 'inhumane,' involving 'failure to protect the physical safety of [the] children,' substantial personnel shortage, and 'poor' and 'hazardous' conditions); *Wyatt v. Stickney,* 344 F.Supp. 387, 391 (MD Ala. 1972), aff'd *sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (CA5 1974) ('grossly substandard' conditions at Partlow School for the Mentally Retarded lead to 'hazardous and deplorable inadequacies in the institution's operation').

"In addition, the chance of an erroneous commitment decision is particularly great where children are involved. Even under the best of circumstances psychiatric diagnosis and therapy decisions are fraught with uncertainties. See *O'Connor v. Donaldson, supra,* 422 U.S. at 584, 95 S.Ct. at 2498 . . . These uncertainties are aggravated when, as under the Georgia practice, the psychiatrist interviews the child during a period of abnormal stress in connection with the commitment, and without adequate time or opportunity to become acquainted with the patient. These uncertainties may be further aggravated when economic and social class separate doctor and child, thereby frustrating the accurate diagnosis of pathology.

"These compounded uncertainties often lead to erroneous commitments since psychiatrists tend to err on the side of medical caution and therefore hospitalize patients for whom other dispositions would be more beneficial. The National Institute of Mental Health recently found that only 36% of patients below age 20 who were confined at St. Elizabeths Hospital actually

required such hospitalization. Of particular relevance to this case, a Georgia Study Commission on Mental Health Services for Children and Youth concluded that more than half of the State's institutionalized children were not in need of confinement if other forms of care were made available or used. Cited in *J.L. v. Parham,* 412 F.Supp. 112, 122 (MD Ga. 1976).

Rights of Children Committed by Their Parents

"Notwithstanding all this, Georgia denies hearings to juveniles institutionalized at the behest of their parents. Georgia rationalizes this practice on the theory that parents act in their children's best interest and therefore may waive their children's due process rights. Children incarcerated because their parents wish them confined, Georgia contends, are really voluntary patients. I cannot accept this argument.

"In our society, parental rights are limited by the legitimate rights and interests of their children. 'Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.' *Prince v. Massachusetts,* 321 U.S. 158, 170, 64 S.Ct. 438, 444, . . . (1944). This principle is reflected in the variety of statutes and cases that authorize State intervention on behalf of neglected or abused children and that, *inter alia,* curtail parental authority to alienate their children's property, to withhold necessary medical treatment, and to deny children exposure to ideas and experiences they may later need as independent and autonomous adults.

"This principle is also reflected in constitutional jurisprudence. Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children. States, for example, may not condition a minor's right to secure an abortion on attaining her parents' consent since the right to an abortion is an important personal right and since disputes between parents and children on this question would fracture family autonomy. See *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. at 75, 96 S.Ct. at 2844.

"This case is governed by the rule of *Danforth.* The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion. Moreover, as in Danforth, the parent-child dispute at issue here cannot be characterized as involving only a routine child-rearing decision made within the context of an ongoing family relationship. Indeed, *Danforth* involved only a potential dispute between parent and child, whereas here a break in family autonomy has actually resulted in the parents' decision to surrender custody of their child to a State mental institution. In my view, a child who has been ousted from his family has even greater need for an independent advocate.

"Additional considerations counsel against allowing parents unfettered power to institutionalize their children without cause or without any hearing to ascertain that cause. The presumption that parents act in their children's best interests, while applicable to most child-rearing decisions, is not applicable on the commitment context. Numerous studies reveal that parental decisions to institutionalize their children often are the results of dislocation in the family unrelated to the children's mental condition. Moreover, even well-meaning parents lack the expertise necessary to evaluate the relative advantages and disadvantages of inpatient as opposed to outpatient psychiatric treatment. Parental decisions to waive hearings in which such questions could be explored, therefore, cannot be conclusively deemed either informed or intelligent. In these circumstances, I respectfully suggest, it ignores reality to assume blindly that parents act in their children's own best interest when making commitment decisions and when waiving their children's due process rights.

"This does not mean States are obliged to treat children who are committed at the behest of their parents on precisely the same manner as others persons who are involuntarily committed. The demands of due process are flexible and the parental commitment decision carries with it practical implications that States may legitimately take into account. While as a general rule, due process requires that commitment hearings precede involuntary hospitalization, when parents seek to hospitalized their children special considerations militate in favor of postponement of formal commitment proceedings against mandatory adversary pre-confinement hearings.

"First, the prospect of an adversary hearing prior to admission might deter parents from seeking needed medical attention for their children. Second, the hearings themselves might delay

treatment of children whose home life has become impossible and who require some form of immediate State care. Furthermore, because adversary hearings at this juncture would necessarily involve direct challenges to parental authority, judgment, or veracity, pre-admission hearings may well result in pitting the child and his advocate against the parents. This, in turn, might traumatize both parent and child and make the child's eventual return to his family more difficult.

"Because of these special considerations, I believe that States may legitimately postpone formal commitment proceedings when parents seek inpatient psychiatric treatment for their children. Such children may be admitted, for a long period, without prior hearing, so long as the admitting psychiatrist first interviews parent and child and concludes that short-term inpatient treatment would be appropriate.

"Georgia's present admission procedures are reasonably consistent with these principles. See *ante,* at 2509-2511. To the extent the District Court invalidated this aspect of the Georgia juvenile commitment scheme and mandated pre-confinement hearings in all cases, I agree with the Court that the District Court was in error.

"I do not believe, however, that the present Georgia juvenile commitment scheme is constitutional in its entirety. Although Georgia may postpone formal commitment hearings, when parents seek to commit their children, the State cannot dispense with such hearings altogether. Our cases make that clear, when protected interests are at stake, the 'fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, . . . (1976), quoting in part from *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, . . . (1965). Whenever prior hearings are impractical, States must provide reasonably prompt post-deprivation hearings. Compare *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 94 S.Ct. 1895, . . . (1974).

"The informal post-admission procedures that Georgia now follows are simply not enough to qualify as hearings — let alone reasonably prompt hearings. The procedures lack all traditional due process safeguards. Commitment decisions are made *ex parte.* Georgia's institutionalized juveniles are not informed of the reasons for their commitment; nor do they enjoy the right to be heard, the right to be confronted with adverse witnesses, the right to cross-examine, or the right to offer evidence of their own. By any standard of due process, these procedures are deficient. See *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, . . . (1974); *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, . . . (1972); *McNeil v. Director, Patuxent Institution,* 407 U.S. 245, 92 S.Ct. 2083, . . . (1972); *Specht v. Patterson,* 386 U.S. at 610, 87 S.Ct. at 1212. See, also, *Goldberg v. Kelly,* 397 U.S. 254, 269-261, 90 S.Ct. 1011, 1021-1022, . . . (1970). I cannot understand why the Court pretermits condemnation of these *ex parte* procedures which operate to deny Georgia's institutionalized juveniles even 'some form of hearing,' *Mathews v. Eldridge, supra,* 424 U.S. at 333, 96 S.Ct. at 902, before they are condemned to suffer the rigors of long-term institutional confinement.

"The special considerations that militate against pre-admission commitment hearings when parents seek to hospitalize their children do not militate against reasonably prompt post-admission commitment hearings. In the first place, post-admission hearings would not delay the commencement of needed treatment. Children could be cared for by the State pending the disposition decision.

"Second, the interest in avoiding family discord would be less significant at this stage since the family autonomy already will have been fractured by the institutionalization of the child. In any event, post-admission hearings are unlikely to disrupt family relationships. At later hearings, the case for and against commitment would be based upon the observations of the hospital staff and the judgments of the staff psychiatrists, rather than upon parental observations and recommendations. The doctors urging commitment, and not the parents, would stand as the child's adversaries. As a consequence, post-admission commitment hearings are unlikely to involve direct challenges to parental authority, judgment, or veracity. To defend the child, the child's advocate need not dispute the parents' original decision to seek medical treatment for their child, or even, for that matter, their observations concerning the child's behavior. The advocate need only argue, for example, that the child had sufficiently improved during his hospital stay to warrant outpatient treatment or outright discharge. Conflict between doctor and advocate on this question is unlikely to lead to family discord.

"As a consequence, the prospect of a post-admission hearing is unlikely to deter parents from seeking medical attention for their children and the hearing itself is unlikely to traumatize parent and child so as to make the child's eventual return to the family impracticable.

"Nor would post-admission hearings defeat the primary purpose of the State juvenile mental health enterprise. Under the present juvenile commitment scheme, Georgia parents do not enjoy absolute discretion to commit their children to public mental hospitals. See *ante,* at 2510. Superintendents of State facilities may not accepts children for long-term treatment unless they first determine that the children are mentally ill and will likely benefit from long-term hospital care, See *ibid.* If the superintendent determines either condition is met, the child must be released or refused admission, regardless of the parents' desires. See *ibid.* No legitimate State interest would suffer if the superintendent's determinations were reached through fair proceedings with due consideration of fairly presented opposing viewpoints rather than through the present practice of secret, *ex parte* deliberations.

"Nor can the good faith and good intentions of Georgia's psychiatrist and social workers, adverted to by the Court, see *ante,* at 2510-2511, excuse Georgia's *ex parte* procedures. Georgia's admitting psychiatrists, like the school disciplinarians described in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975), 'although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed.' *Id.,* at 580, 95 S.Ct. at 739. See App. 188-190, testimony of Dr. Messinger. Here, as in *Goss,* the 'risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the . . . process. '[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . ' 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Goss v. Lopez, supra,* at 580, 95 S.Ct. at 739, quoting in part from *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170, 171-172, 71 S.Ct. 624, 647-648, 649, . . . (1951) (FRANKFURTER, J., concurring). Rights of Children Committed by Their State Guardians.

"Georgia does not accord prior hearings to juvenile wards of the State of Georgia committed by State social workers acting *in loco parentis.* The Court dismissed a challenge to this practice on the grounds that State social workers are obliged by statute to act in the children's best interest. See *ante,* at 2512.

"I find this reasoning particularly unpersuasive. With equal logic, it could be argued that criminal trials are unnecessary since prosecutors are not supposed to prosecute innocent persons.

"To my mind, there is no justification for denying children committed by their social workers the prior hearings that the Constitution typically requires. In the first place, such children cannot be said to have waived their rights to a prior hearing simply because their social workers wished them to be confined. The rule that parents speak for their children, even if it were applicable in the commitment context, cannot be transmuted into a rule that State social workers speak for their minor clients. The rule in favor of deference to parental authority is designed to shield parental control of child rearing from State interference. See *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573, . . . (1925). The rule cannot be involved in defense of unfettered State control of child rearing or to immunize from review the decisions of State social workers. The social worker-child relationship is not deserving of the special protection and deference accorded to the parent-child relationship, and State officials acting *in loco parentis* cannot be equated with parents. See *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, . . . (1975); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, . . . (1972).

"Second, the special considerations that justify postponement of formal commitment proceedings whenever parents seek to hospitalize their children are absent when the children are wards of the State and are being committed upon the recommendations of their social workers. The prospect of pre-admission hearings is not likely to deter State social workers from discharging their duties and securing psychiatric attention for the disturbed clients. Moreover, since the children will already be in some form of State custody as wards of the State, pre-hospitalization hearings will not prevent needy children from receiving State care during the pendency of the commitment proceedings. Finally, hearings in which the decisions of State officials are not likely to traumatize the children or to hinder their eventual recovery.

"For these reasons, I believe that, in the absence of exigent circumstances, juveniles

committed upon the recommendation of their social workers are entitled to pre-admission commitment hearings. As a consequence, I would hold Georgia's present practice of denying these juveniles prior hearings unconstitutional.

"Children incarcerated in public mental institutionsare constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. Georgia should not be permitted to deny that opportunity and that champion simply because the children's parents or guardians wish them to be confined without a hearing. The risk of erroneous commitment is simply too great unless there is some form of adversary review. And fairness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice."

Planned Parenthood of Cent. Mo. v. Danforth

428 U.S. 52, 86 S.Ct. 2831 (1976)

ABORTION - (Parental Consent) — ***The state may not impose a blanket parental consent for abortion by minors, there being no substantial State interest in preserving the family that overrides a girl's right to decide for herself.***

"(p. 2834) Mr. Justice BLACKMUN delivered the opinion of the Court.

"This case is a logical and anticipated corollary to *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 605, . . . (1973), and *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, . . . (1973), for it raises issues secondary to those that were then before the Court. Indeed, some of the questions now presented were forecast and reserved in *Roe* and *Doe.* 410 U.S. at 165, n. 67, 93 S.Ct. at 733.

. . .

"(p. 3835) The plaintiffs (physicians who perform abortions) brought the action on their own behalf and, purportedly, 'on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform the termination of pregnancies and on behalf of the entire class consisting of their patients desiring the termination of pregnancy, all within the State of Missouri.' *Id.,* at 9. Plaintiffs sought to enjoin enforcement of the Act on the ground, among others, that certain of its provisions deprived them and their patients of various constitutional rights: 'the right to privacy in the physician-patient relationship;' the physicians' 'right to practice medicine according to the highest standards of medical practice;' the female patients' 'right to determine whether to bear children;' the patients' 'right to life due to the inherent risk involved in child birth' or in medical procedures alternative to abortion; the physicians' 'right to give plaintiffs' patients' right to receive safe and adequate medical advice and treatment, pertaining to the decision of whether to carry a given pregnancy to term and the method of termination;' the patients' right under the Eighth Amendment to be free from Cruel and Unusual Punishment' by forcing and coercing them to bear each pregnancy they conceive;' and, by being placed 'in the position of decision-making beset with . . . inherent possibilities of bias and conflict of interest,' the physician's right to due process of law guaranteed by the Fourteenth Amendment. *Id.,* at 10-11.

"The particular provisions of the Act that remained under specific challenge at the end of trial were . . . sec. 3(4), requiring, . . . 'the written consent of one parent or person *in loco parentis* of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother;' . . .

. . .

"(p. 2837) In *Roe v. Wade,* the Court concluded that the 'right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.' 410 U.S. at 153, 93 S.Ct. at 727. It emphatically rejected, however, the proffered argument 'that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.' *Ibid.* Instead, this right 'must be considered against important State interests in regulation.' *Id.,* at 154, 93 S.Ct. at 727.

"The Court went on to say that the 'pregnant woman cannot be isolated in her privacy,' for she 'carries an embryo and, later, a fetus.' *Id.,* at 159, 93 S.Ct. at 730. It was therefore 'reasonable

and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.' *Ibid.* The Court stresses the measure of the State's interest in 'the light of present medical knowledge.' *Id.,* at 163, 93 S.Ct. at 731. It concluded that the permissibility of State regulation was to be viewed in three stages: 'For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician,' without interference from the State. *Id.,* at 164, 93 S.Ct. at 732. The participation by the attending physician in the abortion decision, and his responsibility in that decision, thus, were emphasized. After the first stage, as so described, the State may, if it chooses, reasonably regulate the abortion procedure to preserve and protect maternal health. *Ibid.* Finally, for the stage subsequent to viability, a point purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability, the State may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.,* at 163-165, 93 S.Ct. at 731-733.

. . .

"(p. 2838) Our primary task then is to consider each of the challenged provisions of the new Missouri abortion statute in the particular light of the opinions and decisions in *Roe* and in *Doe.* To this we now turn, with the assistance of helpful briefs from both sides and from some *amici.*

. . .

"(p. 2841) Parental Consent. Section 3(4) requires, with respect to the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person *in loco parentis* unless, again, 'the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.' It is to be observed that only one parent need consent.

"The appellees defend the statute in several ways. They point out that the law properly may subject minors to more stringent limitations than are permissible with respect to adults, and they cite, among other cases, *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, . . . (1944), and *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, . . . (1971). Missouri law, it is said, 'is replete with provisions reflecting the interest of the State in assuring the welfare of minors,' citing statutes relating to a guardian ad litem for a court proceeding, to the care of delinquent and neglected children, to child labor, and to compulsory education. Brief for Appellee Danforth 42. Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, a State's permitting a child to obtain an abortion without the counsel of an adult 'who has responsibility or concern for the child would constitute an irresponsible education of the State's duty to protect the welfare of minors.' *Id.,* at 44. Parental discretion, too, has been protected from unwarranted or unreasonable interference from the State, citing *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . (1925); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, . . . (1972). Finally, it is said that sec. 3(4) imposes no additional burden on the physician because even prior to the passage of the Act the physician would require parental consent before performing an abortion on a minor.

"The appellants, in their turn, emphasize that no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment, and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse. Mo.Rev.Stat. sec. 431.061-431.063 (Supp.1975). The result of sec. 3(4), it is said, 'is the ultimate supremacy of the parents' desires over those of the minor child, the pregnant patient.' Brief for Appellants 93. It is noted that in Missouri a woman under the age of 18 who marries with parental consent does not require parental consent to abort, and yet her contemporary who has chosen not to marry must obtain parental approval.

"The District Court majority recognized that, in contrast to sec. 3(3), the State's interest in protecting the mutuality of a marriage relationship is not present with respect to sec. 3(4). It found 'a compelling basis,' however, in the State's interest 'in safeguarding the authority of the family relationship.' 392 F.Supp. at 1370. The dissenting judge observed that one could not seriously argue that a minor must submit to an abortion if her parents insist, and he could not see 'why she would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.' *Id.,* at 1376.

"Of course, much of what has been said above, with respect to sec. 3(3), applies with equal force to sec. 3(4). Other courts that have considered the parental-consent issue in the light of *Roe* and *Doe,* have concluded that a statute like sec. 3(4) does not withstand constitutional scrutiny. See, e.g., *Poe v. Gerstein,* 517 F.2d at 792; *Wolfe v. Schroering,* 388 F.Supp. at 636-637; *Doe v. Rampton,* 366 F.Supp. at 193, 199; *State v. Koome,* . . . , 530 P.2d 260 (Wash. 1975).

"We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as sec. 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

"Constitutional rights do not mature and come into being magically only when one attains the State-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, e.g., *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, . . . (1975); *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, . . . (1975); *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 89 S.Ct. 733, . . . (1969); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967). The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Prince v. Massachusetts,* 321 U.S. at 170, 64 S.Ct. at 444; *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, . . . (1968). It remains, then, to examine whether there is any significant State interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.

"One suggested interest is the safeguarding of the family unit and of parental authority. 392 F.Supp. at 1370. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

"We emphasize that our holding that sec. 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857, . . . The fault with sec. 3(4) is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. It violates the strictures of *Roe* and *Doe.*

. . .

"(p. 2850) Mr. Justice STEWART, with whom Mr. Justice POWELL joins, concurring.

"While joining the Court's opinion, I write separately to indicate my understanding of some of the constitutional issues raised by this litigation.

. . .

"(p. 2851) With respect to the State law's requirement of parental consent, sec. 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird,* 428 U.S. 132, 147-148, 96 S.Ct. 2857, 2866, . . . , suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the

minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

"There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician and an abortion clinic, where abortions for pregnant minors frequently take place.

"As to the constitutional validity of sec. 9 of the Act, prohibiting the use of the saline amniocentesis procedure, I agree fully with the views expresses by Mr. Justice STEVENS.

"Mr. Justice WHITE, with whom The CHIEF JUSTICE, and Mr. Justice REHNQUIST join, concurring in the judgment in part and dissenting in part.

"In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, . . . (9173), this Court recognized a right to an abortion free from State prohibition. The task of policing this limitation on State police power is and will be a difficult and continuing venture in substantial due process. However, even accepting *Roe v. Wade,* there is nothing articulated in the Court's opinion in this case which justifies the invalidation of four provisions of House Committee Substitute for House Bill No. 1211 (hereafter Act) enacted by the Missouri 77th General Assembly in 1974 in response to *Roe v. Wade.* Accordingly, I dissent, in part.

"*Roe v. Wade, supra,* at 163, 93 S.Ct. at 731, holds that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing 'whether or not to terminate her pregnancy.' 410 U.S. at 153, 93 S.Ct. at 727. Section 3(3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that 'since the State cannot . . . proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . . ' *Ante,* at 2841. But the State is not — under sec. 3(3) — delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It by no means follows, from the fact that the mother's interest in deciding 'whether or not to terminate her pregnancy' outweighs the State's interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life. See *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, . . . (1972), and cases there cited. It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade, supra.* These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

"In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe v. Wade* mentioned only the post-birth burdens of rearing a child, 410 U.S. at 153, 93 S.Ct. at 726, and rejected a rule based on her interest in controlling her own body during pregnancy. *Id.,* at 154, 93 S.Ct. at 727. Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo.Rev.Stat. sec. 453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than sec. 3(3) of the Act now before us, resting as it does on precisely the same judgment.

"Section 3(4) requires that an unmarried woman under 18 years of age obtain the consent of a parent or person *in loco parentis* as a condition to an abortion. Once again the Court strikes the provision down in a sentence. It states: 'Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an

absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy . . . ' *Ante,* at 2843. The Court rejects the notions that the *State* has an interest in strengthening the family unit or that the *parent* has an 'independent interest' in the abortion decision, sufficient to justify sec. 3(4) and apparently concludes that the provision is therefore unconstitutional. But the purpose of the parental-consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe v. Wade, supra* — the right of the pregnant woman to decide 'whether *or not* to terminate her pregnancy.' 410 U.S. at 153, 93 S.Ct. at 727 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

. . .

"(p. 2856) Mr. Justice STEVENS, concurring in part and dissenting in part.

"With the exception of Parts IV-D and IV-E, I join the Court's opinion.

"In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, . . . , the Court held that a woman's right to decide whether to abort a pregnancy is entitles to constitutional protection. That decision, which is now part of our law, answers the question discussed in Part IV-E of the Court's opinion, but merely poses the question decided in Part IV-D.

. . .

"In my opinion, however, the parental-consent requirement is consistent with the holding in *Roe.* The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforcement bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the State legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

"The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

"The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes — to marry, to abort, to bear her child out of wedlock — the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decision-making process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process.

"If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and indeed for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect

that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A State legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

"The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible.

"The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with predicate which underlies all State legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law I think a State has power to conclude otherwise and to select a chronological age as its standard.

"In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement."

Prince v. Massachusetts

321 U.S. 158, 64 S.Ct. 438 (1944)

RELIGION - Parental Rights — ***Parents have a primary right to control their children, but both that right and the free exercise of their religion by the parents and the children are subject to State control to protect the children and the public.***

"(p. 439) Mr. Justice RUTLEDGE delivered the opinion of the Court.

"The case brings for review another episode in the conflict between Jehovah's Witnesses and State authority. . . .

. . .

"(p. 440) The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute 'Watchtower' and 'Consolation,' according to the usual plan. She had permitted the children to engage in this activity previously, and had been warned against doing so by the school attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

"That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, mother-like, she yielded. Arriving downtown, Mrs. Prince permitted the children 'to engage in the preaching work with her upon the sidewalks.' That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passerbys to see, copies of 'Watchtower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation, 5 cents per copy.' No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

"Mrs. Prince and Betty remained until 8:45 p.m. A few minutes before this Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warning and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, '[N]either you nor anybody else can stop me ***. This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands.' However, Mrs. Prince and Betty departed. She remarked as she went, 'I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed.' It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was excluded to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'

. . .

"(p. 441) Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done. Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the States. She buttresses this foundation, however, with a claim of parental rights as secured by the due process clause of the latter Amendment. Cf. *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . , 29 A.L.R. 1446. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go,

which for the appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is 'to preach the gospel *** by public distribution' of 'Watchtower' and 'Consolation,' in conformity with the scripture: 'A little child shall lead them.'

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others . . .

"To make accommodation between these freedoms and an exercise of State authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the State over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the State's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

"The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of State power voicing it, have had recognition here, most recently in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178. Previously in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . , 39 A.L.R. 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the State's requirement of attendance at public schools. And in *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . , 29 A.L.R. 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the State's encroachment. It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. *Pierce v. Society of Sisters, supra.* And it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter.

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U.S. 145, . . . ; *Davis v. Beason,* 133 U.S. 333, 10 S.Ct. 299, . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the State as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People v. Pierson,* 176 N.Y. 201, 68 N.E. 243, . . . The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

"But it is said the State cannot do so here. This, first, because when State action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger, cf. *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, . . . ; and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in my view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity.

Cf. *Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146, . . . And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

"Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. *Young v. California,* 308 U.S. 147, 60 S.Ct. 146, . . . But the mere fact a State could not wholly prohibit this form of adult activity, whether characterized locally as a 'sale' or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a State could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the State's command.

"The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public place, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the State's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action . . .

"(p. 444) The judgment is affirmed.

. . .

"Mr. Justice JACKSON.

"The novel feature of this decision is this: the Court holds that a State may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: 'This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion.' '*** the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial project. The constitutional rights of those so reading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.' *Murdock v. P.,* 319 U.S. 105, 109, 111, 63 S.Ct. 870, 873, 874, . . . , 146 A.L.R. 82.

"It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets 'occupy the same high estate' and have the 'same claim to protection' it would seem that child labor laws may be applied to both if to either. If the Murdock doctrine stands along with today's decision, a foundation is laid for any State intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

"This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. . . . Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.

"My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free or anything can be. . . .

. . .

"Mr Justice ROBERTS and Mr. Justice FRANKFURTER join in this opinion.

"Mr. Justice MURPHY, dissenting. 'This attempt by the State of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

"The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. She was a member of Jehovah's Witnesses and had been taught the tenets of that sect be her guardian, the appellant. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of the appellant, Betty Simmons on

the night of December 18, 1941, was standing on a public street corner and offering to distribute Jehovah's Witness literature to passerby. There was no expectation of pecuniary profit to herself or to appellant. It is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in 'an age-old form of missionary evangelism' with a purpose 'as evangelical as the revival meeting.' *Murdock v. Pennsylvania,* 319 U.S. 105, 108, 109, 63 S.Ct. 870, 872, 873, . . . , 146 A.L.R. 82.

"Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by State action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals, and welfare. Our problem here is whether a State, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. No question of freedom of speech or freedom of press is present and we are not called upon to determine the permissible restraints on those rights. Nor are any truancy or curfew restrictions in issue. The statutes in question prohibit all children within the specified age limits from selling or offering to sell 'any newspapers, magazines, periodicals, or any other articles of merchandise of any description *** in any street or public place.' Criminal sanctions are imposed in the parents and guardians who compel or permit minors in theory control to engage in the prohibited transactions.

. . .

"This indirect restraint is no less effective than a direct one. A square conflict between the constitutional guarantee of religious freedom and the State's legitimate interest in protecting the welfare of its children is thus presented.

"As the opinion of the Court demonstrates the power of the State lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

. . .

"The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general. The great interest of the State in shielding minors from the evil vicissitudes of early life does not warrant every limitation on their religious training and activities. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the reasonableness that justifies such drastic restriction when the distribution is part of their religious faith. *Murdock v. Pennsylvania, supra,* 319 U.S. 111, 63 S.Ct. 874, . . . , 146 A.L.R. 82. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the State or to the health, morals, or welfare of the child. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639, 63 S.Ct. 1178, 1186. The vital freedom of religion, which is 'of the very essence of a scheme of ordered liberty,' *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, . . . , cannot be erased by slender references to the State's power to restrict the more secular activities of children.

"The State, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. . . . "

Quilloin v. Walcott

434 U.S. 246, 98 S.Ct. 549 (1978)

ADOPTION - Unwed Fathers - 'Best Interests' — ***An unwed father who had not sought custody or legitimation during the child's eight years does not have a constitutional right to veto and adoption; the child's best interest override the unwed father's.***

"Mr. Justice MARSHALL delivered the opinion of the Court.

"The issue in this case is the constitutionality of Georgia's adoption laws as applied to deny an unwed father authority to prevent adoption of his illegitimate child. The child was born in December 1964 and has been in the custody and control of his mother, appellee Ardell Williams Walcott, for his entire life. The mother and the child's natural father, appellant Leon Webster Quilloin, never married each other or established a home together, and in September 1967 the mother married appellee Randall Walcott. In March 1976, she consented to adoption of the child by her husband, who immediately filed a petition for adoption. Appellant attempted to block the adoption and to secure visitation rights, but he did not seek custody or object to the child's continuing to live with appellees. Although appellant was not found to be an unfit parent, the adoption was granted over his objection.

"In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, . . . (1972), this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent. The Court concluded, on the one hand, that a father's interest in the 'companionship, care, custody, and management' of his children is 'cognizable and substantial,' *id.,* at 651-652, (2 S.Ct. at 1212-13, and, on the other hand, that the State's interest in caring for the children is *'de minimis'* if the father is in fact a fit parent, *id.,* at 657-658, 92 S.Ct. at 1215-1216. *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.

"Generally speaking, under Georgia law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been adjudicated an unfair parent. Even where the child's parents are divorced or separated at the time of the adoption proceedings, either parent may veto the adoption. In contrast, only the consent of the mother is required for adoption of an illegitimate child. . . . To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, sec. 74-101, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father, sec. 74-103. But unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, sec. 74-203, including the power to veto adoption of the child.

"Appellant did not petition for legitimation of his child at any time during the 11 years between the child's birth and the filing of Randall Walcott's adoption petition. However, in response to Walcott's petition, appellant filed an application for a writ of habeas corpus seeking visitation rights, a petition for legitimation, and an objection to the adoption. Shortly thereafter, appellant amended his pleadings by adding the claim that sec. 74-203 and 74-403(3) were unconstitutional as applied to his case, insofar as they denied him the rights granted to married parents, and presumed unwed fathers to be unfit as a matter of law.

"The petitions for adoption, legitimation and writ of habeas corpus were consolidated for trial in the Superior Court of Fulton County, Ga. The court expressly stated that these matters were being tried on the basis of a consolidated record to allow 'the biological father . . . a right to

be heard with respect to any issue or other thing upon which he desire[s] to be heard, including his fitness as a parent . . . ' After receiving extensive testimony from the parties and other witnesses, the trial court found that, although the child had never been abandoned or deprived, appellant had provided support only on an irregular basis. Moreover, while the child previously had visited with appellant on 'many occasions,' and had been given toys and gifts by appellant 'from time to time,' the mother had recently concluded that these contacts were having a disruptive effect on the child and on appellees' entire family. The child himself expressed a desire to be adopted by Randall Walcott and to take on Walcott's name, and the court found Walcott to be a fit and proper person to adopt the child.

"On the basis of these findings, as well as findings relating to appellees' marriage and the mother's custody of the child for all of the child's life, the trial court determined that the proposed adoption was in the 'best interests of [the] child.' The court concluded, further, that granting either the legitimation or the visitation rights requested by appellant would not be in the 'best interests of the child,' and that both should consequently be denied. The court then applied sec. 74-203 and 74-403(3) to the situation at hand, and, since appellant had failed to obtain a court order granting legitimation, he was found to lack standing to object to the adoption. Ruling that appellant's constitutional claims were without merit, the court granted the adoption petition and denied the legitimation and visitation petitions.

"Appellant took an appeal to the Supreme Court of Georgia, claiming that sec. 74-203 and 74-403(3), as applied by the trial court to his case, violated the Equal Protection and Due Process Clauses of the First Amendment. In particular, appellant contended that he was entitled to the same power to veto an adoption as is provided under Georgia law to married or divorced parents and to unwed mothers, and, since the trial court did not make a finding of abandonment or other unfitness of the part of appellant, see n. 2, *supra,* the adoption of his child should not have been allowed.

"Over a dissent which urged that sec. 74-403(3) was invalid under *Stanley v. Illinois,* the Georgia Supreme Court affirmed the decision of the trial court. . . . , 232 S.E.2d 246 (Ga.1977). The majority relied generally on the strong state of policy of rearing children in a family setting, a policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions. The court also emphasized the special force of this policy under the facts of this case, pointing out that the adoption was sought by the child's stepfather, who was part of the family unit in which the child was in fact living, and that the child's natural father had not taken steps to support or legitimate the child over a period of more that 11 years. The court noted in addition that, unlike the father in *Stanley,* appellant had never been a *de facto* member of the child's family unit.

"Appellant brought this appeal pursuant to 28 U.S.C. sec. 1257(2), continuing to challenge the constitutionality of sec. 74-203 and 74-403(3) as applied to his case, and claiming that he was entitled as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent. In contrast to appellant's somewhat broader statement of the issue in the Georgia Supreme Court, on this appeal he focused his equal protection claim solely on the disparate statutory treatment of his case and that of a married father. We noted probable jurisdiction, . . . , and we now affirm.

"At the outset, we observe that appellant does not challenge the sufficiency of the notice he received with respect to the adoption proceeding, see n. 7, *supra,* nor can he claim that he was deprived of a right to a hearing on his individualized interests in his child, prior to entry of the order of adoption. Although the trial court's ultimate conclusion was that appellant lacked standing to object to the adoption, this conclusion was reached only after appellant had been afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent. Had the trial court granted legitimation, appellant would have acquired the veto authority he is now seeking.

"The fact that appellant was provided with a hearing on his legitimation petition is not, however, a complete answer to his attack on the constitutionality of sec. 74-203 and 74-403(3). The trial court denied appellant's petition, and thereby precluded him from gaining veto authority, on the ground that legitimation was not in the 'best interests of the child;' appellant contends that he was entitled to recognition and preservation of his parental rights absent a showing of his 'unfitness.' Thus, the underlying issue is whether, in the circumstances of this case

and in light of the authority granted by Georgia law to married fathers, appellant's interests were adequately protected by a 'best interests of the child' standard. We examine this issue first under the Due Process Clause and then under the Equal Protection Clause.

"Appellees suggest that due process was not violated, regardless of the standard applied by the trial court, since any constitutionally protect interest appellant might have had was lost by his failure to petition for legitimation during the 11 years prior to filing of Randall Walcott's adoption petition. We would hesitate to rest decision on this ground, in light of the evidence in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed. But in any event we need not go that far, since under the circumstances of this case appellant's substantive rights were not violated by application of a 'best interests of the child' standard.

"We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., *Wisconsin v. Yoder,* 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-42, . . . (1972); *Stanley v. Illinois, supra; Meyer v. Nebraska,* 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-27, . . . (1923). 'It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the Statcan neither supply nor hinder.' *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944). And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the First Amendment.' *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, . . . (1974).

"We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, . . . (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'

"Appellant contends that even if he is not entitled to prevail as a matter of due process, principles of equal protection require that his authority to veto an adoption be measured by the same standard that would have been applied to a married father. In particular, appellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently. We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.

"Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, compare sec. 74-202 with sec. 74-105 and sec. 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even seek custody of his child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.

"For these reasons, we conclude that sec. 74-203 and 74-403(3), as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses. The judgment of the Supreme Court of Georgia is accordingly,

"Affirmed."

Ralston v. Robinson

454 U.S. 201, 102 S.Ct. 233 (1982)

CERTIFICATION (Unfinished Juvenile Disposition) — ***Where a child is certified and sentenced as an adult, an unfinished juvenile disposition for a prior offense may be terminated if the sentencing judge deems it of no further value.***

"(p. 236) Justice MARSHALL delivered the opinion of the Court.

"We grant *certiorari* in this case, . . . , to decide whether a youth offender who is sentenced to a consecutive adult term of imprisonment while serving a sentence imposed under the Federal Youth Corrections Act (YCA), . . . , must receive YCA treatment for the remainder of his youth sentence. The Court of Appeals are in conflict on this issue. We conclude that the YCA does not require such treatment if the judge imposing the subsequent adult sentence determines that the youth will not benefit from further YCA treatment during the remainder of his youth sentence. Accordingly, we reverse the judgment of the Court of Appeals.

"In 1974 respondent, who was 17 years old, pleaded guilty to a charge of second-degree murder and was sentenced to a 10-year term of imprisonment under the YCA, sec. 5010(c). The sentencing judge recommended that he be placed at the Kennedy Youth Center in Morgantown, W. Va.; that he not be released until he attained at least an eighth-grade level of education and had successfully completed a trade of his own choosing; and that he participate in intensive, individual therapy on a weekly basis and undergo a complete psychological reevaluation before being returned to the community. The sentence, like all YCA sentences, contemplated that the respondent be segregated from adult offenders. . . .

"Respondent's subsequent conduct has not been exemplary. In 1975, while incarcerated at the Federal Correctional Institution (FCI) at Ashland, Ky., respondent was found guilty of assaulting a federal officer by use of a dangerous weapon, . . . The United States District Court for the Eastern District of Kentucky imposed an additional 10-year adult sentence and stated in its commitment order: 'The Court finds that the defendant will not benefit any further under the provisions of the [YCA] and declines to sentence under said act.' After receiving a presentence report, the judge reduced the sentence to 66 months, to be served consequentively to the YCA sentence. The judge also recommended that respondent be transferred from the Kentucky institution 'to a facility providing greater security.'

"Respondent was placed in the Federal Correctional Institution at Oxford, Wisc. Subsequent disciplinary problems resulted in his transfer to the FCI an Lompoc, Cal. In 1977, while confined in that institution, respondent pleaded guilty to another charge of assaulting a federal officer. The United States District Court for the Central District of California sentenced him . . . to an adult sentence of one year and one day and ordered that the sentence run consequentive to and not concurrent with sentence that respondent was then serving.

"After the second adult sentence, the Bureau of Prisons classified respondent as an offender. Accordingly, at least since that time, respondent has not been segregated from the adult prisoners, and has not been offered the YCA rehabilitative treatment that the initial trial court recommended. The Bureau of Prisons acted pursuant to a written policy when it classified respondent as an adult. In implementing the YCA's treatment and segregation requirements, the Bureau narrowly defines a 'YCA Inmate' as 'any inmate . . . *who is not also sentenced to a concurrent or consecutive adult term,* whether State or federal.' Bureau of Prisons Policy Statement No. 5215.2, p. 1 (Dec. 12, 1978) (emphasis added).

"Respondent exhausted his administrative remedies and filed a petition for habeas corpus on May 25, 1978. The Magistrate recommended transfer to an institution in which respondent would be segregated from adults and would receive YCA treatment. The United States District

Court for the Southern District of Illinois issued an order granting the writ, which was affirmed by the United States Court of Appeals for the Seventh Circuit. 642 F.2d 1077 (1981). The Court of Appeals held that the YCA forbids the reevaluation of a YCA sentence by a second judge, even if the second judge makes an explicit finding that further YCA treatment would not benefit the offender. The Court of Appeals also rejected petitioner's broad argument that the YCA vests discretion in the Bureau of Prisons to modify the treatment terms of a YCA sentence when the offender has received a consecutive or concurrent adult sentence for a felony.

"On January 9, 1982, respondent will be conditionally released from his YCA sentence and will begin his first adult sentence.

"In *Dorszynski v. United States,* 418 U.S. 424, 94 S.Ct. 3042, . . . (1974), this Court exhaustively analyzed the history, structure, and underlying policies of the YCA. From that analysis, and from the language of the YCA, two relevant principles emerge. First, the YCA strongly endorses the discretionary power of a judge to choose among available sentencing options. Second, the YCA prescribes certain basic conditions of treatment for YCA offenders.

"In *Dorszynski,* THE CHIEF JUSTICE, writing for the Court, found that the principal purpose of the YCA is to rehabilitate persons who, because of their youth, are unusually vulnerable to the danger of recidivism:

> 'To accomplish this objective, federal district judges were given two alternatives to add to the array of sentencing options previously available to them . . . : first, they were enabled to commit an eligible offender to the custody of the Attorney General for treatment under the Act. . . . Second, if they believed an offender did not need commitment, they were authorized to place him in probation under the Act. . . . If the sentencing court chose the first alternative, the youth offender would be committed to the program of treatment created by the Act.' *Id.,* at 433, 94 S.Ct. at 3048.

"If a court wishes to sentence a youth to an adult sentence, it is authorized to do so . . . In *Dorszynski,* a majority of this Court held that a judge must make an explicit 'no benefit' finding to invoke this subsection, but need not give a statement of reasons to justify his decision. Both the majority and concurring opinions emphasized that the YCA was not intended to disturb the broad discretion traditionally available to federal judges in choosing among appropriate sentences. 418 U.S. at 436-442, 94 S.Ct. at 3049-52; *id.,* at 450, 94 S.Ct. at 3056 . . .

"We reiterated that trial courts retain significant control over sentencing options in *Durst v. United States,* 434 U.S. 542, 98 S.Ct. 849, . . . (1978), where we unanimously held that the YCA permits the court to impose a fine or require restitution when it places a youth on probation . . . In his opinion for the Court, Justice BRENNAN explained the underlying purposes of the Act:

> 'The core concept of the YCA, like that of England's Borstal System upon which it is modeled, is that rehabilitative treatment should be substitutes for retribution as a sentencing goal. Both the Borstal System and the YCA incorporate three features thought essential to the operation of a successful rehabilitative treatment program flexibility in choosing among a variety of treatment settings and programs tailored to individual needs; separation of youth offenders from hardened criminals; and careful and flexible control of the duration of commitment and of supervised release.' *Id.,* at 545-546, 98 S.Ct. at 851 (footnotes omitted).

"A second important feature of the YCA is that it empowers, and indeed requires, a judge to prescribe certain basic conditions of YCA treatment. This prescription ensures that treatable youth offenders are segregated from adult criminals, and that they receive appropriate rehabilitative care.

"The need to segregate youth from adult criminals drew special attention in the legislative history. Proponents of the statute criticized the practice of 'herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened, and . . . subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques . . . ' H.R.Rep. No. 2979, 81 Cong., 2d Sess., 2-3 (1950); see 96 Cong.Rec. 15036 (1950), U.S. Code Cong. & Admin. News 1950, p. 3983, 3985. This concern was expressed in the statutory requirement that offenders receiving youth sentences by segregated from adults. . . . More generally, '[t]he panoply of treatment options available under the Act is but further evidence that

the YCA program was intended to be sufficiently comprehensive to deal with all but the 'incorrigible' youth. *Dorszynski, supra,* at 449, 94 S.Ct. at 3055. . . .

"The YCA allocates responsibility for determining essential treatment conditions in an unusual way. Under traditional sentencing statutes, prison officials exercise almost unlimited discretion in imposing the security and treatment conditions that they believe appropriate. The YCA is different. By determining that the youth offender should be sentenced under the YCA, the trial court in effect decides two essential conditions of confinement: the Bureau of Prisons must comply with both the segregation and treatment requirements of the YCA. . . . See *Brown v. Carlson,* 431 F.Supp. 755, 765 (WD Wisc. 1977); Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 43-44 (1949) (statement of Judge Parker) (hereinafter 1949 Senate Hearings); Report to the Judicial Conference of the Committee on Punishment for Crime 8-9 (1942). The Bureau retains significant discretion in determining the conditions of confinement, . . . , but its discretion is limited by these requirements.

"The history of the YCA's passage buttresses the conclusion that correctional authorities may not exercise any of the sentencing powers established in the Act:

> 'The initial legislative proposal, an American Law Institute model Act, removed the power to sentence eligible offenders from the trial judges altogether and reposed that power in a correctional authority. Not surprisingly, that proposal brought swift and sharp criticism from the judges whose power was to be sharply curtailed. The next proposal, by the Judicial Conference, involved shared sentencing powers between trial judges and correctional authorities. It met with similar criticism. The 1949 proposal, which was finally enacted into law, retained sentencing power in the trial judge.' S.Ct. at 3054 . . .

"This unusual responsibility for treatment conditions demands that the sentencing judge thoroughly understand all available facts relevant to the offender's treatment needs. Thus, the statute provides the trial court with the opportunity to obtain an extremely comprehensive presentence report, 18 U.S.C. sec. 5010(e). See S.Rep. No. 1180, 81st Cong., 1st Sess., 5 (1949); 1949 Senate Hearings, at 18-19 (statement of Chief Judge Laws); Hearings on H.R. 2139 and H.R. 2140 before Subcommittee No. 3 of the House Committee on the Judiciary, 78th Cong., 1st Sess., 63-64 (1943) (statement of Judge Laws). With this framework in mind, we will review the parties' statutory arguments.

"Respondent asserts that the express language of the YCA prohibits any modification of the basic terms of a YCA sentence before its expiration. Respondent first points to sec. 5010(c), which authorizes a court to 'sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period [beyond six years] that may be authorized by law for the offense . . . or until discharged by the [United States Parole] Commission.' Respondent also relied on sec. 5011, which provides that '[c]ommitted youth offenders . . . *shall undergo treatment* in institutions . . . that will provide the essential varieties of treatment,' and that '[i]nsofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, *and such youth offenders shall be segregated from other offenders,* and classes of committed youth offenders shall be segregated according to their needs for treatment' (emphasis added). From this language, respondent argues that the essential segregation and treatment requirements of the initial YCA sentence cannot be modified before the sentence expires.

"We are not persuaded by this interpretation. Section 5010 enables the sentencing court to determine whether a youth offender would benefit from treatment under the YCA. If the original sentencing court determines that such treatment would be beneficial, it may sentence the youth offender under sec. 5010(a), (b), or (c), or it may request additional information under sec. 5010(e). Once the original sentencing court has made this determination and has sentenced the offender under the YCA, sec. 5011 required the Bureau of Prisons to carry out the mandate of the court with respect to the offender's segregation and treatment needs. We do not read that language as requiring the judge to make an *irrevocable* determination of segregation or treatment needs, or as precluding a subsequent judge from redetermining those needs in light of intervening events.

"At the other extreme, petitioner asserts that the YCA gives the Bureau of Prisons independent statutory authority to determine that a YCA offender will not benefit from YCA treatment. Petitioner believes that the Bureau can make such a determination at any time, whether or not an offender has committed a subsequent offense. We reject this extraordinary broad interpretation, and any interpretation that would grant the Bureau independent authority to deny an offender the treatment and segregation from adults that a sentencing court mandates.

"Prison officials do have a significant degree of discretionary authority under the YCA relevant to the treatment of youth offenders. The Bureau is responsible for studying the treatment needs of committed youth offenders, . . . , and for confining offenders and affording treatment 'under such conditions as [the Director of the Bureau] believes best designed for the protection of the public.' . . . It may commit or transfer offenders to any appropriate agency or institution, . . . , and may provide treatment in a wide variety of institutional settings. 18 U.S.C. sec. 5011. Moreover, it has the authority to recommend conditional release and otherwise to consult with the United States Parole Commission in the implementation of the YCA. 18 U.S.C. sec. 5014, 5015(a)(1), 5016, 5017.

"However, the statute does not give the Bureau any discretion to modify the *basic* terms of treatment that a judge imposes under sec. 5010 and 5011. When a judge imposes a youth sentence under the YCA, the sentence commits the youth to the custody of the Attorney General 'for treatment and supervision pursuant to this chapter.' 18 U.S.C. sec. 5010(b) and (c). Section 5011 provides two elements of mandatory treatment: first, youths must undergo treatment in an appropriate institution that will 'provide the essential varieties of treatment;' second, '[i]nsofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated according to their needs for treatment.' These two elements of the program are statutorily mandated, and the discretion of the Bureau is limited to the flexible discharge of its responsibilities *within* these two broad constraints.

"Even if the Bureau asserted only the right to treat YCA offenders as adults in accordance with its Policy Statement, see *supra,* at 257, this assertion of power is much too broad. The policy would treat *any* youth offender with an adult consecutive sentence as an adult — even if 15 years of his YCA sentence remained and the adult sentence were only for 1 year. It is unreasonable, indeed callous, to assume that such an offender could not receive any further benefit from YCA treatment. This example underscores the importance of leaving such decisions to the sound discretion of a federal sentencing judge, rather than to prison officials. The fatal defect in petitioner's argument is that it permits prison officials to make a determination — whether a YCA offender will benefit from YCA treatment — that the statute commits to the sentencing judge.

"No provision of the YCA explicitly governs the issue before us. The statute describes the sentencing options available to a judge after conviction but does not elucidate what options would be available after the defendant has been convicted of a second crime while serving his initial sentence. The purposes of the statute, however, revealed in its structure and legislative history, compel the conclusion that a court faced with a choice of sentences for a youth offender still serving a YCA term is not deprived of the option of finding no further benefit in YCA treatment for the remainder of the term.

"Under sec. 5010(d), a court sentencing an offender who is serving a youth term may make a 'no benefit' finding and then 'sentence the youth offender under any other applicable penalty provision.' A judge is thus authorized to impose a consecutive adult term, as the second judge did in this case. However, the court also has before it the question whether the offender will benefit from YCA treatment during the remainder of the YCA term. Although sec. 5010(d) does not expressly authorize a second judge to make a 'no benefit' finding with respect to the remainder of an unexpired YCA sentence, we believe that it implicitly authorizes such a determination, as well as the determination that YCA treatment during the consecutive sentence would not be beneficial. It assuredly does *not* authorize prison officials to make either determination.

"Our review of the legislative history reveals no explicit discussion of the trial court's options in sentencing a youth who commits a crime while serving a YCA sentence; Congress apparently did not consider this specific problem. But Congress did understand that the original treatment imposed by the sentencing judge might fail, and that protective as well as rehabilitative purposes might justify a lengthy confinement under sec. 5010(c). In commenting on that section,

the House Report states: 'This affords opportunity for the sentencing court to avail itself of the provisions of this bill and at the same time insure protection of the public if efforts at rehabilitation fail.' H.R.Rep. No. 2979, 81st Cong., 2d Sess., 4 (1950), U.S.Code Cong. & Admin. News, 1950, p. 3986.

"The history and structure of the YCA discussed above, *supra,* at 237-240, demonstrate Congress' intent that a court — but not prison officials — may require a youth offender to serve the remainder of a YCA sentence as an adult after the offender has received a consecutive adult term. First, the YCA prescribes certain basic elements of treatment, segregation from adults and individualized rehabilitative programs, as part of a YCA sentence. Second, sponsors of the Act repeatedly stated that its purpose was to prevent youths from becoming recidivists, and to insulate them from the insidious influence of more experienced adult criminals. Housing incorrigible youths with youths who show promise of rehabilitation would not serve this purpose. Third, the decision whether to employ the unique treatment methods of the YCA is exclusively committed to the discretion of the sentencing judge, rather than to prison officials. If segregation of a particular class of youths from adults would be futile, that is a decision to be made by a court, not by prison authorities.

"Finally, in light of the above, we do not believe that when Congress withdrew from prison officials some of their traditional authority to adjust the conditions of confinement over time, Congress intended that no one exercise that authority. The result would be an inflexible rule requiring, in many cases, the continuation of futile YCA treatment. The only reasonable conclusion is that Congress reposed that authority in the court, the institution that the YCA explicitly invests with the discretion to make the original decision about basic treatment conditions.

"We find further support for this conclusion from the fact that, in several circumstances, the YCA permits a youth offender initially sentenced under the YCA to be treated as an adult for what would otherwise be the remainder of the YCA sentence. For example, the statute permits a court to sentence a defendant to an adult term if he commits an adult offense after receiving a suspended sentence and probation under sec. 5010(a). If respondent had been sentenced initially to probation under sec. 5010(a) and had been subsequently convicted of criminal assault, the court could have imposed an adult sentence for the original crime, for the assault, or for both, to begin immediately. In fact, respondent committed his second crime while incarcerated. It hardly seems logical to prohibit an immediate modification of respondent's treatment conditions simply because he originally received the harsher sentence of YCA incarceration.

"Moreover, respondent concedes that the statute permits a judge to impose a *concurrent* adult sentence on an offender who is serving a YCA term. Such an adult sentence would commence at the time that it was imposed and would modify the YCA treatment that the offender would otherwise receive for the remainder of his term. Finally, every offender sentenced under the YCA *must* be released conditionally two years prior to the termination of his sentence. 18 U.S.C. sec. 5017. However, if the offender violates the terms of this conditional release by committing a crime, the conditional release may be revoked and an adult sentence may immediately be imposed, notwithstanding the fact that the youth sentence has not yet expired. Respondent concedes as much, since he does not challenge the commencement of his adult term in January 1982, even though two years of his youth sentence will still remain.

"We therefore conclude that a judge who sentences a youth offender to a consecutive adult term may require that the offender also serve the remainder of his youth sentence as an adult. Only this interpretation can give meaning to both the language and the underlying purposes of the YCA. '[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.' *F.T.C. v. Fred Meyer, Inc.,* 390 U.S. 341, 349, 88 S.Ct. 904, 908, . . . (1968). Accordingly, we hold that a judge may modify the essential terms of treatment of a continuing YCA sentence if he finds that such treatment would not benefit the offender further.

"The standards that a district judge should apply in determining whether an offender will obtain any *further* benefit from YCA treatment are no different from the standards applied in imposing a sentence originally. Of course, the judge should consider the fact that the offender has been convicted of another crime. In light of all relevant factors, the court can exercise its sound discretion in determining whether the offender should receive youth or adult treatment for the

remainder of his term. The court need not adopt a rigid rule of the type urged by petitioner. Rather, it should make a judgment informed by both the rehabilitative purposes of the of the YCA and the realistic circumstances of the offender.

"Applying these principles to the facts before us, we conclude that the second judge made a sufficient finding that respondent would not benefit from YCA treatment during the remainder of his youth term. The judge found that respondent would not benefit 'further' under the YCA, and he declined to impose a youth sentence under that Act, imposing instead a consecutive adult sentence. In the future, we expect that judges will eliminate interpretive difficulties by making an explicit 'no benefit' finding with respect to the remainder of the YCA sentence.

"In conclusion, we are convinced that Congress did not intend that a person who commits serious crimes while serving a YCA sentence should automatically receive treatment that has proved futile. On the other hand, Congress carefully designed this statute to require a sentencing judge, rather than the Bureau of Prisons, to evaluate whether the basic elements of treatment — segregation from adults and individualized programs — are appropriate and consistent with YCA policies over time. Our interpretation comports with the overriding legislative purpose that 'once a person [is] committed for treatment under the Act, the execution of sentence [is] to fit the person, not the crime.' *Dorszynski,* 418 U.S. at 434, 94 S.Ct. at 3048.

"We reverse the judgment of the Court of Appeals and remand the case for proceedings consistence with this opinion.

"It is so ordered.

"Justice POWELL, concurring in the judgement.

"The only question presented in this case is whether an offender, the respondent, serving a sentence under the Federal Youth Corrections Act (YCA), . . . , and thereafter sentenced to a consecutive term of imprisonment as an adult, must nevertheless be separated from other adult offenders for the remainder of his sentence under the Act. I agree with the Court that the answer to this question must be in the negative. I write separately because it seems to me that the Court's opinion, in addressing broadly the authority of the Director of the Bureau of Prisons (the Director), may be read as unnecessarily curtailing his authority and discretion to act in other cases.

"It was a District Court that imposed the consecutive adult term on respondent, but it was the Director who made the *decision* the treat respondent as an adult prisoner no longer entitled to be segregated from adult offenders. I agree with the Court as to the authority of the District Court to impose the consecutive adult term of imprisonment. I confine this concurrence to the issue of authority of the Director.

. . .

" . . . the express language of YCA vests broad discretion in the Director. It contains no mandatory directions that youth segregation must continue indefinitely no matter how clearly appropriate adult treatment may be. The statutory emphasis instead is on flexibility and individualized treatment. . . . The YCA does require youth offenders to be separated from adult offenders, but this command is qualified by the phrase '[i]nsofar as practical.' We need not in this case consider the limits on the discretion thus conferred. This is an easy case in view of respondent's convictions as an adult offender and the findings of the federal courts. In these circumstances the Director plainly had the authority —indeed the duty — to transfer respondent from the Federal Youth Center to a 'facility providing greater security.' We properly defer to the Director's judgment that continued segregation from adult offenders is no longer 'practical' under such circumstances. Even in the absence of subsequent felony convictions, there could be occasions when, because of a youth offender's incorrigibility and threat to the safety of others, it would be highly *impractical* to continue his segregation in a youth center. As we are not confronted with such a situation in this case, I would limit our decision to the record before us and defer to another day a general discussion of the Director's authority.

"Justice STEVENS, with whom Justice BRENNAN and Justice O'CONNOR join, dissenting.

"At common-law a sentence could be amended during the term in which it was imposed subject to the limitation that 'a punishment already partly suffered be not increased.' 'The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it,' *United States v. Benz,* 282 U.S. 304, 307, 51 S.Ct. 113,

114, . . . , has been recognized by this Court over and over again. Whether the well-settled rule prohibiting judges from increasing the severity of a sentence after it has become final is constitutionally mandated, it is unquestionably the sort of rule that judges may not disregard without express authorization from Congress.

"That rule requires a firm rejection of the argument that a second sentencing judge has power to convert an unexpired YCA sentence into an adult sentence. For there can be no question about the fact that an adult sentence is more severe than a YCA sentence. Nor can we 'assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it.' *Dorszynski v. United States,* 418 U.S. 424, 441, 94 S.Ct. 3042, 3052, . . . It is undisputed that the Youth Corrections Act contains no such clear expression of congressional intent. Indeed, the Court's opinion repeatedly confirms this proposition. The Court's novel holding is supported by nothing more than inferences drawn from the 'history and structure of the YCA.' . . . Manifestly, such inferences are insufficient to justify a judicial rewriting of what 'has been accurately described as the most comprehensive federal statute concerned with sentencing.' *Dorszynski, supra,* at 432, 94 S.Ct. at 3047.

"The Court's first argument rests on the premise that Congress did not intend either that corrigible youth offenders or that futile YCA treatment be continued. The Court reasons that continued YCA treatment is in derogation of such congressional intent whenever a youth offender, while serving his YCA sentence, commits another crime sufficiently serious to convince the second sentencing judge that the youth will no longer benefit from YCA treatment. *Ante,* at 242. All of this may well be true, but it does not follow that the second sentencing judge may impose a consecutive adult sentence and also confine the offender as an adult under the unexpired YCA sentence. A much less drastic solution will accomplish the objectives ascribed to Congress. The second judge simply may impose a concurrent adult sentence and thereby end the offender's YCA treatment. Moreover, even if, as in this case, the second judge imposes a consecutive rather than a concurrent sentence, prison officials nonetheless can effectuate these objectives by exercising their authority to terminate the YCA confinement and allow the consecutive adult sentence to commence. . . . It is therefore clear that the Court's premise does not support its conclusion that Congress must have intended that the second sentencing judge may modify the first sentence by increasing its severity.

"The Court's second argument is no better. The Court noted that, 'in several circumstance, the YCA permits a youth offender initially sentenced under the YCA to be treated as an adult for what would otherwise be the remainder of the YCA sentence.' . . . The Court's examples are set forth in the margin. I do not disagree with the Court that the imposition of a YCA sentence does not entitle an offender to YCA treatment for the full length of that sentence no matter what crimes he commits in the interim, or that respondent could have been subjected to immediate adult confinement in each of the Court's examples. I do not agree, however, that a second judge may impose adult treatment on an offender who continues to be incarcerated not on the basis of a subsequent adult sentence but on the basis of the original YCA sentence. None of the Court's examples poses that situation; hence there is no reason to suppose that Congress intended that any authority, even a court, may increase the severity of a sentence after that sentence has become final. In fact, as the Court points out in a footnote, the only statutory authorization for a judicial modification of a YCA sentence permits 'a judge [to] *reduce* the severity of the terms of commitment in light of changed circumstances.' . . .

"There is, therefore, nothing in the text, history, or structure of the Youth Corrections Act that supports the Court's holding that a judge may increase the severity of a YCA sentence after it has become final. Even apart from the constitutional problem with such a holding, see n. 3, *supra,* this absence of statutory support is fatal. Not only did Congress not intend the result reached by the Court today, there is good reason to believe that Congress intended just the opposite.

"In enacting the Youth Corrections Act, Congress recognized that a YCA sentence of a given number of years is qualitatively less severe than an adult sentence of equal length. Indeed, sec. 5010(b) authorizes a District Court to impose a longer YCA sentence (up to six years) than would be authorized if the offender were sentenced as an adult. The federal courts unanimously have upheld sec. 5010(b) against constitutional challenges on the reasoning early expressed by THE CHIEF JUSTICE when a Circuit Judge and often quoted thereafter:

'[T]he basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as compromising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in a ordinary prison . . . [T]he Youth Corrections Act 'provides for and affords youthful offenders, in the discretion of the judge, not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and restoration.' *Carter v. United States,* . . . , 306 F.2d 283, 285 (D.C. 1962) (quoting *Cunningham v. United States,* 256 F.2d 467, 472 (CA5 1958)).

"It is of no consequence that respondent was sentenced not under sec. 5010(b), but under sec. 5010(c), for the same *quid pro quo* theory that justifies longer YCA terms than maximum adult terms for a given offense also justifies YCA terms within the statutory adult maximum but longer than an adult would generally receive. See *Watts v. Hadden,* 651 F.2d 1354, 1365 (CA10 1981); *United States ex rel. Dancy v. Arnold,* 572 F.2d 107, 111 (CA3 1978). It is no coincidence that the Youth Corrections Act vests broad authority in the district judge to impose lengthy YCA sentences and also vests broad authority in prison officials to order early releases of youth offenders from their YCA sentences. The proponents of the Youth Corrections Act repeatedly emphasized that prison officials must be given sufficient time to rehabilitate youth offenders and sufficient authority to release rehabilitated offenders from their custodial sentences. As the then Director of the Bureau of Prisons explained before the Senate Subcommittee studying the proposed Youth Corrections Act of 1949, the imposition of ordinary adult-length sentences on youth offenders was completely unrelated to the rehabilitative effort; the sentences were either far too long or far too short. The promises of treatment and of early release justified the imposition of longer YCA sentences.

"If a second sentencing judge is able to convert an unexpired YCA sentence into an adult sentence, the *quid pro quo* vanishes. The youth offender who is sentenced to a longer term of confinement when sentenced under the YCA than if he were sentenced as an adult may end up, as respondent will under the Court's holding, serving that lengthier sentence under the adult conditions he paid a price to avoid. Furthermore, he is not entitled for the duration of that sentence to the good-time allowances available to offenders sentenced as adults. The humanitarian objectives of the Youth Corrections Act do not justify fundamental unfairness.

"If the original sentencing judge had known that a subsequent adult sentence could result in expiration of YCA treatment but not of the YCA sentence, he might will have discounted the length of the YCA sentence to reflect this possibility. Moreover, if respondent had know of this possibility, he might have elected to stand trial rather than to plead guilt. Speculation of this kind would be unnecessary if the Court declined to enlarge upon the statute that Congress has written. If an amendment to the statute is needed to deal with a problem that Congress did not foresee, it is Congress — not this Court — that must perform that task.

"I do not purpose to know whether YCA treatment is effective for youthful offenders in general, or would serve any useful purpose for this particular offender. No such question is relevant to the legal issue raised by this case. The only question presented is whether a federal judge confronted with the task if sentencing an inmate for an offense committed while he is serving a sentence for an earlier crime may not only impose the punishment authorized by law for the later offense but also take it upon himself to enhance the earlier sentence as well. The answer to that question seems so obvious to me that I shall not further belabor it.

"I respectfully dissent."

Santosky v. Kramer

455 U.S. 745, 102 S.Ct. 1388 (1982)

TERMINATION - (Burden of Proof) — ***Clear and convincing evidence is required for termination of parental rights.***

"(p. 1391) Justice BLACKMUN delivered the opinion of the Court.

"Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is 'permanently neglected.' N.Y.Soc.Serv.Law . . . The New York Family Court Act . . . requires that only a 'fair preponderance of the evidence' support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

"Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

"New York authorizes its officials to remove a child temporarily from his or her home if the child appears 'neglected,' within the meaning of Art. 10 of the Family Court Act. . . . Once removed, a child under the age of 18 customarily is placed 'in the care of an authorized agency,' . . . usually a State institution or a foster home. At that point, 'the State's first obligation is to help the family with services to . . . reunite it . . . ' . . . But if convinced that 'positive, nurturing parent-child relationships no longer exist,' . . . the State may initiate 'permanent neglect' proceedings to free the child for adoption.

"The State bifurcates its permanent neglect proceeding into 'fact-finding stage, the State must prove that the child has been 'permanently neglected,' as defined by Fam.Ct.Act . . . The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. . . .

"At the fact-finding hearing, the State must establish, among other things, that for more than a year after the child entered State custody, the agency 'made diligent efforts to encourage and strengthen the parental relationship.' . . . The State must further prove that during that same period, the child's natural parents failed 'substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so.' . . . Should the State support its allegations by 'a fair preponderance of the evidence,' . . . the child may be declared permanently neglected. . . . That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. . . . Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.

"New York's permanent neglect statute provides natural parents with certain procedural protections. But New York permits its officials to establish 'permanent neglect' with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a 'fair preponderance of the evidence.' The only analogous federal statute of which we are aware permits termination of parental rights solely upon 'evidence beyond a reasonable doubt.' Indian Child Welfare Act of 1978, . . . The question here is whether New York's' fair preponderance of the evidence' standard is constitutionally sufficient.

"Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding

. . . and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate danger to his life or health.

"In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children. Petitioners challenged the constitutionality of the 'fair preponderance of the evidence' standard specified in Fam.Ct.Act . . . The Family Court Judge rejected this constitutional challenge, . . . and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits 'at best superficial and devoid of any real emotional content.' . . . After deciding that the agency had made 'diligent efforts' to encourage and strengthen the parental relationship,' . . . , he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. . . . The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody. . . .

"Petitioners appealed, again contesting the constitutionality of (the Act's) standard of proof. The New York Supreme Court, Appellate Division, affirmed, holding application of the preponderance-of-the-evidence standard' proper and constitutional.' *In re John AA,* . . . 427 N.Y.S.2d 319, 320 (1980). That standard, the court reasoned, 'recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . ' *Ibid.*

"The New York Court of Appeals then dismissed petitioners' appeal to that court 'upon the ground that no substantial constitutional question is directly involved.' App. 55. . . .

"Last term in *Lassiter v. Department of Social Services,* 452 U.S. 18, 101 S.Ct. 2153, . . . (1981), this Court, by a 5-4 vote, held that the Fourteenth Amendment's Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here — whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

"In *Lassiter,* it was 'not disputed that State intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.' *Id.,* at 24-32, 101 S.Ct. at 2158-2162 (opinion of the Court); *id.,* at 59-60,101 S.Ct. at 2176 (STEVENS, J., dissenting). See, also, *Little v. Streater,* 452 U.S. 1, 13, 101 S.Ct. 2202, 2209, . . . (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 554, . . . (1978); *Smith v. Organization of Foster Families,* 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, . . . (1977); *Moore v. East Cleveland,* 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, . . . (1977) (plurality opinion); . . . ; *Stanley v. Illinois,* 405 U.S. 645, 651-652, 92 S.Ct. 1208, 1212-1213, . . . (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574, . . . (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, . . . (1923).

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting State intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

"In *Lassiter,* the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of 'three distinct factors' specified in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U.S. at 27-31, 101 S.Ct. at 2159-2162; *id.,* at 37-48, 101 S.Ct. at 2164-2171 (first dissenting opinion). But see *id.,* at 59-60, 101 S.Ct. at 2176 (STEVENS, J., dissenting). While the respective *Lassiter*

opinions disputed whether those factors should be weighed against a presumption disfavoring appointment counsel for one not threatened with loss of physical liberty, compare 452 U.S. at 31-32, 101 S.Ct. at 2161-2162, with *id.,* at 41, and n. 8, 101 S.Ct. at 2167, and n. 8 (first dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straight-forward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

"In *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, . . . (1979), the Court, by a unanimous vote of participating Justices, declared: 'the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *Id.,* at 423, 99 S.Ct. at 1808, quoting *In re Winship,* 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, . . . (1970) (HARLAN, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

"Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' 441 U.S. at 423, 99 S.Ct. at 1808. When the State brings a criminal action to deny a defendant liberty or life, however, 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' *Ibid.* The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected, *id.,* at 427, 99 S.Ct. at 1810, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.' *Id.,* at 424, 99 S.Ct. at 1808. See, also, *In re Winship,* 397 U.S. at 372, 90 S.Ct. at 1076 (HARLAN, J., concurring).

"The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' *Vitek v. Jones,* 445 U.S. 480, 491, 100 S.Ct. 1254, 1262, . . . (1980). See, also, *Logan v. Zimmerman Brush Co.,* 445 U.S. 422, 432, 102 S.Ct. 1148, 1155-1156, . . . (1982). Moreover, the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.' *Woodby v. INS,* 385 U.S. 276, 284, 87 S.Ct. 483, 487, . . . (1966). 'In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at minimum] reflects the value society places on individual liberty.' *Addington v. Texas,* 441 U.S. at 425, 99 S.Ct. at 1809, quoting *Tippett v. Maryland,* 436 F.2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dism'd *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 92 S.Ct. 2091, . . . (1972).

"This Court has mandated an intermediate standard of proof — 'clear and convincing evidence' — when the individual interests at stake in a State proceeding are both 'particularly important' and 'more substantial than mere loss of money.' *Addington v. Texas,* 441 U.S. at 424, 99 S.Ct. at 1808. Notwithstanding 'the State's civil labels and good intentions,' *id.,* at 427, 99 S.Ct. at 1810, quoting *In re Winship,* 397 U.S. at 365-366, 90 S.Ct. at 1073-1074, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or stigma.' 441 U.S. at 425, 426, 99 S.Ct. at 1808, 1809. See, e.g., *Addington v. Texas,* supra (civil commitment); *Woodby v. INS,* 385 U.S. at 285, 87 S.Ct. at 487 (deportation); *Chaunt v. United States,* 364 U.S. 350, 353, 81 S.Ct. 147, 149, . . . (1943) (denaturalization).

"In *Lassiter,* to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceeding even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U.S. at 31-32, 101 S.Ct. at

2161-2162 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases,* not the rare exceptions.' *Mathews v. Eldridge,* 424 U.S. at 344, 96 S.Ct. at 907 (emphasis added). Since the litigants and the fact-finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

"In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a 'fair preponderance of the evidence' standard in such proceedings is inconsistent with due process.

"'The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' *Goldberg v. Kelly,* 397 U.S. 254, 262-263, 90 S.Ct. 1011, 1017-18, . . . (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, 646, . . . (1951) (FRANKFURTER, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the fact-finder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

"*Lassiter* declared it 'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right. 452 U.S. at 27, 101 S.Ct. at 2160, quoting *Stanley v. Illinois,* 405 U.S. at 651, 92 S.Ct. at 1212. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.' 452 U.S. at 27, 101 S.Ct. at 2160.

"In government-initiated proceedings to determine juvenile delinquency, *In re Winship, supra;* civil commitment, *Addington v. Texas, supra;* deportation, *Woodby v. INS, supra;* and denaturalization, *Chaunt v. United States, supra,* and *Schneiderman v. United States, supra,* this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all *reversible* official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. See n. 1, *supra.* Few forms of state action are both so severe and so irreversible.

"Thus, the first *Eldridge* factor — the private interest affected — weighs heavily against use of the preponderance standard at a State-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the fact-finding stage of the New York proceeding, the focus emphatically is not on them.

"The fact-finding does not purport — and is not intended — to balance the parent's interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the fact-finding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam.Ct.Act sec. 614.1(d). The question disputed and decided are what the State did — 'made diligent efforts,' . . . and what the natural parents did not do — 'maintain contact with or plan for the future of the child.' . . . The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.

"At the fact-finding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents to diverge. See Fam.Ct.Act . . . (judge shall make his order 'solely on the basis of the best interests of the child,' and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital

interest in preventing erroneous termination of their natural relationship. Thus, at the fact-finding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

"However substantial the foster parents' interests may be, cf. *Smith v. Organization of Foster Families,* 431 U.S. at 845-847, 97 S.Ct. at 2110-2111, they are not implicated directly in the fact-finding stage of a State-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. . . . Alternatively, the foster parents can make their case for custody at the dispositional stage of a State-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests. . . . For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural r rotections.

"Under *Mathews v. Eldridge,* we next must consider both the risk of erroneous deprivation of private interests resulting from use of a 'fair preponderance' standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U.S. at 335, 96 S.Ct. at 903. Since the fact-finding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous fact-finding between these two parties.

"In New York, the fact-finding stage of a State-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter v. Department of Social Services,* 452 U.S. at 42-44, 101 S.Ct. at 2167-2169 (first dissenting opinion); *Meltzer v. C. Busk LeCraw & Co.,* 402 U.S. 954, 959, 91 S.Ct. 1624, 1626, . . . (1971) (BLACK, J., dissenting from denial of *certiorari*). See also dissenting opinion, *post,* at 1406-1408 (describing procedures employed at fact-finding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. . . . The fact-finding hearing is conducted pursuant to formal rules of evidence. . . . The State, the parents, and the child are all represented by counsel. . . . The State seeks to establish a series of historical facts about the intensity of its agency's efforts to reunite the family, the infrequency and insubstantiality of the parents' contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. . . .

"At such a proceeding, numerous factors combine to magnify the risk of erroneous fact-finding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families,* 431 U.S. at 835, n. 36, 97 S.Ct. at 2105, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.,* at 833-835, such proceedings are often vulnerable to judgments based on cultural or class bias.

"The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecution a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the fact-finding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

"This disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no 'double jeopardy' defense against repeated State termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra,* it always can try once again to cut off the

parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

"Coupled with a 'fair preponderance of the evidence' standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the fact-finder in the marginal case. See *In re Winship,* 397 U.S. at 371, n. 3, 90 S.Ct. at 1076, n. 3 (HARLAN, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

"Raising the standard of proof would have practical and symbolic consequences. Cf. *Addington v. Texas,* 441 U.S. at 426, 99 S.Ct. at 1809. The Court has long considered the heightened standard of proof used in criminal prosecutions to be 'a prime instrument for reducing the risk of convictions resting on factual error.' *In re Winship,* 397 U.S. at 363, 90 S.Ct. at 1072. An elevated standard of proof in a parental rights termination proceeding would alleviate 'the possible risk that a fact-finder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior.' *Addington v. Texas,* 441 U.S. at 427, 99 S.Ct. at 1810. 'Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' terminations will be ordered. *Ibid.*

"The Appellate Division approved New York's preponderance standard on the ground that it properly 'balanced rights possessed by the child . . . with those of the natural parents . . . ' 75 App.Div.2d at 910, 427 N.Y.S.2d at 320. By so saying, the court suggested that a preponderance standard properly allocated the risk of error *between* the parents and the child. That view is fundamentally mistaken.

"The court's theory assumes that termination of the natural parents' rights invariably will benefit the child. Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distribute the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf., *In re Winship,* 397 U.S. at 371, 90 S.Ct. at 1076 (HARLAN, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocated the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

"Two State interests are at stake in parental rights termination proceedings — a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"'Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision' at the *fact-finding* proceeding. *Lassiter v. Department of Social Services,* 452 U.S. at 27, 101 S.Ct. at 2160. As *parens patriae,* the State's goal is to provide the child with a permanent home. See Soc.Serv.Law sec. 384-b.1.(a)(i) (statement of legislative findings and intent). Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of the natural familial bonds. . . . '[T]he State registers no gain towards its declared goals when it separated children from the custody to fit parents.' *Stanley v. Illinois,* 405 U.S. at 652, 92 S.Ct. at 1213.

"The State's interest in finding the child an alternative permanent home arises only 'when it is *clear* that the natural parent cannot or will not provide a normal family home for the child.' Soc.Serv.Law sec. 384-b.1.(a)(iv) (emphasis added). At the *fact-finding,* that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

"Unlike a constitutional requirement of hearings, see, e.g., *Mathews v. Eldridge,* 424 U.S. at 347, 96 S.Ct. at 908, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their fact-finding proceedings. See n. 3, *supra.*

"Nor would an elevated standard of proof create any real administrative burdens for the State's fact-finders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. . . . the Act requiring 'clear and convincing proof' before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse. New York also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. . . . We cannot believe that it would burden the State unduly to require that its *fact-finders* have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

"The logical conclusion of this balancing process is that the 'fair preponderance of the evidence' standard prescribed . . . (the Act) violates the Due Process Clause of the Fourteenth Amendment. The Court quoted in *Addington:* 'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the State.' 441 U.S. at 427, 99 S.Ct. at 1810. Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a 'beyond a reasonable doubt' or a clear and convincing' standard is constitutionally mandated.

"In *Addington,* the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons — because of our hesitation to apply that unique standard 'too broadly or causally in noncriminal cases,' *id.,* at 428, 99 S.Ct. at 1810, and because the psychiatric evidence ordinarily adduced at commitment proceedings is rarely susceptible to proof beyond a reasonable doubt. *Id.,* at 429-430, 432-433, 99 S.Ct. at 1811-1812, 1812-1813. To be sure, as has been noted above, in the Indian Welfare Act . . . Congress requires 'evidence beyond a reasonable doubt' for termination of Indian parental rights, reasoning that 'the removal of a child from the parents is a penalty as great [as], if not greater than, a criminal penalty . . . ' H.R.Rep.No. 95-1386, p. 22 (1978), U.S.Code Cong. & Admin. News 1978, p. 7530, 7545. Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all State-initiated parental rights termination hearings.

"Like civil commitment hearings, termination proceedings often require that the fact-finder evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress. Cf. *Lassiter v. Department of Social Services,* 452 U.S. at 30, 101 S.Ct. at 2161; *id.,* at 44-46, 101 S.Ct. at 2168-2169 (first dissenting opinion) (describing issues raised in State termination proceedings). The substantive standards applied vary from state to state. Although Congress found a 'beyond a reasonable doubt' standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to State efforts to free permanently neglected children for adoption.

"A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra.* We hold that such a standard adequately conveys to the fact-finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard is a matter of State law properly left to State legislatures and State courts. Cf. *Addington v. Texas,* 441 U.S. at 433, 99 S.Ct. at 1813.

"We, of course express no view on the merits of petitioners' claims. At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

"It is so ordered.

"Justice REHNQUIST, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join, dissenting.

"I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites

further federal court intrusion into every facet of State family law. If ever there were an area in which federal courts should heed the admonition of Justice HOLMES that 'a page of history is worth a volume of logic,' it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

"Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with 'fundamental fairness' whenever its actions infringe their protected liberty or property interests. By adoption of the procedures relevant to this case, New York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme 'fundamentally fair.'

"State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approached and promising progress.

"Throughout this experience the Court has scrupulously refrained from interfering with State answers to domestic relation questions. 'Both theory and the precedents of this Court teach us solicitude for State interests, particularly in the field of family and family-property arrangements.' *United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 507, . . . (1966). This is not to say that the Court should clink at clear constitutional violations in State statutes, but rather that in this area, of all areas, 'substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals.' *Mathews v. Eldridge,* 424 U.S. 319, 349, 96 S.Ct. 893, 909, . . . (1976).

"This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to *aid* marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance-of-the-evidence standard represents New York's good faith effort to balance the interest of parents against the legitimate interests of the child and the State. These earnest efforts by the State officials should be given weight in the Court's application of due process principles. 'Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri K & T.R. Co. v. May,* 194 U.S. 267, 270, 24 S.Ct. 638, 639, . . . (1904).

"The majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide 'due process of law.' In fact, however, fixing the standard of federal constitutional law will only lead to further federal court intervention in State schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any State scheme passes constitutional muster so long as it applies that standard of proof. A State law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be acceptable to the majority if it provided no procedures other than one 30-minute hearing. Similarly, the majority probably would balk at a State scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, . . . (1977) (STEWART, J., concurring in judgment).

"After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart State searches for better solutions in an area where this Court should encourage State experimentation. 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.' *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 386, . . . (1932)

(BRANDIS, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

"As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were unsuccessful, however, and on April 10, 1979, the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory category of permanent neglect. Petitioners now contend, the Court today holds, that they were denied due process of law, not because of general inadequacy of procedural protections, but simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

"It is well settled that '[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' *Board of Regents v. Roth,* 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, . . . (1972). In determining whether such liberty or property interests are implicated by a particular government action, 'we must look not to the 'weight' but to the *nature* of the interest at stake.' *Id.,* at 571, 92 S.Ct. at 2706 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith v. Organization of Foster Families, supra,* at 862-863, 97 S.Ct. at 2119 (STEWART, J., concurring in judgment). 'Once it is determined that due process applies, [however,] the question remains what process is due.' *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2595, 2600, . . . (1972). It is the majority's answer to this question with which I disagree.

"Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, 'not all situations calling for procedural safeguards call for the same kind of procedure.' *Morrissey v. Brewer, supra,* at 481, 92 S.Ct. at 2600. See, also, *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, . . . (1979); *Mathews v. Eldridge,* 424 U.S. at 334, 96 S.Ct. at 902; *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, . . . (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

"Given this flexibility, it is obvious that a proper due process inquiry cannot not be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine all procedural protections offered by the State, and must assess the cumulative effect of such safeguards. As we have stated before, courts must consider 'the fairness and reliability of the existing . . . procedures' before holding that the Constitution requires more. *Mathews v. Eldridge, supra,* 424 U.S. at 343, 96 S.Ct. at 907. Only through such a broad inquiry may courts determined whether a challenged governmental action satisfies the due process requirement of 'fundamental fairness.' In some instances, the Court has even looked to nonprocedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. See, e.g., *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, . . . (1977). In this case, it is just a broad look at the New York scheme which reveals its fundamental fairness.

. . .

"(p. 1409) The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment. At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Service (Department) to take custody of the three children.

"Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding

that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also directed the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

"A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. . . . Between early 1976 and the final termination decision in April 1979, the State spent more than $15,000 in these efforts to rehabilitate petitioners as parents. . . .

"Petitioners' response to the States' effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. . . . Petitioners' reaction to the State's efforts was generally 'nonresponsive, even hostile,' the fact that they were 'at least superficially cooperative' led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. . . . Accordingly, the petition for permanent termination was dismissed.

"Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had 'failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them.' . . .

"In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated petitioners' parental rights, thereby freeing the three children for adoption.

"As this account demonstrated, the State's extraordinary 4-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one Family Court Judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

"It is inconceivable to me that these proceedings were
'fundamentally unfair' to petitioners. Only by its obsessive focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise. As the discussion above indicates, however, such a focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

"In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof 'represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship,* 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, . . . (1970) (HARLAN, J., concurring); *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1807, . . . (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.' *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. at 13, 99 S.Ct. at 2106. See, also, *Addington v. Texas, supra,* at 425, 99 S.Ct. at 1808-1809; *Mathews v. Eldridge,* 424 U.S. at 344, 96 S.Ct. at 907.

"In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in fact-finding affect more than one interest, we try to minimize error as to those interests which we consider to be most important. As Justice HARLAN explained in his well-known concurrence to *In re Winship:*

'In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

'The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.' 397 U.S. at 370-371, 90 S.Ct. at 1076.

"When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that '[t]he litigants . . . share the risk of error in a roughly equal fashion,' *Addington v. Texas, supra,* at 423, 99 S.Ct. at 1808, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

"On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois,* 405 U.S. 645, 651, [92 S.Ct. 1208, 1212, . . .]; *Lassiter v. Department of Social Services,* 452 U.S. 18, 27, 101 S.Ct. 2153, 2161, . . . (1981). In creating the scheme at issue in this case, the New York Legislature was expressly aware of this right of parents 'to bring up their own children.' . . .

"On the other side of the termination proceeding are the often countervailing interests of the child. A stable, loving home life is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home or to the often unstable world of foster care. The reality of these risks is magnified by the fact that the only families faced with termination actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial action because of threatened irreparable injury through abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least on year.

"In addition to the child's interest in a normal home life, 'the State has an urgent interest in the welfare of the child.' *Lassiter v. Department of Social Services,* 452 U.S. at 27, 101 S.Ct. at 2160. Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility

of self-governance. 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.' *Prince v. Massachusetts,* 321 U.S. 158, 168, 64 S.Ct. 438, 443, . . . (1944). Thus, 'the whole community' has an interest 'that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.' *Id.,* at 165, 64 S.Ct. at 442. See, also, *Ginsberg v. New York,* 390 U.S. 629, 640-641, 88 S.Ct. 1274, 1281-82, . . . (1968).

"When, in the context of a permanent neglect termination proceeding, the interest of the child and the State in a stable, nurturing home life are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. See *Addington v. Texas,* 441 U.S. at 423, 99 S.Ct. at 1807-1808. This is precisely the balance which has been struck by the New York Legislature: 'It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption.' SSL sec. 384-b.1(b).

"For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violated due process of law. The decision disregards New York's earnest efforts to *aid* parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure.

"Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to State care. The Court thereby begins, I fear, a trend of federal intervention in State family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent."

Schall v. Martin

467 U.S. 253, 104 S.Ct. 2403 (1984)

DETENTION - (Preventive) — ***An accused juvenile who poses a serious risk of committing a crime if released may be detained if (a) he is given notice, (b) a statement of the facts and reasons for detention, and (c) a probable cause hearing within a short time.***

"(p. 2405) Justice REHNQUIST delivered the opinion of the Court.

" . . . of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that these is a 'serious risk' that the child 'may before the return date commit an act which if committed by an adult would constitute a crime.' Appellees brought suit on behalf of a class of all juveniles detained pursuant to that provision. The District Court struck down sec. 320.5(3)(b) as permitting detention without due process of law and ordered the immediate release of all class members, *United States ex rel. Martin v. Strasburg,* 513 F.Supp. 691 (SDNY 1981). The Court of Appeals for the Second Circuit affirmed, holding the provision 'unconstitutional as to all juveniles' because the statute is administered in such a way that 'the detention period serves as punishment imposed without proof if guilt established according to the requisite constitutional standard.' *Martin v. Strasburg,* 689 F.2d 365, 373-374 (1982) . . . We conclude that preventive detention under the FCA serves a legitimate State objective, and that the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

"Appellee Gregory Martin was arrested on December 13, 1977, and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon based on an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers. . . . Martin had possession of the gun when he was arrested. He was 14 years old at the time and, therefore, came within the jurisdiction of the New York Family Court. The incident occurred at 11:30 at night, and Martin lied to the police about where and with whom he lived. He was consequently detained overnight.

"A petition of delinquency was filed, and Martin made his 'initial appearance' in Family Court on December 14th, accompanied by his grandmother. The Family Court Judge, citing the possession of the loaded weapon, the false address given to the police, and the lateness of the hour, as evidencing a lack of supervision, ordered Martin detained . . . A probable cause hearing was held five days later, on December 19th, and probable cause was found to exist for all the crimes charged. At the fact-finding hearing held December 27-29, Martin was found guilty on the robbery and criminal possession charges. He was adjudicated a delinquent and placed on two years' probation. He had been detained pursuant to sec. 320.5(3)(b), between the initial appearance and the completion of the fact-finding hearing, for a total of 15 days.

"Appellees Luis Rosario and Kenneth Morgan, both age 14, were also ordered detained pending their fact-finding hearings. Rosario was charged with attempted first-degree robbery and second-degree assault for an incident in which he, with four others, allegedly tried to rob two men, putting a gun to the head of one of them and beating both about the head with sticks. . . . At the time of his initial appearance, on March 15, 1978, Rosario had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted. Probable cause was found on March 21. On April 11, Rosario was released to his father, and the case terminated without adjustment on September 25, 1978.

"Kenneth Morgan was charged with attempted robbery and attempted grand larceny for an incident in which he and another boy allegedly tried to steal money from a 14-year-old girl and her brother by threatening to blow their heads off and grabbing them to search their pockets. . . .

Morgan, like Rosario, was on release status on another petition for robbery and criminal possession of stolen property — at the time of his initial appearance on March 27, 1978. He has been arrested four previous times, and his mother refused to come to court because he had been in trouble so often she did not want him home. A probable-cause hearing was set for March 30, but was continued until April 4, when it was combined with a fact-finding hearing. Morgan was found guilty of harassment and petit larceny and was ordered placed with the Department of Social Services for 18 months. He was detained a total of eight days between his initial appearance and the fact-finding hearing.

"On December 21, 1977, while still in preventive detention pending his fact-finding hearing, Gregory Martin instituted a habeas corpus class action on behalf of 'those persons who are, or during the pendency of this action will be, preventively detained pursuant to' sec. 320.5(3)(b) of the FCA. Rosario and Morgan were subsequently added as additional named plaintiffs. These three class representatives sought a declaratory judgment that sec. 320.5(3)(b) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

"In an unpublished opinion, the District Court certified the class. App. 20-32. The court also held that appellees were not required to exhaust their State remedies before resorting to federal habeas because the highest State Court had already rejected an identical challenge to the juvenile preventive detention statute. See *People ex rel. Wayburn v. Schupf,* . . . , 350 N.E.2d 906 (N.Y. 1976). Exhaustion of State remedies, therefore, would be 'an exercise in futility.' . . .

"At trial, appellees offered in evidence the case histories of 34 members of the class, including the three named petitioners. Both parties presented some general statistics on the relation between pretrial detention and ultimate disposition. In addition, there was testimony concerning juvenile proceedings from a number of witnesses, including a legal aid attorney specializing in juvenile cases, a probation supervisor, a child psychologist, and a Family Court Judge. On the basis of this evidence, the District Court rejected the equal protection challenge as 'insubstantial,' but agreed with appellees that pretrial detention under the FCA violated due process. The court ordered that 'all class members in custody pursuant to Family Court Act Section [320.5(3)(b)] shall be released forthwith.' *Id.,* at 93.

"The Court of Appeals affirmed. After reviewing the trial record, the court opined that 'the vast majority of juveniles detained under [sec. 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.' 689 F.2d at 368. The court concluded from that fact that sec. 320.5(3)(b) 'is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.' *Id.,* at 372. The early release of so many of those detained contradicts any asserted need for pretrial confinement to protect the community. The court therefore concluded that sec. 320.5(3)(b) must be declared unconstitutional as to all juveniles. Individual litigation would be a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.

"There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem,' we have stresses, 'is to ascertain the precise impact of the due process requirement upon such proceedings.' *In re Gault,* 387 U.S. 1, 13-14, 87 S.Ct. 1428, 1436-1437, . . . (1967). We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. See *Id.,* at 31-57, 87 S.Ct. at 1445-1459 (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . . (1970) (proof beyond a reasonable doubt); *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, . . . (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, e.g., *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, . . . (1971) (no right to jury trial). The State has 'a *parens patriae* interest in preserving and promoting the welfare of the child,' *Santosky v. Kramer,* 445 U.S. 745, 766, 102 S.Ct. 1388, 1401, . . . (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance — to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, *In re Winship, supra,* 397 U.S. at 366, 90 S.Ct. at 1073, and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause. *Breed v. Jones, supra,* 421 U.S. at 531, 95 S.Ct. at 1786; *McKeiver, supra,* 403 U.S. at 543, 91 S.Ct. at 1985 (plurality opinion).

"The statutory provision at issue in these cases, sec. 320.5(3)(b), permits a brief pretrial detention based on a finding of a 'serious risk' that an arrested juvenile may commit a crime

before his return date. The question before us is whether preventive detention of juveniles pursuant to sec. 320.5(3)(b) is compatible with the 'fundamental fairness' required by due process. Two separate inquiries are necessary to answer this question. First, does preventive detention under the New York statute serve a legitimate State objective? See *Bell v. Wolfish,* 441 U.S. 520, 534, n. 15, 99 S.Ct. 1861, 1871, n. 15, . . . (1979); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, . . . (1963). And second, are the procedural safeguards contained in the FCA adequate to authorize the pretrial detention of at least some juveniles charged with crimes? See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976); *Gerstein v. Pugh,* 420 U.S. 103, 114, 95 S.Ct. 854, 863, . . . (1975).

"Preventive detention under the FCA is purportedly designed to protect the child and society from the potential consequences of his criminal acts. *People ex rel. Wayburn v. Schupf,* . . . , 385 N.Y.S.2d at 521-522, 350 N.E.2d at 910. When making any detention decision, the Family Court judge is specifically directed to consider the needs and best interests of the juvenile as well as the need for protection of the community. FCA sec. 301.1; *In re Craig S.,* . . . , 394 N.Y.S.2d 200 (1977). In *Bell v. Wolfish, supra,* at 534, n. 15, 99 S.Ct. at 1871, n. 15, we left open the question whether any governmental objective other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention. As an initial matter, therefore, we must decide whether, in the context of the juvenile system, the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention.

"The 'legitimate and compelling State interest' in protecting the community from crime cannot be doubted. *De Veau v. Braisted,* 363 U.S. 144, 155, 80 S.Ct. 1146, 1152, . . . (1960). See, also, *Terry v. Ohio,* 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, . . . (1968). We have stressed before that crime prevention is 'a weighty social objective,' *Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, . . . (1979), and this interest persists undiluted in the juvenile context. See *In re Gault, supra,* at 20, n. 26, 87 S.Ct. 1440, n. 26, . . . The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator. And the harm to society generally may even be greater in this context given the high rate of recidivism among juveniles. *In re Gault, supra,* at 22, 87 U.S. at 22, 87 S.Ct. at 1440.

"The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. See *In re Gault, supra,* at 27, 87 S.Ct. at 1443. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. *Lehman v. Lycoming County Children's Services,* 458 U.S. 502, 510-511, 102 S.Ct. 3231, 3237-3238, . . . (1982); *In re Gault, supra,* 387 U.S. at 17, 87 S.Ct. at 1438. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* See *State v. Gleason,* 404 A.2d 573, 580 (Me.1979); *People ex rel. Wayburn v. Schupf, supra,* at 690, 385 N.Y.S.2d at 522, 350 N.E.2d at 910; *Baker v. Smith,* 477 S.W.2d 149, 150-151 (Ky. 1971). In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *'parens patriae* interest and promoting the welfare of the child.' *Santosky v. Kramer, supra,* at 766, 102 S.Ct. at 1401, . . .

"The New York Court of Appeals, in upholding the statute at issue here, stressed at some length 'the desirability of protecting the juvenile from his own folly.' *People ex rel. Wayburn v. Schupf, supra,* at 688-689, 385 N.Y.S.2d at 520-521, 350 N.E.2d at 909. Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity — both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child. See *L.O.W. v. District Court of Arapahoe,* 623 P.2d 1253, 1258-1259 (Colo. 1981); *Morris v. D'Amario,* 416 A.2d 137, 140 (R.I. 1980). See, also, *Eddings v. Oklahoma,* 455 U.S. 104, 115, 102 S.Ct. 869, 876, . . . (1982) (minority 'is a time and condition of life when a person may be most susceptible to influence and psychological damage'); *Bellotti v. Baird,* 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, . . . (1979) (juveniles 'often lack the experience, perspective, and judgment to recognized and avoid choices that could be detrimental to them').

"The substantiality and legitimacy of the State interests underlying this statute are confirmed by the widespread use and judicial acceptance of preventive detention for juveniles. Every State, as well as the United States in the District of Columbia, permits preventive detention of juveniles accused of crime. A number of model juvenile justice Acts also contain

provisions permitting preventive detention. And the courts of eight States, including the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, including pretrial crime. *L.O.W. v. District Court of Arapahoe, supra,* at 1258-1259; *Morris v. D'Amario,* at 139-140; *State v. Gleason,* 404 A.2d at 583; *Pauley v. Gross,* . . . , 574 P.2d 234, 237-238, (Kan.App. 1977); *People ex rel. Wayburn v. Schupf,* . . . , 385 N.Y.S.2d at 520-521, 350 N.E.2d at 909-910; *Aubrey v. Gadbois,* 50 Cal.App.3d 470, 472, . . . (1975); *Baker v. Smith,* 477 S.W.2d at 150-151; *Commonwealth ex rel. Sprowal v. Hendrick,* . . . , 265 A.2d 348, 349-350 (Pa. 1970).

"The fact that a practice is followed by a large number of States is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts,* 291 U.S. 97, 105 [54 S.Ct. 330, 332, . . .] (1934).' *Leland v. Oregon,* 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, . . . (1952). In light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings. Cf. *McKeiver v. Pennsylvania,* 403 U.S. at 548, 91 S.Ct. at 1987 (plurality opinion).

"Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that '[d]ue process requires that a pretrial detainee not be punished.' *Bell v. Wolfish,* 441 U.S. at 535, n. 16, 99 S.Ct. at 1982, n. 16. Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under sec. 320.5(3)(b) are in fact compatible with those purposes. *Kennedy v. Mendoza-Martinez,* 372 U.S. at 168-169, 83 S.Ct. at 567-568. 'A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.' *Bell v. Wolfish, supra,* 441 U.S. at 538, 99 S.Ct. at 1873. Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' *Kennedy v. Mendoza-Martinez, supra,* 372 U.S. at 1874; *Flemming v. Nestor,* 363 U.S. 603, 613-614, 80 S.Ct. 1367, 1373-1375, . . . (1960).

"There is no indication in the statute itself that preventive detention is used or intended as a punishment. First of all, the detention is strictly limited in time. If a juvenile is detained at his initial appearance and has denied charges against him, he is entitled to a probable-cause hearing to be held not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner. . . . If the Family Court judge finds probable cause, he must also determine whether continued detention is necessary pursuant to sec. 320.5(3)(b), sec. 325.3(3).

"Detained juveniles are also entitled to an expedited fact-finding hearing. If the juvenile is charged with one of a limited number of designated felonies, the fact-finding hearing must be scheduled to commence not more than 14 days after the conclusion of the initial appearance. Sec. 340.1. If the juvenile is charged with a lesser offense, then the fact-finding hearing must be held not more than three days after the initial appearance. In the latter case, since the times for the probable-cause hearing and the fact-finding hearing coincide, the two hearings are merged.

"Thus, the maximum possible detention under sec. 320.5(3)(b) of a youth accused of a serious crime, assuming a 3-day extension of the fact-finding hearing for good cause shown, is 17 days. The maximum detention for less serious crimes, again assuming a 3-day extension for good cause shown, is six days. These time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case.

"The conditions of confinement also appear to reflect the regulatory purposes relied upon by the State. When a juvenile is remanded after his initial appearance, he cannot, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals. FCA sec. 304.1(2). Instead, the child is screened by an 'assessment unit' of the Department of Juvenile Justice. Testimony of Mr. Kelly (Deputy Commissioner of Operations, New York City Department of Juvenile Justice), App. 286-287. The assessment unit places the

child in either nonsecure or secure detention. Nonsecure detention involves an open facility in the community, a sort of 'halfway house,' without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities. *Id.,* at 285; Testimony of Mr. Benjamin, *id.,* at 149-150.

"Secure detention is more restrictive, but it is still consistent with the regulatory and *parens patriae* objectives relied upon by the State. Children are assigned to separate dorms based on age, sex, and behavior. They wear street clothes provided by the institution and partake in educational and recreational programs and counseling sessions run by trained social workers. Misbehavior is punished by confinement to one's room. See Testimony of Mr. Kelly, *id.,* at 292-297. We cannot conclude from this record that the controlled environment briefly imposed by the State on juveniles in secure pretrial detention 'is imposed for the purpose of punishment' rather than as 'an incident of some other legitimate governmental purpose.' *Bell v. Wolfish,* 441 U.S. at 538, 99 S.Ct. at 1873.

"The Court of Appeals, of course, did conclude that the underlying purpose of sec. 320.5(3)(b) is punitive rather than regulatory. But the court did not dispute that preventive detention might serve legitimate regulatory purposes or that the terms and conditions of pretrial confinement in New York are compatible with those purposes. Rather, the court invalidated a significant aspect of New York's juvenile justice system based solely on some case histories and a statistical study which appeared to show that 'the vast majority of juveniles detained under [sec. 320.5(3)(b)] either have their petitions dismissed before adjudication of delinquency or are released after adjudication.' 689 F.2d at 369. The court assumed that dismissal of a petition or failure to confine a juvenile at the dispositional hearing belied the need to detain him prior to fact-finding and that, therefore, the pretrial detention constituted punishment. *Id.,* at 373. Since punishment imposed without a prior adjudication of guilt is *per se* illegitimate, the Court of Appeals concluded that no juveniles could be held pursuant to sec. 320.5(3)(b).

"There are some obvious flaws in the statistics and case histories relied upon by the lower court. But even assuming it to be the case that 'by far the greater number of juveniles incarcerated under [sec. 320.5(3)(b)] will never be confined as a consequence or a disposition imposed after an adjudication of delinquency,' 689 F.2d at 371-372, we find that to be an insufficient ground for upsetting the widely shared legislative judgment that preventive detention serves an important and legitimate function in the juvenile justice system. We are unpersuaded by the Court of Appeals' rather cavalier equation of detention that do not lead to continued confinement after an adjudication of guilt and 'wrongful' or 'punitive' pretrial detentions.

"Pretrial detention need not be considered punitive merely because a juvenile is subsequently discharged subject to conditions or put on probation. In fact, such actions reinforce the original finding that close supervision of the juvenile is required. Lenient but supervised disposition is in keeping with the Act's purpose to promote the welfare and development of the child. As the New York Court of Appeals noted:

> 'It should surprise no one that caution and concern for both the juvenile and society may indicate the more conservative decision to detain at the very onset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement may not be indicated.' *People ex rel Wayburn v. Schupf,* . . . , 386 N.Y.S.2d at 522, 350 N.E.2d at 910.

"Even when a case is terminated prior to fact-finding, it does not follow that the decision to detain the juvenile pursuant to sec. 320.5(3)(b) amounted to a due process violation. A delinquency petition may be dismissed for any number of reasons collateral to its merits, such as the failure of a witness to testify. The Family Court judge cannot be expected to anticipate such developments at the initial hearing. He makes his decision based on the information available to him at that time, and the propriety of the decision must be judged in that light. Consequently, the final disposition of a case is 'largely irrelevant' to the legality of a pretrial detention. *Baker v. McCollan,* 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, . . . (1979).

"It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis. Section 320.5(3)(b) is not invalid 'on its face' by reason of the ambiguous statistics and case histories relied upon by the court below. We find no justification for the conclusion that,

contrary to the express language of the statute and the judgment of the highest State court, sec. 320.5(3)(b) is a punitive rather than a regulatory measure. Preventive detention under the FCA serves the legitimate State objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime.

"Given the legitimacy of the State's interest in preventive detention, and the nonpunitive nature of that detention, the remaining question is whether the procedures afforded juveniles detained prior to fact-finding provide sufficient protection against erroneous and unnecessary deprivations of liberty. See *Mathews v. Eldridge,* 424 U.S. at 335, 96 S.Ct. at 903, . . . In *Gerstein v. Pugh,* 420 U.S. at 114, 95 S.Ct. at 863, . . . , we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of a crime. We did not, however, mandate a specific time-table. Nor did we require the 'full panoply of adversary safe-guards — counsel, confrontation, cross-examination, and compulsory process for witnesses.' *Id.,* at 119, 95 S.Ct. at 866. Instead, we recognized 'the desirability of flexibility and experimentation by the States.' *Id.,* at 123, 95 S.Ct. at 868. *Gerstein* arose under the Fourteenth Amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate pre-detention procedures, is present in this context. *In re Winship,* 397 U.S. at 366, 90 S.Ct. at 1074, . . . ; *Kent v. United States,* 383 U.S. 541, 554, 86 S.Ct. 1045, 1054, . . . (1966).

"In many respects, the FCA provides far more pre-detention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein.* The initial appearance is informal, but the accused juvenile is given full notice of the charges against him and a complete stenographic record is kept of the hearing. See 513 F.Supp. at 702. The juvenile appears accompanied by his parent or guardian. He is first informed of his rights, including the right to remain silent and the right to be represented by counsel chosen by him or by a law-guardian assigned by the court. FCA sec. 320.3. The initial appearance may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an appointed law-guardian or other counsel to appear before the court. Sec. 320.2(3). When his counsel is present, the juvenile is informed of the charges against him and furnished with a copy of the delinquency petition. Sec. 320.4(1). A representative from the presentment agency appears in support of the petition.

"The nonhearsay allegations in the delinquency petition and supporting depositions must establish probable cause to believe the juvenile committed the offense. Although the Family Court judge is not required to make a finding of probable cause at the initial appearance, the youth may challenge the sufficiency of the petition on that ground. FCA sec. 315.1. Thus, the juvenile may oppose any recommended detention by arguing that there is not probable cause to believe he committed the offense or offenses with which he is charged. If the petition is not dismissed, the juvenile is given an opportunity to admit or deny the charges. Sec. 321.1.

"At the conclusion of the initial appearance, the presentment agency makes a recommendation regarding detention. A probation officer reports on the juvenile's record, including other prior and current Family Court and probation contacts, as well as relevant information concerning home life, school attendance, and any special medical or developmental problems. He concludes by offering his agency's recommendation on detention. Opposing counsel, the juvenile's parents, and the juvenile himself may all speak on his behalf and challenge any information or recommendation. If the judge does decide to detain the juvenile under sec. 320.5(3)(b), he must state on the record the facts and reasons for the detention.

"As noted, a detained juvenile is entitled to a formal, adversarial probable-cause hearing within three days of his initial appearance, with one 3-day extension possible for good cause shown. The burden at this hearing is on the presentment agency to call witnesses and offer evidence to call witnesses and offer evidence in support of the charges. Sec. 325.2. Testimony is under oath and subject to cross-examination. *Ibid.* The accused juvenile may call witnesses and offer evidence in his own behalf. If the court finds probable cause, the court must again decide whether continued detention is necessary under sec. 320.5(3)(b). Again, the facts and reasons for the detention must be state on the record.

"In sum, notice, a hearing, and a statement of facts and reasons are given prior to any detention under sec. 320.5(3)(b). A formal probable-cause hearing is then held within a short while thereafter, if the fact-finding hearing is not itself scheduled within three days. These flexible procedures have been found constitutionally adequate under the Fourth Amendment, see

Gerstein v. Pugh, and under Due Process Clause, see *Kent v. United States, supra,* 557, 86 S.Ct. at 1055, . . . Appellees have failed to note any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate State purposes.

"Appellees argue, however, that the risk of erroneous and unnecessary detentions is too high despite these procedures because the standard for detention is fatally vague. Detention under sec. 320.5(3)(b) is based on a finding that there is a 'serious risk' that the juvenile, if released, would commit a crime prior to his next court appearance. We have already seen that detention of juveniles on that ground serves legitimate regulatory purposes. But appellees claim, and the District Court agreed, that it is virtually impossible to predict future criminal conduct with any degree of accuracy. Moreover, they say, the statutory standard fails to channel the discretion of the Family Court Judge by specifying the factors on which he should rely in making that prediction. The procedural protections noted above are thus, in their view, unavailing because the ultimate decision is intrinsically arbitrary and uncontrolled.

"Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and District Court, 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.' *Jurek v. Texas,* 428 U.S. 262, 274, 96 S.Ct. 2950, 2957, . . . (1976); *id.,* at 279, 96 S.Ct. at 2959 . . .

"We have also recognized that a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified. *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 16, 99 S.Ct. 2100, 2108, . . . (1979). Judge Quinones of the Family Court testified at trial that he and his colleagues made a determination under sec. 320.5(3)(b) based on numerous factors including the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and any special circumstances that might be brought to his attention by the probation officer, the child's attorney, or any parents, relatives, or other responsible persons accompanying the child. Testimony of Judge Quinones, App. 254-267. The decision is based on as much information as can reasonably be obtained at the initial appearance. *Ibid.*

"Given the right to a hearing, to counsel, and to a statement or reasons, there is no reason that the specific factors upon which the Family Court Judge might rely must be specified in the statute. As the New York Court of Appeals concluded, *People ex rel. Wayburn v. Schrupf,* . . . , 385 N.Y.S.2d at 522, 350 N.E.2d at 910, 'to a very real extent Family Court must exercise a substitute parental control for which there can be no particularized criteria.' There is also no reason, we should add, for a federal court to assume that a State court judge will not strive to apply State law as conscientiously as possible. *Sumner v. Mata,* 449 U.S. 539, 549, 101 S.Ct. 764, 770, . . . (1981).

"It is worth adding that the Court of Appeals for the Second Circuit was mistaken in its conclusion that '[i]ndividual litigation . . . is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.' 689 F.2d at 373. In fact, one of the juveniles in the very case histories upon which the court relied was released from pretrial detention on a writ of habeas corpus issued by the State Supreme Court. New York courts also have adopted a liberal view of the doctrine of 'capable of repetition, yet evading review' precisely in order to ensure that pretrial detention orders are not unreviewable. In *People ex rel. Wayburn v. Schupf, supra,* at 686, 385 N.Y.S.2d at 520, 350 N.E.2d at 908, the court declined to dismiss an appeal from the grant of a writ of habeas corpus despite the technical mootness of the case.

> 'Because the situation is likely to recur . . . and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal might be prosecuted, fact-finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us), . . . we decline to dismiss [the appeal] on the ground of mootness.'

"The required statement of facts and reasons justifying the detention and the stenographic record of the initial appearance will provide a basis for the review of individual cases. Pretrial detention orders in New York may be reviewed by writ of habeas corpus brought in State Supreme Court. And the judgment of that court is appealable as of right and may be taken directly to the Court of Appeals if a constitutional question is presented. N.Y.Civ.Prac. Law sec. 5601(b)(2) (McKinney 1978). Permissive appeals from a Family Court order may also be had to the Appellate Division. FCA sec. 365.2. Or a motion for reconsideration may be directed to the Family Court Judge. Sec. 355.1(1)(b). These post-detention procedures provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detentions ordered under sec. 320.5(3). Such procedures may well flesh out the standards specified in the statute.

"The dissent would apparently have us strike down New York's preventive detention statute on two grounds: first, because the preventive detention of juveniles constitutes poor public policy, with the balance of harms outweighing any positive benefits either to society or to the juveniles themselves, *post,* at 2423-2425, 2433, and, second, because the statute could have been better drafted to improve the quality of the decision-making process, *post,* at 2431-2432. But it is worth recalling with formulating public policy or an American Bar Association committee charged with drafting a model statute. The question before us today is solely whether the preventive detention system chosen by the State of New York and applied by the New York Family Court comports with constitutional standards. Given the regulatory purpose for the detention and the procedural protections that precede its imposition, we conclude that sec. 320.5(3)(b) of the New York FCA is not invalid under the Due Process Clause of the Fourteenth Amendment.

"The judgment of the Court of Appeals is

"Reversed.

"Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting,

"The New York Family Court Act governs the treatment of persons between 7 and 16 years of age who are alleged to have committed acts that, if committed by adults, would constitute crimes. The Act contains two provisions that authorize the detention of juveniles arrested for offenses covered by the Act for up to 17 days pending adjudication of their guilt. Section 320.5(3)(a) empowers a judge of the New York Family Court to order detention of a juvenile if he finds 'there is a substantial probability that [the juvenile] will not appear in court on the return date.' Section 320.5(3)(b), the provision at issue in these cases, authorizes detention if the judge finds 'there is a serious risk [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime.'

"There are few limitations on sec. 320.5(3)(b). Detention need not be predicated on a finding that there is probable cause to believe that the child committed the offense for which he was arrested. The provision applies to all juveniles, regardless of their prior records or the severity of the offenses of which they are accused. The provision is not limited to the prevention of dangerous crimes; a prediction that a juvenile if released may commit a minor misdemeanor is sufficient to justify his detention. Aside from the reference to 'serious risk,' the requisite likelihood that the juvenile will misbehave before his trial is not specified by the statute.

"The Court today holds that preventive detention of a juvenile pursuant to sec. 320.5(3)(b) does not violate the Due Process Clause. Two rulings are essential to the Court's decision: that the provision promotes legitimate government objectives important enough to justify the abridgment of the detained juvenile's liberty interests, *ante,* at 2415; and that the provision incorporates procedural safeguards sufficient to prevent unnecessary or arbitrary impairment of constitutionally protected rights, *ante,* at 2417, 2418. Because I disagree with both of those rulings, I dissent.

"The District Court made detailed findings, which the Court of Appeals left undisturbed, regarding the manner in which sec. 320.5(3)(b) is applied in practice. Unless clearly erroneous, those findings are binding upon us, see Fed.Rule Civ.Proc. 52(a), and must guide our analysis of the constitutional questions presented by these cases.

"The first step of the process that leads to detention under sec. 320.5(3)(b) is known as 'probable intake.' A juvenile may arrive at intake by one of three routes: he may be brought there directly by an arresting officer; he may be released upon arrest and directed to appear at a designated time. *United States ex rel. Martin v. Strasburg,* 513 F.Supp. 691, 701 (S.D.N.Y.

1981). The heart of the intake procedure is a 10-to-40-minute interview of the juvenile, the arresting officer, and sometimes the juvenile's parent or guardian. The objectives of the probation officer conducting the interview are to determine the nature of the offense the child may have committed and to obtain some background information on him. *Ibid.*

"On the basis of the information derived from the interview and from an examination of the juvenile's record, the probation officer decides whether the case should be disposed of informally ('adjusted') or whether it should be referred to the Family Court. If the latter, the officer makes an additional recommendation regarding whether the juvenile should be detained. 'There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole . . . ' *Ibid.*

"The actual decision whether to detain a juvenile under sec. 320.5(3)(b) is made by a Family Court judge at what is called an 'initial appearance' — a brief hearing resembling an arraignment. *Id.,* at 702. The information on which the judge makes his determination is very limited. He has before him a 'petition for delinquency' prepared by a State agency, charging the juvenile with an offense, accompanied with one or more affidavits attesting to the juvenile's involvement. Ordinarily the judge has in addition the written report and recommendation of the probation officer. However, the probation officer who prepared the report rarely attends the hearing. *Ibid.* Nor is the complainant likely to appear. Consequently, '[o]ften there is no one present with personal knowledge of what happened.' *Ibid.*

"In the typical case, the judge appoints counsel for the juvenile at the time his case is called. Thus, the lawyer has no opportunity to make an independent inquiry into the juvenile's background or character, and has only a few minutes to prepare arguments on the child's behalf. *Id.,* at 702, 708. The judge ordinarily does not interview the juvenile, *id.,* at 708, makes no inquiry into the truth of allegations in the petition, *id.,* at 702, and does not determine whether there is probable cause to believe the juvenile committed the offense. The typical hearing lasts between 5 and 15 minutes, and the judge renders his decision immediately afterward. *Ibid.*

"Neither the statute nor any other body of rules guides the efforts of the judge to determine whether a given juvenile is likely to commit a crime before his trial. In making a detention decision, 'each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute.' *Ibid.* Family Court judges are not provided information regarding the behavior of juveniles over whose cases they have presided, so a judge has no way of refining the standards he employs in making detention decisions. *Id.,* at 712.

"After examining a study of a sample of 34 cases in which juveniles were detained under sec. 320.5(3)(b) along with various statistical studies of pretrial detention of juveniles in New York, the District Court made findings regarding the circumstances in which the provision habitually is invoked. Three of those findings are especially germane to appellees' challenge to the statute. First, a substantial number of 'first offenders' are detained pursuant to sec. 320.5(3)(b). For example, at least 5 of the 34 juveniles in the sample had no prior contact with the Family Court before being detained and at least 16 had no prior adjudications of delinquency. *Id.,* at 695-700. Second, many juveniles are released — for periods ranging from five days to several weeks -- after their arrests and are then detained under sec.320.5(3)(b), despite the absence of any evidence of misconduct during the time between their arrests and 'initial appearances.' Sixteen of the thirty-four cases in the sample fit this pattern. *Id.,* at 705, 713-714. Third, 'the overwhelming majority' of the juveniles detained under sec. 320.5(3)(b) are released either before or immediately after their trials either unconditionally or on parole. *Id.,* at 705. At least 23 of the juveniles in the sample fell into this category. *Martin v. Strasburg,* 689 F.2d 365, 369, n. 19 (CA2 1982); see 513 F.Supp. at 695-700.

"Finally, the District Court made a few significant findings concerning the conditions associated with 'secure detention' pursuant to sec. 320.5(3)(b). In a 'secure facility, [t]he juveniles are subjected to strip-searches, wear institutional clothing, and follow institutional regimen. At Spofford [Juvenile Detention Center], which is a secure facility, some juveniles who have had dispositional determinations and were awaiting placement (long-term care) commingle with those in pretrial detention (short-term care).' *Id.,* at 695, n. 5.

"It is against the backdrop of these findings that the contentions of the parties must be examined.

"As the majority concedes, *ante,* 2409, the fact that sec. 320.5(3)(b) applies only to juveniles does not insulate the provision from review under the Due Process Clause. '[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.' *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . (1967). Examination of the provision must, of course, be informed by a recognition that juveniles have different needs and capacities than adults, see *McKeiver v. Pennsylvania,* 403 U.S. 528, 550, 91 S.Ct. 1976, 1988, . . . (1971), but the provision still 'must measure up to the essentials of due process and fair treatment,' *Kent v. United States,* 383 U.S. 541, 562, 86 S.Ct. 1045, 1057, . . . (1966).

"To comport with 'fundamental fairness,' sec. 320.5(3)(b) must satisfy two requirements. First, it must advance goals commensurate with the burdens it imposes on constitutionally protected interests. Second, it must not punish the juveniles to whom it applies.

"The majority only grudgingly and incompletely acknowledges the applicability of the first of these tests, but its grip on the cases before us is undeniable. It is manifest that sec. 320.5(3)(b) impinges upon fundamental rights. If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint. *Ingraham v. Wright,* 430 U.S. 651, 673-674, 97 S.Ct. 1401, 1413-1414, . . . (1977); *Board of Regents v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, . . . (1972). Only a very important government interest can justify deprivation of liberty in this basic sense.

"The majority seeks to evade the force of this principle by discounting the impact on a child of incarceration pursuant to sec. 320.5(3)(b). The curtailment of liberty consequent upon detention of a juvenile, the majority contends, is mitigated by the fact that 'juveniles, unlike adults, are always in some form of custody.' *Ante,* at 2410. In any event, the majority argues, the conditions of confinement associated with secure detention' under sec. 320.5(3)(b) are not unduly burdensome. *Ante,* at 2413. These contentions enable the majority to suggest that sec. 320.5(3)(b) need only advance a 'legitimate State objective' to satisfy the strictures of the Due Process Clause. *Ante,* at 2406, 2409, 2415.

"The majority's arguments do not survive scrutiny. Its characterization of preventive detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously. Surely there is a qualitative difference between imprisonment and the condition of being subject to the supervision and control of an adult who has one's best interests at heart. And the majority's depiction of the nature of confinement under sec. 320.5(3)(b) is insupportable on this record. As noted above, the District Court found that secure detention entails incarceration in a facility closely resembling a jail and that pretrial detainees are sometimes mixed with juveniles who have been found to be delinquent, *supra,* at 2433. Evidence adduced at trial reinforces these findings. For example, Judge Quinones, a Family Court Judge with eight years of experience, described the conditions of detention as follows:

> 'Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.' App. 270.

Many other observers of the circumstances of juvenile detention in New York have come to similar conclusions.

"In short, fairly viewed, pretrial detention of a juvenile pursuant to sec. 320.5(3)(b) gives rise to injuries comparable to those associated with imprisonment of an adult. In both situations, the detainee suffers stigmatization and severe limitation of his freedom of movement. See *In re Winship,* 397 U.S. 358, 367, 90 S.Ct. 1068, 1074, . . . (1970); *In re Gault,* 387 U.S. at 27, 87 S.Ct. at 1443. Indeed, the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.' Such serious injuries to presumptively innocent persons — encompassing the curtailment of their constitutional rights to liberty — can be justified only by a weighty public interest that is substantially advanced by the statute.

"The applicability of the second of the two tests is admitted even by the majority. In *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 1872, . . . (1979), the Court held that an adult may

not be punished prior to determination that he is guilty of a crime. The majority concedes, as it must, that this principle applies to juveniles. *Ante,* at 2409, 2412-2413. Thus, if the only purpose substantially advanced by sec. 320.5(3)(b) is punishment, the provision must be struck down.

"For related reasons, sec. 320.5(3)(b) cannot satisfy either of the requirements discussed above that together define 'fundamental fairness' in context of pretrial detention.

"Appellants and the majority contend that sec. 320.5(3)(b) advances a pair of intertwined government objectives: 'protecting the community from crime,' *ante,* at 2410, and 'protecting a juvenile from the consequences of his criminal activity,' *ante,* at 2411. More specifically, the majority argues that detaining a juvenile for a period of up to 17 days prior to his trial has two desirable effects: it protects society at large from the crimes he might have committed during that period if released; and it protects the juvenile himself 'both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.' *Ante,* at 2410-2411.

"Appellees and some *amici* argue that public purposes of this sort can never justify incarceration of a person who has not been adjudicated guilty of a crime, at least in the absence of a determination that there exists probable cause to believe he committed a criminal offense. We need not reach that categorical argument in these cases because, even if the purposes identified by the majority are conceded to be compelling, they are not sufficiently promoted by detention pursuant to sec. 320.5(3)(b) to justify the concomitant impairment of the juveniles' liberty interests. To state the case more precisely, two circumstances in combination render sec. 320.5(3)(b) invalid in *toto:* in the large majority of cases in which the provision is invoked, its asserted objectives are either not advanced at all or are only minimally promoted; and, as the provision is written and administered by the State courts, the cases in which its asserted ends are significantly advanced cannot practicably by distinguished from the cases in which they are not.

"Both of the courts below concluded that only occasionally and accidentally does pretrial detention of a juvenile under sec. 320.5(3)(b) prevent the commission of a crime. Three subsidiary findings undergird that conclusion. First, Family Court judges are incapable of determining which of the juveniles who appear before them would commit offenses before their trials if left at large and which would not. In part, this incapacity derives from the limitations of current knowledge concerning the dynamics of human behavior. On the basis of evidence adduced at trial, supplemented by a thorough review of the secondary literature, see 513 F.Supp. at 708-712, and n. 31-32, the District Court found that 'no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.' *Id.,* at 708. The evidence supportive of this finding is overwhelming. An independent impediment to identification of the defendants who would misbehave if released is the paucity of data available at an initial appearance. The judge must make his decision whether to detain a juvenile on the basis of a set of allegations regarding the child's alleged offense, a cursory review of his background and criminal record, and the recommendation of a probation officer who, in the typical case, has seen the child only once. *Id.,* at 712. In view of this scarcity of relevant information, the District Court credited the testimony of appellees' expert witness, who 'stated that he would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about probability of future crime as only 4% better than chance — virtually wholly unpredictable.' *Id.,* at 708.

"Second, sec. 320.5(3)(b) is not limited to classes of juveniles whose past conduct suggests that they are substantially more likely than average juveniles to misbehave in the immediate future. The provision authorizes the detention of persons arrested for trivial offenses and persons without any prior contacts with juvenile court. Even a finding that there is probable cause to believe a juvenile committed the offense with which he was charged is not a prerequisite to his detention. See *supra,* at 2421-2422, and n. 6.

"Third, the courts below concluded that circumstances surrounding most of the cases in which sec. 320.5(3)(b) has been invoked strongly suggest that the detainee would not have committed a crime during the period before his trial if he had been released. In a significant proportion of the cases, the juvenile had been released after his arrest and had not committed any reported crimes while at large, see *supra,* at 2422; it is not apparent why a juvenile would be more likely to misbehave between his initial appearance and his trial than between his arrest and initial appearance. Even more telling is the fact that 'the vast majority of persons detained under sec.

320.5(3)(b) are released either before or immediately after their trials. 698 F.2d at 369; see 513 F.Supp. at 705. The inference is powerful that most detainees, when examined more carefully than at their initial appearances, are deemed insufficiently dangerous to warrant further incarceration.

"The rarity with which invocation of sec. 320.5(3)(b) results in detention of a juvenile who otherwise would have committed a crime fatally undercuts the two public purposes assigned to the statute by the State and the majority. The argument that sec. 320.5(3)(b) serves 'the State's *'parens patriae* interest in preserving and promoting the welfare of the child,' *ante,* at 2410 (citation omitted), now appears particularly hollow. Most juveniles detained pursuant to the provision are not benefited thereby, because they would have both have committed crimes if left to their own devices and thus would not have been exposed to the risk of physical injury or the perils of the cycle of recidivism, see *ante,* at 2425. On the contrary, these juveniles suffer several serious harms: deprivation of liberty and stigmatization as 'delinquent' or 'dangerous,' as well as impairment of their ability to prepare their legal defenses. The benefits even to those few juveniles who would have committed crimes if released are not unalloyed; the gains to them are partially offset by the aforementioned injuries. In view of this configuration of benefits and harms, it is not surprising that Judge Quinones repudiated the suggestion that detention under sec. 320.5(3)(b) serves the interests of the detainees. App. 269-270.

"The argument that sec. 320.5(3)(b) protects the welfare of the community fares little better. Certainly the public reaps no benefit from incarceration of the majority of the detainees who would not have committed any crimes had they been released. Prevention of the minor offenses that would have been committed by a small proportion of the persons detained confers only a slight benefit on the community. Only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty interests of all the presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance.

"The majority seeks to deflect appellees' attack on the constitutionality of sec. 320.5(3)(b) by contending that they have framed their argument too broadly. It is possible, the majority acknowledges, that 'in some circumstances detention of a juvenile [pursuant to sec. 320.5(3)(b)] would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis.' *Ante,* at 2415; see *ante,* at 2412, n. 18. The majority thus implies that, even if the Due Process Clause is violated by most detentions under sec. 320.5(3)(b) because those detainees would not have committed crimes if released, the statute nevertheless is not valid 'on its face' because detention of those persons who would have committed a serious crime comports with the Constitution. Separation of the properly detained juveniles from the improperly detained juveniles must be achieved through 'case-by-case' adjudication.

"There are some obvious practical impediments to adoption of the majority's proposal. Because a juvenile may not be incarcerated under sec. 320.5(3)(b) for more than 17 days, it would be impractical for a particular detainee to secure his freedom by challenging the constitutional basis of his detention; by the time the suit could be rendered moot by the juvenile's release or long-term detention pursuant to a delinquency adjudication. Nor could an individual detainee avoid the problem of mootness by filing a suit for damages or for injunctive relief. Thus Court's declaration that sec. 320.5(3)(b) is not unconstitutional on its face would almost certainly preclude a finding that detention of a juvenile pursuant to the statute violated any clearly established constitutional rights; in the absence of such findings all State officials would be immune from liability in damages, see *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, . . . (1982). And, under current doctrine pertaining to the standing of an individual victim of allegedly unconstitutional conduct to obtain an injunction against repetition of that behavior, it is far from clear that an individual detainee would be able to obtain an equitable remedy. Compare *INS v. Delgado,* 466 U.S. 210, 217, n. 4, 104 S.Ct. 1758, 1763, n. 4, . . . (1984), with *Los Angeles v. Lyons,* 461 U.S. 95, 105-106, 103 S.Ct. 1660, 1666-1667, . . . (1983).

"But even if these practical difficulties could be surmounted, the majority's proposal would be inadequate. Precisely because of the unreliability of any determination whether a particular juvenile is likely to commit a crime between his arrest and trial, see *supra,* at 2425-2426, no individual detainee would be able to demonstrate that he would have abided by the law had he

been released. In other words, no configuration of circumstances would enable a juvenile to establish that he fell into a category of persons unconstitutionally detained. Thus, to protect the rights of the majority of juveniles whose incarceration advances no legitimate State interest, sec. 320.5(3)(b) must be held unconstitutional 'on its face.'

"The findings reviewed in the preceding section lend credence to the conclusion reached by the courts below: sec. 320.5(3)(b) 'is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.' 689 F.2d at 372; see 513 F.Supp. at 715-717.

"The majority contends that, of the many factors we have considered in trying to determine whether a particular sanction constitutes 'punishment,' see *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, . . . (1963), the most useful are 'whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned,' *ibid.* (footnotes omitted). See *ante,* at 2412-2413. Assuming, *arguendo,* that this test is appropriate, but cf. *Bell v. Wolfish,* 441 U.S. at 564-565, 99 S.Ct. at 1887-1888 (MARSHALL, J., dissenting), it requires affirmance in these cases. The alternative purpose assigned by the State to sec. 320.5(3)(b) is the prevention of crime by the detained juveniles. But, as has been shown, that objective is advanced at best sporadically by the provision. Moreover, sec. 320.5(3)(b) frequently is invoked under circumstances in which it is extremely unlikely that the juvenile in question would commit a crime while awaiting trial. The most striking of these cases involve juveniles who have been at large without mishap for a substantial period of time prior to their initial appearances, see *supra,* at 2422, and detainees who are adjudged delinquent and are nevertheless released into the community. In short, sec. 320.5(3)(b) as administered by the New York courts surely 'appears excessive in relation to' the putatively legitimate objectives assigned to it.

"The inference that sec. 320.5(3)(b) is punitive in nature is supported by additional materials in the record. For example, Judge Quinones and even appellants' counsel acknowledged that one of the reasons juveniles detained pursuant to sec. 320.5(3)(b) usually are released after the determination of their guilt is that the judge decides that their pretrial detention constitutes sufficient punishment. 689 F.2d at 370-371, and n. 27-28. Another Family Court Judge admitted using 'preventive detention' to punish one of the juveniles in the sample. 513 F.Supp. at 708.

"In summary, application of the litmus test the Court recently has used to identify punitive sanctions supports the finding of the lower courts that preventive detention under sec. 320.5(3)(b) constitutes punishment. Because punishment of juveniles before adjudication of their guilt violates the Due Process Clause, see *supra,* at 11, the provision cannot stand.

"If the record did not establish the impossibility, on the basis of the evidence available to a Family Court judge at a sec. 320.5(3)(b) hearing, of reliably predicting whether a given juvenile would commit a crime before his trial, and if the purposes relied upon by the State were promoted sufficiently to justify the deprivations of liberty effected by the provision, I would nevertheless still strike down sec. 320.5(3)(b) because of the absence of procedural safeguards in the provision. As Judge Newman, concurring in the Court of Appeals observed, 'New York's statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty — likelihood of future criminal behavior.' 689 F.2d at 375.

"Appellees point out that sec. 320.5(3)(b) lacks two crucial procedural constraints. First, a New York Family Court Judge is given no guidance regarding what kinds of evidence he should consider or what weight he should accord different sorts of material in deciding whether to detain a juvenile. For example, there is no requirement in the statute that the judge take into account the juvenile's background or current living situation. Nor is a judge obliged to attach significance to the nature of a juvenile's criminal record or the severity of the crime for which he was arrested. Second, sec. 320.5(3)(b) does not specify how likely it must be that a juvenile will commit a crime before his trial to warrant this detention. The provision indicated only that there must be a 'serious risk' that he will commit an offense and does not prescribe the standard of proof that should govern the judge's determination of that issue.

"Not surprisingly, in view of the lack of directions provided by the statute, different judges have adopted different ways of estimating the chances whether a juvenile will misbehave in the near future. 'Each judge follows his own individual approach to [the detention] determination.'

513 F.Supp. at 702; see App. 265 (testimony of Judge Quinones). This discretion exercised by Family Court judges in making detention decisions gives rise to two related constitutional problems. First, it creates an excessive risk that juveniles will be detained 'erroneously' — *i.e.*, under circumstances in which no public interest would be served by their incarceration. Second, it fosters arbitrariness and inequality in a decision-making process that impinges upon fundamental rights.

"One of the purposes of imposing procedural constraints on decisions affecting life, liberty, or property is to reduce the incidence of error. See *Fuentes v. Shevin,* 407 U.S. 67, 80-81, 92 S.Ct. 1983, 1994-1995, . . . (1972). In *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, . . . (1976), the Court identified a complex of considerations that has proved helpful in determining what protections are constitutionally required in particular contexts to achieve that end:

> '[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function or substitute procedural requirement would entail.' *Id.,* at 335, 96 S.Ct. at 903.

"As Judge Newman recognized, 689 F.2d at 375-376, a review of these three factors in the context of New York's preventive-detention scheme compels the conclusion that the Due Process Clause is violated by sec. 320.5(3)(b) in its present form. First, the private interest affected by a decision to detain a juvenile is personal liberty. Unnecessary abridgment of such a fundamental right, see *supra,* at 2423, should be avoided if at all possible.

"Second, there can be no dispute that there is a serious risk under the present statute that a juvenile will be detained erroneously — *i.e.*, despite the fact that he would not commit a crime if released. The findings of fact reviewed in the preceding sections make it apparent that the vast majority of detentions pursuant to sec. 320.5(3)(b) advance no State interest; only rarely does the statute operate to prevent crime. See *supra,* at 2427. This high incident of demonstrated error should induce a reviewing court to exercise utmost care in ensuring that no procedures could be devised that would improve the accuracy of the decision-making process. Opportunities for improvement in the extant regime are apparent even to a casual observer. Most obviously, some measure of guidance to Family Court Judges regarding the evidence they should consider and the standard of proof they should use in making their determinations would surely contribute to the quality of their detention determinations.

"The majority purports to see no value in such additional safeguards, contending that activity of estimating the likelihood that a given juvenile will commit a crime in the near future involves subtle assessment of a host of variables, the precise weight of which cannot be determined in advance. *Ante,* at 2417-2418. A review of the hearings that resulted in the detention of the juveniles included in the sample of 34 cases reveals the majority's depiction of the decision-making process to be hopelessly idealized. For example, the operative portion of the initial appearance of Tyrone Parson, the three-card monte player, consisted of the following:

> 'Court Officer: Will you identify yourself.
>
> . . .
>
> "Tyrone Parson: Tyrone Parson, age 15.
>
> "The Court: Miss Brown, how many times has Tyrone been known to the Court?
>
> . . .
>
> "Miss Brown: Seven times.
>
> "The Court: Remand the respondent.' Petitioners' Exhibit 18a.

This kind of parody of reasoned decision-making would be less likely to occur if judges were given more specific and mandatory instructions regarding the information they should consider and the manner in which they should assess it.

"Third and finally, the imposition of such constraints on the deliberations of the Family Court Judges would have no adverse effect on the State's interest in detaining dangerous juveniles and would give rise to insubstantial administrative burdens. For example, a simple

directive to Family Court Judges to state on the record the significance they give to the seriousness of the offense of which a juvenile's background would contribute materially to the quality of the decision-making process without significantly increasing the duration of initial appearances.

"In summary, the three factors enumerated in *Mathews* in combination incline overwhelmingly in favor of imposition of more stringent constraints on detention determinations under sec. 320.5(3)(b). Especially in view of the impracticability of correcting erroneous decisions through judicial review, see *supra,* at 2428-2429, the absence of meaningful procedural safeguards in the provision renders it invalid. See *Santosky v. Kramer,* 445 U.S. 745, 757, and n. 9, 102 S.Ct. 1388, 1396, and n. 9, . . . (1982).

"A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights. Two concerns underlie this principle: excessive discretion fosters inequality in the distribution of entitlements and harms, inequality which is especially troublesome when those benefits and burdens are great; and discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights.

"So, in striking down on vagueness grounds a vagrancy ordinance, we emphasized the 'unfettered discretion it places in the hands of the . . . police.' *Papachristou v. City of Jacksonville,* 405 U.S. 156, 168, 92 S.Ct. 839, 846, . . . (1972). Such flexibility was deemed constitutionally offensive because it 'permits and encourages an arbitrary and discriminatory enforcement of the law.' *Id.,* at 170, 92 S.Ct. at 847. Partly for similar reasons, we have consistently held violative of the First Amendment ordinances which make the ability to engage in constitutionally protected speech 'contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official.' *Staub v. City of Baxley,* 355 U.S. 313, 322, 78 S.Ct. 277, 282, . . . (1958); accord, *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151, 153, 89 S.Ct. 935, 938, 940, . . . (1969). Analogous considerations inform our understanding of the dictates of the Due Process Clause. Concurring in the judgment in *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, . . . (1978), strike down a statute that conditioned the right to marry upon the satisfaction of child-support obligations, Justice POWELL aptly observed:

> 'Quite apart from any impact on the truly indigent, the statute appears to 'confer upon [the judge] a license for arbitrary procedure,' in the determination of whether an applicant's children are 'likely thereafter to become public charges.' A serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction in this area.' *Id.,* at 402, n. 4, 98 S.Ct. at 690, (quoting *Kent v. United States,* 383 U.S. at 553, 86 S.Ct. at 1053, . . .).

"The concerns that powered these decisions are strongly implicated by New York's preventive-detention scheme. The effect of the lack of procedural safeguards constraining detention decisions under sec. 320.5(3)(b) is that the liberty of a juvenile arrested even for a petty crime is dependent upon the 'caprice' of a Family Court Judge. See 513 F.Supp. at 707. The absence of meaningful guidelines creates opportunities for judges to use illegitimate criteria when deciding whether juveniles should be incarcerated pending their trials — for example, to detain children for the express purpose of punishing them. Even the judges who strive conscientiously to apply the law have little choice but to assess juveniles' dangerousness on the basis of whatever standards they deem appropriate. The resultant variation in detention decisions gives rise to a level of inequality in the deprivation of a fundamental right too great to be countenanced under the Constitution.

"The majority acknowledges — indeed, founds much of its argument upon — the principle that a State has both the power and the responsibility to protect the interests of the children within its jurisdiction. See *Santosky v. Kramer, supra,* at 766, 102 S.Ct. at 1401. Yet the majority today upholds a statute whose net impact on the juveniles who come within its purview is overwhelmingly detrimental. Most persons detained under the provision reap no benefit and suffer serious injuries thereby. The welfare of only a minority of the detainees is even arguably enhanced. The inequity of this regime, combined with the arbitrariness with which it is

administered, is bound to disillusion its victims regarding the virtues of our system of criminal justice. I can see — and the majority has pointed to —no public purpose advanced by the statute sufficient to justify the harm it works.

"I respectfully dissent."

Secretary, Etc. v. Institutionalized Juveniles

442 U.S. 640, 99 S.Ct. 2523 (1979)

CIVIL COMMITMENT - (Juveniles) — ***Parents cannot waive the due process rights of children, both those under 18 and those under 14, to due process civil commitment procedures to test the fallibility of psychiatric diagnosis determination after 72 hours of hospitalization, a formal adversary hearing within 14 days from the initial admission with right of confrontation, and a finding by an impartial tribunal that institutional treatment is necessary based on clear and convincing evidence.***

"(p. 2524) Mr. Chief Justice BURGER delivered the opinion of the Court.

"This appeal raises issues similar to those decided in *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, . . . as to what process is due when the parents or guardian of a child seek State institutional mental health care.

"This is the second time we have reviewed a District Court's judgment that Pennsylvania's procedures for the voluntary admission of mentally ill and mentally retarded children to a State hospital are unconstitutional. In the earlier suit, five children who were between the ages of 15 and 18 challenged the 1966 statute pursuant to which they had been admitted to Haverford State Hospital. . . . After a three-judge District Court, with one judge dissenting, declared the statute unconstitutional, *Bartley v. Kremens,* 402 F.Supp. 1039 (ED Pa. 1975), the Pennsylvania Legislature amended its mental health code with regard to the mentally ill. The amendments placed adolescents over the age of 14 in essentially the same position as adults for purposes of a voluntary admission. Mental Health Procedures Act of 1976, sec. 201, Pa.Stat.Ann. Tit. 50 sec. 7201 (Purdon Supp. 1978). Under the new statute, the named plaintiffs could obtain their requested releases from the State hospitals independently of the constitutionality of the 1966 statute, and we therefore held that the claims of the named plaintiffs were moot. *Kremens v. Bartley,* 431 U.S. 119, 129, 97 S.Ct. 1709, . . . (1977). We then remanded the case to the District Court for 'reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims.' *Id.,* at 135, 97 S.Ct. at 1718.

"On remand, 12 new plaintiffs, appellees here, were named to represent classes of mentally ill and mentally retarded children. Nine of the children were younger than 14 and constituted all of those who had been admitted to the States' hospitals for the mentally ill in accordance with the 1976 Act at the time the suit was brought; three other children represented a class of patients who were 18 and younger and who had been or would be admitted to a State hospital for the mentally retarded under the 1966 Act and 1973 regulations implementing that Act. All 12 children had been admitted on the application of parents or someone standing *in loco parentis* with State approval after an independent medical examination.

"The suit was filed against several named defendants, the Pennsylvania Secretary of Public Welfare and the directors of three State owned and operated facilities. The District Court, however, certified a defendant class that consisted of 'directors of all mental health and mental retardation facilities in Pennsylvania which are subject to regulation by defendant Secretary of Public Welfare.' 459 F.Supp. 30, 40, n. 37 (ED Pa. 1978).

"Representatives of the nine mentally ill children sought a declaration that the admission procedures embodied in sec. 201 of the Pennsylvania Mental Health Procedures Act of 1976, Pa.Stat.Ann. Tit. 50, sec. 7201 (Purdon Supp.1978), which subsequently have been expanded by regulations promulgated by the Secretary of Public Welfare, 8 Pa.Bull. 2432 *et seq.* (1978), violated their procedural due process rights and requested the court to issue an injunction against

the statute's future enforcement. The three mentally retarded children presented the same claims as to sec. sec. 402 and 403 of the Mental Health and Mental Retardation Act of 1966, Pa.Stat.Ann. Tit. 50, sec. 4402 and 4403 (Purdon 1969), and the regulations promulgated thereunder.

"The District Court certified two subclasses of plaintiffs under Fed.Rule Civ.Proc. 23 and held that the statutes challenged by each subclass were unconstitutional. It held that the State's procedures were insufficient to satisfy the Due Process Clause of the Fourteenth Amendment.

"The District Court's analysis in this case was similar to that issued by the District Court in *J.L. v. Parham,* 412 F.Supp. 112 (MD Ga. 1976), reversed and remanded *sub nom. Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, . . . The court in this case concluded that these children had a constitutionally protected liberty interest that could not be 'waived' by their parents. This conclusion, coupled with the perceived fallibility of psychiatric diagnosis, led the court to hold that only a formal adversary hearing could suffice to protect the children in appellees' class from being needlessly confined in mental hospitals.

"To further protect the children's interests, the court concluded that the following procedures were required before any child could be admitted voluntarily to a mental hospital:

'1) 48-hour notice prior to any hearing;
2) legal counsel 'during all significant stages of the commitment process';
3) the child's presence at all commitment hearings;
4) a finding by an impartial tribunal based on clear and convincing evidence that the child required institutional treatment;
5) a probable cause determination within 72 hours after admission to a hospital;
6) a full hearing, including the right to confront andcross-examine witnesses, within two weeks from the date of the initial admission.' App. 1097a-1098a.

"Appellants, all of the defendants before the District Court, appealed the judgment. We noted probable jurisdiction, and consolidated the case with *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, . . . 437 U.S. 902, 98 S.Ct. 3087, . . .

"Much of what we said in *Parham v. J.R.* applies with equal force to this case. The liberty rights and interest of the appellee children, the prerogatives, responsibilities, and interests of the parents, and the obligations and interests of the State are the same. Our holding as to what process is due in *Parham* controls here, particularly:

> 'We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral fact-finder' to determine whether the statutory requirements for admission are satisfied. . . . That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decision-maker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.' *Parham v. J.R., supra,* at 606-607, 99 S.Ct. at 2506.

The only issue is whether Pennsylvania's procedures for the voluntary commitment of children comply with these requirements.

"Unlike in *Parham v. J.R.,* where the statute being challenged was general and thus the procedures for admission were evaluated hospital by hospital, the statute and regulation in Pennsylvania are specific. Our focus here is on the codified procedures declared unconstitutional by the District Court.

"The Mental Health Procedures Act of 1976 and regulations promulgated by the Secretary describe the procedures for the voluntary admission for inpatient treatment of mentally ill children. Section 201 of the Act provides that '[a] parent, guardian, or person standing *in loco parentis* to a child less than 14 years of age' may apply for a voluntary examination and treatment for the child. After the child receives an examination and is provided with temporary treatment, the hospital must formulate 'an individualized treatment plan . . . by a treatment

team.' Within 72 hours the treatment team is required to determine whether inpatient treatment is 'necessary' and why. Pa.Stat.Ann. Tit. 50, sec. 7205 (Purdon Supp. 1978). The hospital must inform the child and his parents both of the necessity for institutional treatment and of the nature of the proposed treatment. *Ibid.*

"Regulations promulgated under the 1976 Act provide that each child shall be re-examined and his or her treatment plan reviewed not less than once every 30 days. . . . The regulations also permit a child to object to the treatment plan and thereby obtain a review by a mental health professional independent of the treatment team. The findings of this person are reported directly to the director of the hospital who has the power and the obligation to release any child who no longer needs institutional treatment.

"The statute provides three methods for release of a child under the age of 14 from a mental hospital. First, the child's parents or guardian may effect his release at will . . . Second, 'any responsible party' may petition the Juvenile Court if the person believes that treatment in a less restrictive setting would be in the best interests of the child. . . . If such a petition is filed, an attorney is appointed to represent the child's interests and a hearing is held within 10 days to determine 'what inpatient treatment, if any, is in the minor's best interest.' . . . Finally, the director of the hospital may release any child whenever institutional treatment is no longer medically indicated. . . .

"The Mental Health and Mental Retardation Act of 1966 regulated the voluntary admission for inpatient hospital habilitation of the mentally retarded. The admission process has been expanded significantly by regulations promulgated in 1973 by Pennsylvania's Secretary of Public Welfare. . . . Unlike the procedure for the mentally ill, a hospital is not permitted to admit a mentally retarded child based solely on the application of a parent or guardian. All children must be referred by a physician and each referral must be accompanied by a medical or psychological evaluation. In addition, the director of the institution must make an independent examination of each child, and if he disagrees with the recommendation of the referring physician as to whether hospital care is 'required,' the child must be discharged. Mentally retarded children or anyone acting on their behalf may petition for a writ of habeas corpus to challenge the sufficiency or legality of the 'proceedings leading to commitment.' . . .

"Any child older than 13 who is admitted to a hospital must have his rights explained to him and must be informed that a status report on his condition will be provided periodically. The older child is also permitted to object, either orally or in writing, to his hospitalization. After such objection, the director of the facility, if he feels that hospitalization is still necessary, must institute an involuntary commitment proceeding . . .

"What the statute and regulations do not make clear is how the hospital staff decides that inpatient care is required for a child. The director of Haverford State Hospital for the mentally ill was the sole witness called by either side to testify about the decision-making process at a State hospital. She described the process as follows:

> '[T]here is an initial examination made by the psychiatrist, and is so designated admission note on the hospital record. Subsequently, for all adolescents on the Adolescent Service at Haverford State Hospital, there are routine studies done, such as an electroencephalogram, a neurological examination, a medical examination, and a complete battery of psychological tests and school evaluation, as well as a psychiatric evaluation. When all their data has been compiled, an entire staff conference is held, which is called a new case conference, at which point the complete case is re-examined and it is decided whether or not the child needs hospitalization, and at that same time, as well, an adequate treatment course is planned.' . . .

"In addition to the physical and mental examination that are conducted for each child within the institutions, the staff compiles a substantial 'pre-admission background information' file on each child. After the child is admitted, there is a periodic review of the child's condition by the staff. His status is reviewed by a different social worker at least every 30 days. Since the State places a great deal of emphasis on family therapy, the parents or guardians are met with weekly to discuss the child's case. . . .

"We are satisfied that these procedures comport with the due process requirements set out earlier. No child is admitted without at least one and often more psychiatric examinations by an

independent team of mental health professionals whose sole concern under the statute is whether the child needs and can benefit from institutional care. The treatment team not only interviews the child and parents but also compiles a full background history from all available sources. If the treatment team concludes that institutional care is not in the child's best interest, it must refuse the child's admission. Finally, every child's condition is reviewed at least every 30 days. This program meets the criteria of our holding in *Parham.* Accordingly, the judgment of the District Court that Pennsylvania's statutes and regulations are unconstitutional is reversed, and the case remanded for further proceedings consistent with this opinion.

"Reversed and remanded.

"For the reasons stated in his opinion concurring in the judgment in *Parham v. J.R.,* 442 U.S. 584, 621, 99 S.Ct. 2493, 2513, . . . Mr. Justice STEWART concurs in the judgment.

"Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice STEVENS join, concurring in part and dissenting in part.

"For reasons stated in my opinion in *Parham v. J.R.,* 442 U.S. 584, 625, 99 S.Ct. 2493, 2515, . . . (concurring in part and dissenting in part), I agree that Pennsylvania's pre-admission psychiatric interview procedures pass constitutional muster. I cannot agree, however, with the Court's decision to pretermit questions concerning Pennsylvania's post-admission procedures. See *ante,* at 2528, n. 9. In my view, these procedures should be condemned now.

"Pennsylvania provides neither representation nor reasonably prompt post-admission hearings to mentally retarded children 13 years of age or younger. For the reasons stated in my opinion in *Parham v. J.R.,* I believe that this is unconstitutional.

"As a practical matter, mentally retarded children over 13 and children confined as mentally ill fare little better. While under current regulations these children must be informed of their right to a hearing and must be given the telephone number of an attorney within 24 hours of admission, see 459 F.Supp. 30, 49, 51 (ED Pa. 1978) (Broderick, J., dissenting), the burden of contacting counsel and the burden of initiating proceedings is placed upon the child. In my view, this placement of the burden vitiates Pennsylvania's procedures. Many of the institutionalized children are unable to read, write, comprehend the formal explanation of their rights, or use the telephone. . . . Few, as a consequence, will be able to take the initiative necessary for them to secure the advice and assistance of a trained representative. Few will be able to trigger the procedural safeguards and hearing rights that Pennsylvania formally provides. Indeed, for most of Pennsylvania's institutionalized children the recitation of rights required by current regulations will amount to no more than a hollow ritual. If the children's constitutional rights to representation and to a fair hearing are to be guaranteed in substance as well as in form, and if the commands of the Fourteenth Amendment are to be satisfied, then waiver of those constitutional rights cannot be inferred from mere silence or inaction on the part of the institutionalized child. Cf. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, . . . (1938). Pennsylvania must assign each institutionalized child a representative obliged to initiate contact with the child and ensure that the child's constitutional rights are fully protected. Otherwise, it is inevitable that the children's due process rights will be lost through inadvertence, inaction, or incapacity. See 459 F.Supp. at 44, n. 47; *Bartley v. Kremens,* 402 F.Supp. 1039, 1050-1051 (ED Pa. 1975)."

Smith v. Daily Mail Publishing Co.

443 U.S. 97, 99 S.Ct. 2667 (1979)

CONFIDENTIALITY - (Press) — *A State statute cannot constitutionally bar the press from publishing a juvenile's name which it obtains independently of the court.*

"(p. 2668) Mr. Chief Justice BURGER delivered the opinion of the Court.

"We granted *certiorari* to consider whether a West Virginia statute violates the First and Fourteenth Amendments of the United States Constitution by making it a crime for a newspaper to publish, without the written approval of the Juvenile Court, the name of any youth charged as a juvenile offender.

"(p. 2669) On February 9, 1978, a 15-year-old student was shot and killed at Hayes Junior High School in St. Albans, W. Va., a small community located about 13 miles outside of Charleston, W. Va. The alleged assailant, a 14-year-old classmate, was identified by seven different eyewitnesses and was arrested by the police soon after the incident.

"The Charleston Daily Mail and the Charleston Gazette, respondents here, learned of the shooting by monitoring routinely the police band radio frequency; they immediately dispatched reporters and photographers to the junior high school. The reporters for both papers obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecution attorney who were at the school.

"The staffs of both newspapers prepared articles for publication about the incident. The Daily Mail's first article appeared in its February 9 afternoon edition. The article did not mention the alleged attacker's name. The editorial decision to omit the name was made because of the statutory prohibition against publication without prior court approval.

"The Gazette made a contrary editorial decision and published the juvenile's name and picture in an article about the shooting that appeared in the February 10 morning edition of the paper. In addition, the name of the alleged juvenile attacker was broadcast over at least three different radio stations on February 9 and 10. Since the information had become public knowledge, the Daily Mail decided to include the juvenile's name in an article in its afternoon paper on February 10.

"On March 1, an indictment against the respondents was returned by a grand jury. . . . Respondents then files an original-jurisdiction petition with the West Virginia Supreme Court of Appeals, seeking a writ if prohibition against the prosecuting attorney and the Circuit Court Judges of Kanawha County, petitioners here. Respondents alleged that the indictment was based on a statute that violated the First and Fourteenth Amendments of the United States Constitution and several provisions of the State's Constitution and requested an order prohibiting the county officials from taking any action on the indictment.

"The West Virginia Supreme Court of Appeals issued the writ of prohibition. W. Va., 248 S.E.2d 269 (1978). Relying on holdings of this Court, it held that the statue abridged the freedom of the press. The court reasoned that the statute operated as a prior restraint on speech and that the State's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints.

. . .

"Respondents urge this Court to hold that because sec. 49-7-3 requires court approval prior to publication of the juvenile's name it operated as a 'prior restraint' on speech. See *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, . . . (1976); *New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, . . . (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 91 S.Ct. 1575, . . . (1971); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, . . . (1931). Respondents concede that this statute is not in the classic mold of prior restraint,

there being no prior injunction against publication. Nonetheless, they contend that the prior-approval requirement acts in 'operation and effect' like a licensing scheme and thus is another form of prior restraint. See *Near v. Minnesota ex rel. Olson, supra,* at 708, 51 S.Ct. at 628. As such, respondents argue, the statute bears 'a heavy presumption 'against its constitutional validity.' *Organization for a Better Austin v. Keefe, supra,* 402 U.S. at 419, 91 S.Ct. at 1578. They claim that the State's interest in the anonymity of a juvenile offender is not sufficient to overcome that presumption.

"Petitioners do not dispute that the statute amounts to a prior restraint on speech. Rather, they take the view that even if it is a prior restraint the statute is constitutional because of the significance of the State's interest in protecting the identity of juveniles.

"The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint. First Amendment protection reaches beyond prior restraints. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535, . . . (1978); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, . . . (1975), and respondents acknowledge that the statutory provision for court approval of disclosure actually may have a less oppressive effect on freedom of the press than a total ban on the publication of the child's name.

"Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of State interest to sustain its validity. . . .

. . .

"The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense. In *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, . . . (1974), similar arguments were advanced by the State to justify not permitting a criminal defendant to impeach a prosecution witness on the basis of his juvenile record. We said there that '[w]e do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.' *Id.,* at 319, 94 S.Ct. at 1112. However, we concluded that the State's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. *Ibid.* The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. See *Nebraska Press Assn. v. Stuart,* 427 U.S. at 561, 96 S.Ct. at 2803. Therefore, the reasoning of *Davis* that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.

"The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements. The statute does not restrict the electronic media or any form of publication, except 'newspapers,' from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a State interest of the highest order, it does not accomplish its stated purpose.

"In addition, there is no evidence to demonstrate that the imposition of criminal penalties is necessary to protect the confidentiality of juvenile proceedings. As the Brief for Respondents' points out at 29, n. **, all 50 states have statutes that provide in some way for confidentiality, but only 5, including West Virginia, impose criminal penalties on nonparties for publication of the identity of the juvenile. Although every State has asserted a similar interest, all but a handful have found other ways of accomplishing the objective. See *Landmark Communications, Inc. v. Virginia,* 435 U.S. at 843, 98 S.Ct. at 1543.

"Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings, see *Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 496, n. 26, 95 S.Ct. at 1046, n. 26; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a State to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted State interest cannot justify the statute's imposition of criminal sanctions on this type of publication. Accordingly, the judgment of the West Virginia Supreme Court of Appeals is

"Affirmed."

"Mr. Justice POWELL took no part in the consideration or decision of this case.

"Mr. Justice REHNQUIST, concurring in the judgment.

"Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government. But recognition of this proposition has not meant that the public interest in free speech and press always has prevailed over competing interests of the public. 'Freedom of speech thus does not comprehend the right to speak on any subject at any time,' *American Communications Assn. v. Douds,* 339 U.S. 382, 394, 70 S.Ct. 674, 682, . . . (1950), and 'the press is not free to publish anything it desires to publish;' *Branzburg v. Hayes,* 408 U.S. 665, 683, 92 S.Ct. 2646, 2658, . . . (1972); See *Near v. Minnesota ex re. Olson,* 283 U.S. 695, 708, 716, 51 S.Ct. 625, 628, 631, . . . (1931). While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented, e.g., *Landmark Communication, Inc. v. Virginia,* 435 U.S. 829, 838, 843, 98 S.Ct. 1535, 1541, 1543, . . . (1978); *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 562, 96 S.Ct. 2791, 2804, . . . (1976); *American Communications Assn. v. Douds, supra,* 339 U.S. at 400, 70 S.Ct. at 684.

"The Court does not depart from these principles today. See *ante,* at 2671. Instead, it concludes that the asserted State interest is not sufficient to justify punishment of publication of truthful, lawfully obtained information about a matter of public significance. *Ante,* at 2671. So valued is the liberty of speech and of the press that there is a tendency in cases such as this to accept virtually any contention supported by a claim of interference with speech or the press. See *Jones v. Opelika,* 316 U.S. 584, 595, 62 S.Ct. 1231, 1238, . . . (1942). I would resist that temptation. In my view, a State's interest in preserving the anonymity of its juvenile offenders — an interest that I consider to be, in the words of the Court, of the 'highest order' — far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' name entails.

"It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our Juvenile Courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States, 131-133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958). This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and 'bury them in a graveyard of the forgotten past.' *In re Gault,* 387 U.S. 1, 24-25, 87 S.Ct. 1428, 1442, . . . (1967). The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State. National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention, Standard 5.13, p. 224-225 (1976); see *Davis v. Alaska,* 415 U.S. 308, 319, 94 S.Ct. 1105, 1111, . . . (1974); *Kent v. United States,* 383 U.S. 541, 554-555, 86 S.Ct. 1045, 1053-1054, . . . (1966). Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public. E. Eldenfonso, Law Enforcement and the Youthful Offender, 166 (2d ed. 1978). This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts. *Davis v. Alaska, supra,* 415 U.S. at 319, 94 S.Ct. at 1111. Such publicity also renders nugatory States' expungement laws. For a potential employer or any other person can retrieve the information the States seek to 'bury' simply by visiting the morgue of the local newspaper. The resultant widespread dissemination of a juvenile offender's name, therefore, may defeat the beneficent and rehabilitative purposes of a State's Juvenile Court system.

"By contrast, a prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of press. West Virginia's statute, like similar laws in other States, prohibits publication only of the name of the young person. . . . The press is free to describe the details of the offense and inform the community of the proceedings against the juvenile. It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' 'watchdog' role. In those rare instances where the press

believes it is necessary to publish the juvenile's name, the West Virginia law, like the statutes of other States, permits the Juvenile Court judge to allow publication. The Juvenile Court judge, unlike the press, is capable of determining whether publishing the name of the particular young person will have a deleterious effect on his chances for rehabilitation and adjustment to society's norms.

"Without providing for punishment of such unauthorized publications it will be virtually impossible for a State to ensure the anonymity of its juvenile offenders. Even if the Juvenile Court's proceedings and records are closed to the public, the press still will be able to obtain the child's name in the same manner as it was acquired in this case. *Ante,* at 2669; . . . Thus, the Court's reference to effective alternatives for accomplishing the State's goals is a mere chimera. The fact that other States do not punish publication of the names of juvenile offenders, while relevant, certainly is not determinative of the requirements of the Constitution.

"Although I disagree with the Court that a State statute punishing publication of the identity of a juvenile offender can never serve an interest of the 'highest order' and thus pass muster under the First Amendment, I agree with the Court that West Virginia's statute 'does not accomplish its stated purpose.' *Ante,* at 2672. The West Virginia statute prohibits only newspapers from printing the names of youths charged in juvenile proceedings. Electronic media and other forms of publication can announce the young person's name with impunity. In fact, in this case three radio stations broadcast the alleged assailant's name before it was published by the Charleston Daily Mail. *Ante,* at 2669. This statute thus largely fails to achieve its purpose. It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment. . . . I, therefore, join in the Court's judgment striking down the West Virginia law. But for the reasons previously stated, I think that a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional."

Smith v. Organization of Foster Families for Equality and Reform

431 U.S. 816, 97 S.Ct. 2094 (1977)

FOSTER PARENTS - (Rights) — ***Foster parents' rights to custody of children who have been in their care for 18 months are adequately protected when they are given notice of removal and an administrative hearing with judicial review.***

"(p. 2096) Mr. Justice BRENNAN delivered the opinion of the Court.

"Appellees, individual foster parents and an organization of foster parents, brought this civil rights class action pursuant to 42 U.S.C. sec. 1983 in the United States District Court for the Southern District of New York, on their behalf and on behalf of children for whom they have provided homes for a year or more. They sought declaratory and injunctive relief against New York State and New York City officials, alleging that the procedures governing the removal of foster children from foster homes provided in N.Y.Soc. Serv. Law sec. 383(2) and 400 . . . violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court appointed independent counsel for the foster children to forestall any possibility of conflict between their interests and the interests asserted by the foster parents. A group of natural mothers of children in foster care were granted leave to intervene on behalf of themselves and others similarly situated.

"A divided three-judge District Court concluded that 'the pre-removal procedures presently employed by the State are constitutionally defective,' holding that 'before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decision-maker charged with determining the future placement of the child,' *Organization of Foster Families v. Dumpson,* 418 F.Supp. 277, 282 (1976). Four appeals to this Court were taken from the ensuing judgment declaring the challenged statutes unconstitutional and permanently enjoining their enforcement. The New York City officials are appellants in No. 76-180. The New York State officials are appellants in No. 76-183. Independent counsel appointed for the foster children appeals on their behalf in No. 76-5200. The intervening natural mothers are appellants in No. 76-5193. We noted probable jurisdiction of the four appeals. . . . We reverse.

"A detailed outline of the New York statutory system regulating foster care is a necessary preface to a discussion of the constitutional questions presented.

"The expressed central policy of the New York system is that 'it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and . . . parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered,' Soc.Serv. Law sec. 384-b(1)(a)(ii) . . . But the State has opted for foster care as one response to those situations where the natural parents are unable to provide the 'positive, nurturing family relationships' and 'normal family life in a permanent home' that offer 'the best opportunity for children to develop and thrive.' Sec. sec. 384-b(1)(b), (1)(a)(i).

"Foster care has been defined as '[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible.' Child Welfare League of America, Standards for Foster Family Care Service, 5 (1959). Thus, the distinctive features of foster care are, first, 'that it is care in a *family,* it is noninstitutional substitute care,' and second, 'that it is for a *planned* period — either temporary or extended. This is unlike adoptive placement, which implies a *permanent* substitution of one home for another.' Kadushin 355.

"Under the New York scheme children may be placed in foster care either by voluntary placement or by court order. Most foster care replacements are voluntary. They occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable homelife for their children for some limited period. Resort to such placements is almost compelled when it is not possible in such circumstance to place the child with a relative or friend, or to pay for the services of a homemaker or boarding school.

"Voluntary placement requires the signing of a written agreement by the natural parent or guardian, transferring the care and custody of the child to an authorized child welfare agency. N.Y.Soc.Serv. Law sec. 384-a(1) . . . Although by statute the terms of such agreements are open to negotiation, sec. 384-a(2)(a), it is contended that agencies require execution of standardized forms. . . . The agreement may provide for return of the child to the natural parent at a specified date or upon occurrence of a particular event, and if it does not, the child must be returned by the agency, in the absence of a court order, within 20 days of notice from the parent. Sec. 384-a(2)(a).

"The agency may maintain the child in an institutional setting, sec. 374-b, 374-c, 374-d . . . but more commonly acts under its authority to 'place out and board out' children in foster homes. Sec. 374(1). Foster parents, who are licensed by the State or an authorized foster-care agency, sec. 376, 377, provide care under a contractual arrangement with the agency, and are compensated for their services. See 18 N.Y.C.R.R. sec. 606.2, 606.6 (1977); App. 76a, 81a. The typical contract expressly reserves the right of the agency to remove the child on request. 418 F.Supp. at 281; App. 76a, 79a. See N.Y.Soc.Serv. Law sec. 383(2) (McKinney 1976). Conversely, the foster parent may cancel the agreement at will.

"The New York system divides parental functions among agency, foster parents, and natural parents, and the definitions of the respective roles are often complex and often unclear. The law transfers 'care and custody' to the agency, sec. 384-a; see also sec. 383(2), but day-to-day supervision of the child and his activities, and most of the functions ordinarily associated with legal custody, are the responsibility of the foster parent. Nevertheless, agency supervision of the performance of the foster parents takes forms indicating that the foster parent does not have the full authority of a legal custodian. Moreover, the natural parent's placement of the child with the agency does not surrender legal guardianship; the parent retains authority to act with respect to the child in certain circumstances. The natural parent has not only the right but the obligation to visit the foster child and plan for his future; failure of a parent with capacity to fulfill the obligation for more than a year can result in a court order terminating the parent's rights on the ground of neglect. Sec. 384-b(4), (7). See, also, sec. 384-b(5); N.Y.Dom.Rel. Law sec. 111 (McKinney Supp. 1976-1977); N.Y.Family Court Act sec. 611 . . .

"Children may also enter foster care by court order. The Family Court may order that a child be placed in the custody of an authorized child-care agency after a full adversary judicial hearing under Art. 10 of the New York Family Court Act, if found that the child has been abused or neglected by his natural parents. Sec. 1052, 1055. In addition, a minor adjudicated a juvenile delinquent, or 'person in need of supervision' may be placed by the court with an agency. Sec. 753, 754, 756. The consequences of foster-care placement by court order do not differ substantially from those for children voluntarily placed, except that the parent is not entitled to return of the child on demand pursuant to Soc.Serv. Law sec. 384-a(2)(a); termination of foster care must then be consented to by the court. Sec. 383(1).

"The provisions of the scheme specifically at issue in this litigation come into play when the agency having legal custody determines to remove the foster child from the foster home, either because it has determined that it would be in the child's best interests to transfer him to some other foster home, or to return the child to his natural parents in accordance with the statute or placement agreement. Most children are removed in order to be transferred to another foster home. The procedures by which foster parents may challenge a removal made for that purpose differ somewhat from those where the removal is made to return the child to his natural parent.

"Section 383(2), n. 3, *supra,* provides that the 'authorized agency placing out or boarding [a foster] child . . . may in its discretion remove such child from the home where placed or boarded.' Administrative regulations implement this provision. The agency is required, except on emergencies, to notify the foster parents in writing 10 days in advance of any removal. 18 N.Y.C.R.R. sec. 450.10(a) (1976). The notice advises the foster parents that if they object to the

child's removal they may request a 'conference' with the Social Services Department. *Ibid.* The department schedules requested conferences within 10 days of the receipt of the request. Sec. 450.10(b). The foster parent may appear with counsel at the conference, where he will 'be advised of the reasons [for the removal of the child], and be afforded an opportunity to submit reasons why the child should not be removed.' Sec. 450.10(a). The official must render a decision in writing within five days after the close of the conference, and send notice of his decision to the foster parents and the agency. Sec. 450.10(c). The proposed removal is stayed pending the outcome of the conference. Sec. 450.10(d).

"If the child is removed after the conference, the foster parent may appeal to the Department of Social Services for a 'fair hearing,' that is, a full adversary administrative hearing, under Soc.Serv. Law sec. 400, the determination of which is subject to judicial review under N.Y.Civ.Prac.Law sec. 7801 *et seq.* (McKinney 1963); Art. 78; however, the removal is not automatically stayed pending the hearing and judicial review.

"This statutory and regulatory scheme applies statewide. In addition, regulations promulgated by the New York City Human Resources Administration, Department of Social Services — Special Services for Children (SSC) provide even greater procedural safeguards there. Under SSC Procedure No. 5 (Aug. 5, 1974), in place of or in addition to the conference provided by the State regulations, the foster parents may request a full trial-type hearing *before* the child is removed from their home. This procedure applies, however, only if the child is being transferred to another foster home, and not if the child is being returned to his natural parents.

"One further pre-removal procedural safeguard is available. Under Soc.Serv.Law sec. 392, the Family Court has jurisdiction to review, on petition of the foster parent or the agency, the status of any child who has been in foster care for 18 months or longer. The foster parents, the natural parents, and all interested agencies are made parties, and all interested agencies are made parties to the proceeding. Sec. 392(4). After hearing, the court may order that foster care be continued, or that the child be returned to his natural parents, or that the agency take steps to free the child for adoption. Sec. 392(7). Moreover, sec. 392(8) authorizes the court to issue an 'order of protection' which 'may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court.' Thus, the court may order not only that foster care be continued, but additionally, 'in assistance or as a condition of' that order that the agency leave the child with the present foster parent. In other words, sec. 392 provides a mechanism whereby a foster parent may obtain pre-removal judicial review of an agency's decision to remove a child who has been in foster care for 18 months or more.

"Foster care of children is a sensitive and emotion-laden subject, and foster-care programs consequently stir strong controversy. The New York regulatory scheme is no exception. New York would have us view the scheme as described in its brief:

> 'Today New York premises its foster care system on the accepted principle that the placement of a child into foster care is solely a temporary, transitional action intended to lead to the future reunion of the child with his natural parent or parents, or if such a reunion is not possible, to legal adoption and the establishment of a new permanent home for the child.' Brief for Appellants in No. 76-183, p. 3.

Some of the parties and *amici* argue that this is a misleadingly idealized picture. They contend that a very different [perspective] is revealed by the empirical criticism of the system presented in the record of this case and confirmed by published studies of foster care.

"From the standpoint of natural parents, such as the appellant intervenors here, foster care has been condemned as a class-based intrusion into the family life of the poor. See, e.g., Jenkins, Child Welfare as a Class System, in Children and Decent People, 3 (A. Schorr ed. 1974). And, see generally, tenBroek, California's Dual System of Family Law: Its Origins, Development and Present Statu' (pt. I), 16 Stan.L.Rev. 257 (1964); (pt. II), 16 Stan.L.Rev. 900 (1964); (pt. III), 17 Stan.L.Rev. 614 (1965). It is certainly true that the poor resort to foster care more often than other citizens. For example, over 50% of all children in foster care in New York City are from female-headed families receiving Aid to Families with Dependent Children. Foundation for Child Development, State of the Child: New York City 61 (1976). Minority families are also more likely to turn to foster care; 52.3% of the children in foster care in New York City are Black, and 25.5% are Puerto Rican. Child Welfare Information Services, Characteristics of Children in

Foster Care, New York City Reports, Table No. 2 (Dec. 31, 1976). This disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families. Commentators have also noted, however, that middle- and upper-income families who need temporary care services for their children have resources to purchase private care. See, e.g., Rein, Nutt, & Weiss 24, 25. The poor have little choice but to submit to State-supervised child care when family crises strike. *Id.*, at 34.

"The extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent. Mnookin I 599, 601. Studies also suggest that social workers of middle-class backgrounds, perhaps unconscientiously, incline to favor continued placement in foster care with a generally higher-status family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child. Rein, Nutt, & Weiss 42-44; Levine, Caveat Parents: A Domestification of the Child Protection System, 35 U.Pitt.L.Rev. 1, 29 (1973). This accounts, it has been said, for the hostility of agencies to the efforts of natural parents to obtain the return of their children.

"Appellee foster parents as well as natural parents question the accuracy of the idealized picture portrayed by New York. They note that children often stay in 'temporary' foster care much longer than contemplated by the theory of the system. See, e.g., Kadushin 411-412; Mnookin I 610-613; Wald 662-663; Rein, Nutt, & Weiss 37-39. The District Court found as a fact that the median time spent in foster care in New York was over four years. 418 F.Supp. at 281. Indeed, many children apparently remain in this 'limbo' indefinitely. Mnookin II 226, 273. The District Court also found that the longer a child remains in foster care, the more likely it is that he will never leave: '[T]he probability of a foster child being returned to his biological parents declined markedly after the first year in foster care.' 418 F.Supp. at 279, n. 6. See, also, E. Sherman, R. Neuman, & A. Shyne, Children Adrift in Foster Care: A Study of Alternative Approaches 3 (1973); Fanshel, The Exit of Children from Foster Care: An Interim Research Report, 50 Child Welfare 65, 67 (1971). It is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents. Yet such ties do not seem to be regarded as obstacles to transfer of the child from one foster placement to another. The record in this case indicates that nearly 60% of the children in foster care in New York City have experienced more than one placement, and about 28% have experienced three or more. App. 189a. See, also, Wald 645-646; Mnookin I 625-626. The intended stability of the foster-home management is further damaged by the rapid turnover among social work professionals who supervise the foster care arrangements on behalf of the State. *Id.*, at 625; Rein, Nutt, & Weiss 41; Kadushin 420. Moreover, even when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable homelife through final termination of parental ties and adoption into a new family. Fanshel, Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study, 55 Child Welfare 143, 145, 157 (1976); Mnookin II 275-277; Mnookin I 612-613. See, also, n. 23, *supra.*

"The parties and *amici* devote much of their discussion to these criticisms of foster care, and we present this summary in the view that some understanding of those criticisms is necessary for a full appreciation of the complex and controversial system with which this lawsuit is concerned. But the issue presented by the case is a narrow one. Arguments asserting the need for reform of New York's statutory scheme are properly addressed to the New York Legislature. The relief sought in this case is entirely procedural. Our task is only to determine whether the District Court correctly held that the present procedures preceding the removal from a foster home of children resident there a year or more are constitutionally inadequate. To that task we now turn.

"Our first inquiry is whether appellees have asserted interests within the Fourteenth Amendment's protection of 'liberty' and 'property.' *Board of Regents v. Roth,* 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, . . . (1972).

"The appellees have not renewed in this Court their contention, rejected by the District Court, 418 F.Supp. at 280-281, that the realities of the foster care system in New York gave them a justified expectation amounting to a 'property' interest that their status as foster parents would

be continued. Our inquiry is therefore narrowed to the question whether their asserted interests are within the 'liberty' protected by the Fourteenth Amendment.

"The appellees' basic contention is that when a child has lived in a foster home for a year or more, a psychological tie is created between the child and the foster parents which constitutes the foster family the true 'psychological family' of the child. See J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973). That family, they argue, has a 'liberty interest' in its survival as a family protected by the Fourteenth Amendment. Cf. *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, . . . Upon this premise they conclude that the foster child cannot be removed without a prior hearing satisfying due process. Appointed counsel for the children, appellants in No. 76-5200, however, disagrees, and has consistently argued that the foster parents have no such liberty interest independent of the interests of the foster children, and that the best interests of the children would not be served by procedural protections beyond those already provided by New York law. The intervening natural parents of children in foster care, appellants on No. 76-5193, also oppose the foster parents, arguing that recognition of the procedural right claimed would undercut both the substantive family law of New York, which favors the return of the children to their natural parents as expeditiously as possible, see *supra,* at 2099, and their constitutionally protected right of family privacy, by forcing them to submit to a hearing and defend their rights to their children before the children could be returned to them.

"The District Court did not reach appellees' contention 'that the foster home is entitled to the same constitutional deference as that long-granted to the more traditional biological family.' 418 F.Supp. at 281. Rather than 'reach[ing] out to decide such novel questions,' the Court based its holding that 'the pre-removal procedures presently employed by the State are constitutionally defected,' *id.,* at 282, not on the recognized liberty interest in family privacy, but on an independent right of the foster child 'to be heard before being 'condemned' to suffer grievous loss,' *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, . . . (1951) (FRANKFURTER, J., concurring).' *Ibid.*

"The Court apparently reached this conclusion by weighing the 'harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family,' *id.,* at 283, and concluding that this disruption of the stable relationships needed by the child might constitute 'grievous loss.' But if this was the reasoning applied by the District Court, it must be rejected. *Meachum v. Fano,* 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, . . . (1976), is authority that such a finding does not, in and of itself, implicate the due process guarantee. What was said in *Board of Regents v. Roth, supra,* 408 U.S. at 570-571, 92 S.Ct. at 2705 applies equally well here:

> 'The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. . . . [A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.'

"We therefore turn to appellees' assertion that they have a constitutionally protected liberty interest — in the words of the District Court, a 'right to familial privacy,' 418 F.Supp. at 279 — in the integrity of their family unit. This assertion clearly presents difficulties.

"It is, of course, true that 'freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, . . . (1974). There does exist a 'private realm of family life which the State cannot enter,' *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944), that has been afforded both substantive and procedural protection. But is the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection? Although considerable difficulty has attended the task of defining 'family' for purposes of the Due Process Clause, see *Moore v. City of East Cleveland, supra,* 431 U.S., p. 495, 97 S.Ct. p. 1934 (plurality opinion of POWELL, J.); 531, 97 S.Ct. p. 1957 (WHITE, J., dissenting), we are not without guides to some of the elements that define the concept of 'family' and contribute to its place in our society.

"First, the unusual understanding of 'family' implies biological relationships, and most decision treating the relation between parent and child have stressed this element. *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, . . . (1972), for example, spoke of '[t]he rights to conceive and to raise one's children' as essential rights, citing *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 S.Ct. 1110, . . . (1942). And *Prince v. Massachusetts,* stated:

> 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.' 321 U.S. at 166, 64 S.Ct. at 442.

"A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases:

> 'We deal with a right of privacy older that the Bill of Rights — older than our political parties, older than our school systems. Marriage is a coming together for better of for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.' *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, . . . (1965).

See, also, *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, . . . (1967).

"Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, *Wisconsin v. Yoder,* 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, . . . (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing function, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. Cf. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, . . . (1974).

"But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in State law and contractual arrangements. The individual's freedom to marry and reproduce is 'older than the Bill of Rights,' *Griswold v. Connecticut, supra,* 381 U.S. at 486, 85 S.Ct. at 1682. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, cf. *Board of Regents v. Roth,* 408 U.S. at 577, 92 S.Ct. at 2709, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in State law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' *Moore v. City of East Cleveland,* 431 U.S. at 503, 97 S.Ct. at 1938. Cf. also *Meachum v. Fano,* 427 U.S. at 230, 96 S.Ct. at 2540 (STEVENS, J., dissenting). Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive law sources, see, e.g., *Wolff v. McDonnell,* 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, . . . (1974), in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relationship with the State, it is appropriate to ascertain from State law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited 'liberty' in the foster family.

"A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of

another. Here, however, such a tension is virtually unavoidable. Under New York law, the natural parent of a foster child in voluntary placement has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family. See n. 46, 47, *supra.* Moreover, the natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances. These rights are difficult to reconcile with the liberty interest in the foster family relationship claimed by appellees. It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or State law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, State law sanction, basic human rights — an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

"As this discussion suggests, appellees' claim to a constitutionally protected liberty interest raises complex and novel questions. It is unnecessary for us to resolve those questions definitely in this case, however, for like the District Court, we conclude that 'narrowed grounds exist to support' our reversal. We are persuaded that, even on the assumption that appellees have a protected 'liberty interest,' the District Court erred in holding that the pre-removal procedures presently employed by the State are constitutionally defective.

"Where procedural due process must be afforded because a 'liberty' or 'property' interest is within the Fourteenth Amendment's protection, there must be determined 'what process is due' in the particular context. The District Court did not spell out precisely what sort of pre-removal hearing would be necessary to meet the constitutional standard, leaving to 'the various defendants — State and local officials — the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion.' 418 F.Supp. at 286. This court's opinion, however, would seem to require at a minimum that in all cases to require at a minimum that in all cases in which removal of a child within the certified class is contemplated, including the situation where the removal is for the purpose of returning the child to his natural parents, a hearing be held automatically, regardless of whether or not the foster parents request a hearing; that the hearing be before an officer who has had no previous contact with the decision to remove the child, and who has authority to order that the child remain with the foster parents; and that the agency, the foster parents, and the natural parents, as well as the child, if he is able intelligently to express his true feelings, and an independent representative of the child's interests, if he is not, be represented and permitted to introduce relevant evidence.

"It is true that '[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Board of Regents v. Roth,* 408 U.S. at 570, n. 7, 92 S.Ct. at 2705; quoting *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, . . . (1971). But the hearing required is only one 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 657, . . . (1950). See, e.g., *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, . . . (1971); *Goldberg v. Kelly,* 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, . . . (1970); *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, . . . (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, . . . (1972). Only last Term, the Court held that 'identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, . . . (1976). Consideration of the procedures employed by the State

and New York City in light of these three factors requires the conclusion that those procedures satisfy constitutional standards.

"Turning first to the procedure applicable in New York City, SSC Procedure No. 5, see *supra,* at 2103, and n. 29, provides that before a child is removed from a foster home for transfer to another foster home, the foster parents may request an 'independent review.' The District Court's description of this review is set out in the margin. Such a procedure would appear to give a more elaborate trial-type hearing to foster families than this Court has found required in other contexts of administrative determinations. Cf. *Goldberg v. Kelly, supra,* 397 U.S. at 266-271, 90 S.Ct. at 1019-1022. The District Court found the procedure inadequate on four grounds, none of which we find sufficient to justify the holding that the procedure violates due process.

"First, the court held that the 'independent review' administrative proceeding was insufficient because it was only available on the request of the foster parents. In the view of the District Court, the proceeding should be provided as a matter of course, because the interests of the foster parents and those of the child would not necessarily be co-extensive, and it could not be assumed that the foster parents would invoke the hearing procedure in every case in which it was in the child's interest to have a hearing on his own, automatic review in every case is necessary. We disagree. As previously noted, the constitutional liberty, if any, sought to be protected by the New York procedures is a right of *family* privacy or autonomy, and the basis for recognition of any such interest in the foster family must be that close emotional ties analogous to those between parent and child are established when a child resides for a lengthy period with a foster family. If this is so, necessarily we should expect that the foster parents will seek to continue the relationship to preserve the stability of the family; if they do not request a hearing, it is difficult to see what right or interest of the foster child is protected by holding a hearing to determine whether removal would unduly impair his emotional attachments to a foster parent who does not care enough about the child to contest the removal. Thus, consideration of the interest to be protected and the likelihood of erroneous deprivations, the first two factors identified in *Mathews v. Eldridge, supra,* as appropriate in determining the sufficiency of procedural protections, do not support the District Court's imposition of this additional administrative burden on the State. According to appellant city officials, during the approximately two years between the institution of SSC Procedure No. 5 in August 1974 and June 1976, there were approximately 2,800 transfers per year in the city, but only 26 foster parents requested hearings. Brief for Appellants in No. 76-180, p. 20-21. It is not at all clear what would be gained by requiring full hearings in the more than 5,500 cases in which they were not requested.

"Second the District Court faulted the city procedure on the ground that participation is limited to the foster parents and the agency and the natural parent and the child are not made parties to the hearing. This is not fatal in light of the nature of the alleged constitutional interests at stake. When the child's transfer from one foster home to another is pending, the interest arguably requiring protection is that of the foster family, not that of the natural parents. Moreover, the natural parent can generally add little to the accuracy of fact-finding concerning the wisdom of such a transfer, since the foster parents and the agency, through its caseworkers, will usually be most knowledgeable about conditions in the foster home. Of course, in those cases where the natural parent does have a special interest in the proposed transfer or particular information that would assist the fact-finder, nothing in the city's procedure prevents any party from securing his testimony.

"Much the same can be said in response to the District Court's statement:

> '[I]t may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings.' 418 F.Supp. at 285-286.

But nothing in the New York City procedure prevents consultation of the child's wishes, directly or through an adult intermediary. We assume, moreover, that some such consultation would be among the first steps that a rational fact-finder, inquiring into the child's best interests, would pursue. Such consultation however, does not require that the child or an appointed representative must be a party with full adversary powers in all pre-removal hearings.

"The other two defects in the city procedure found by the District Court must also be rejected. One is that the procedure does not extend to the removal of a child from foster care to be returned to his natural parent. But as we have already held, whatever liberty interest may be argued to exist in the foster family is significantly weaker in the case of removals preceding return to the natural parent, and the balance of due process interests must accordingly be different. If the city procedure is adequate where it is applicable, it is no criticism of the procedure that it does not apply in other situations where different interests are at stake. Similarly, the District Court pointed out that the New York City procedure coincided with the informal 'conference' and post-removal hearings provided as a matter of State law. This overlap in procedures may be unnecessary or even to some degree unwise, see *id.*, F.Supp. at 285, but a State does not violate the Due Process Clause by providing alternative or additional procedures beyond what the Constitution requires.

"Outside New York City, where only the statewide procedures apply, foster parents are provided not only with the procedures of a pre-removal conference and post-removal hearing provided by 18 N.Y.C.R.R. sec. 450.10 (1976) and Soc.Serv.Law sec. 400 (McKinney 1976), see *supra,* at 12-13, but also with the pre-removal *judicial* hearing available on request to foster parents who have been in foster care for 18 months or more, Soc.Serv.Law sec. 392. As observed *supra,* at 2104, and n. 32, a foster parent on such case may obtain an order that the child remain in his care.

"The District Court found three defects in this full judicial process. First, a sec. 392 proceeding is available only to those foster children who have been in foster care for 18 months or more. The class certified by the court was broader, including children who had been in the care of the same foster parents for more than one year. Thus, not all class members had access to the sec. 392 remedy. We do not think that the 18-month limitation on sec. 392 actions renders the New York scheme constitutionally inadequate. The assumed liberty interest to be protected in this case is one rooted in the emotional attachments that develop over time between a child and the adults who care for him. But there is no reason to assume that those attachments ripen at less than 18 months or indeed at any precise point. Indeed, testimony in the record, see App. 177a, 204a, as well as material in published psychological tests, see, e.g., J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child, 40-42, 49 (1973), suggests that the amount of time necessary for the development of the sort of tie appellees seek to protect varies considerably depending on the age and previous attachments of the child. In a matter of such imprecision and delicacy, we see no justification for the District Court's substitution of its view of the appropriate cutoff date for that chosen by the New York Legislature, given that any line is likely to be somewhat arbitrary and fail to protect some families where relationships have developed quickly while protecting others where no such bonds have formed. If New York sees 18 months rather than 12 as the time at which temporary foster care begins to turn into a more permanent and family-like setting requiring procedural protection and/or judicial inquiry into the propriety of continuing foster care, it would take far more than this record provides to justify a finding of constitutional infirmity in New York's choice.

"The District Court's other two findings of infirmity in the sec. 392 procedure have already been considered and held to be without merit. The District Court disputed defendants' reading of sec. 392 as permitting an order requiring the leaving of the foster child in the same foster home. The plain words of the statute and the weight of New York judicial interpretation do not support the court. See *supra,* at 2104, and n. 32. The District Court also faulted sec. 392, as it did the New York City procedure, in not providing an automatic hearing in every case even in cases where foster parents chose not to seek one. Our holding sustaining the adequacy of the city procedure, *supra,* at 2113-2114, applies in this context as well.

"Finally, the sec. 392 hearing is available to foster parents, both in and outside New York City, even where the removal sought is for the purpose of returning the child to his natural parents. Since this remedy provides a sufficient constitutional pre-removal hearing to protect whatever liberty interest might exist in the continued existence of the foster family when the State seeks to transfer the child to another foster home, a *fortiori* is adequate to protect the lesser interest of the foster family in remaining together at the expense of the disruption of the natural family.

"We deal here with issues of unusual delicacy, in an area where profession judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate whether a particular procedural scheme is adequate under the Constitution. Since we hold that the procedures provided by New York State in sec. 392 and by New York City's SSC Procedure No. 5 are adequate to protect whatever liberty interest appellees may have, the judgment of the District Court is

"Reversed."

"Mr. Justice STEWART, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, concurring in the judgment.

"The foster parent-foster child relationship involved in this litigation is, of course, wholly a creation of the State. New York law defines the circumstances under which a child may be placed in foster care, prescribes the obligations of the foster parents, and provides for the removal of the child from the foster home 'in [the] discretion' of the agency with custody of the child. N.Y.Soc.Serv.Law sec. 383(2) (McKinney 1976). The agency compensates the foster parents, and reserves in its contracts the authority to decide as it sees fit whether and when a child shall be returned to his natural family or placed elsewhere. See Part I-A of the Court's opinion, *ante,* at 2099-2102. Were it not for the system of foster care that the State maintains, the relationship for which constitutional protection is asserted would not even exist.

"The New York Legislature and the New York Courts have made it unmistakably clear that foster care is intended only as a temporary way station until a child can be placed for adoption. Thus, Soc.Serv.Law sec. 384-b(1)(b) (McKinney Supp. 1976-1977) states a legislative finding that 'many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. And, specifically repudiating the contention that New York law contemplates that a child will have a 'secure, stable, and continuous' relationship with a third-party custodian as the child's 'psychological parent,' the New York Court of Appeals has '[p]articularly rejected the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child.' *Bennett v. Jeffreys,* . . . N.E.2d 277, 285, n. 2 (N.Y.).

"In these circumstances, I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents or foster children in New York have some sort of 'liberty' interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.

"At the outset, I would reject, as does the Court, the apparent holding of the District Court that 'the trauma of separation from a familiar environment' or the 'harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family,' *Organization of Foster Families v. Dumpson,* 418 F.Supp. 277, 283, constitutes a 'grievous loss' which therefore is protected by the Fourteenth Amendment. Not every loss, however 'grievous,' invokes the protection of the Due Process Clause. Its protections extend only to a deprivation by a State of 'life, liberty, or property.' And when a State law does operate to deprive a person of his liberty or property, the Due Process Clause is applicable even though the deprivation may not be 'grievous.' *Goss v. Lopez,* 419 U.S. 565, 576, 95 S.Ct. 729, 737, . . . '[T]o determine whether due process requirements apply in the first place, we look not to the 'weight' but to the *nature* of the interest at stake.' *Board of Regents v. Roth,* 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2705, . . . See *Ingraham v. Wright,* 430 U.S. 651, 672, 97 S.Ct. 1401, 1413, . . . ; *Meachum v. Fano,* 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, . . . ; *Goss v. Lopez, supra,* 419 U.S. at 575-576, 95 S.Ct. at 736-737.

"Clearly, New York has deprived nobody of his life in these cases. It seems to me just as clear that the State has deprived nobody of his liberty or property. Putting to one side the District Court's erroneous 'grievous loss' analysis, the appellees are left with very little ground on which to stand. Their argument seems to be that New York, by providing foster children with the opportunity to live in a foster home and to form a close relationship with foster parents, has created 'liberty' or 'property' that it may not withdraw without complying with the procedural safeguards that the Due Process Clause confers. But this Court's decision in *Meachum v. Fano, supra,* illustrates the fallacy of that argument.

"At issue in *Meachum* was a claim by Massachusetts State prisoners that they could not constitutionally be transferred to another institution with less favorable living conditions without a prior hearing that would probe the reasons for their transfer. In accord with previous cases, see, e.g., *Goss v. Lopez, supra; Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, . . . ; *Board of Regents v. Roth, supra; Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, . . . ; *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, . . . , the Court recognized that where State law confers a liberty or property interest, the Due Process Clause requires certain minimum procedures 'to ensure that the state-created right is not arbitrarily abrogated.' 427 U.S. at 226, 96 S.Ct. at 2539, quoting *Wolff, supra,* 418 U.S. at 557, 94 S.Ct. at 2975. But the predicate for invoking the Due Process Clause —the existence of state-created liberty or property — was missing in *Meachum* just as it is missing here. New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances. As was true of prison transfers in *Meachum,* transfers in and out of foster families 'are made for a variety of reasons and often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child].' 427 U.S. at 225, 96 S.Ct. at 2540.

"Similarly, New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely. Cf. *Perry v. Sindermann, supra,* 408 U.S. at 599-603, 92 S.Ct. at 2698-2700. The District Court in this litigation recognized as much, noting that the typical foster care contract gives the agency the right to recall the child 'upon request,' and commenting that the discretionary authority vested in the agency 'is on its face incompatible with plaintiffs' claim of legal entitlement.' 418 F.Supp. at 281. To be sure, the New York system has not operated perfectly. As the State legislature found, foster care has in many cases been unnecessarily protracted, no doubt sometimes resulting in the expectation on the part of some foster families indefinitely. But, as already noted, the New York Court of Appeals has unequivocally rejected the notion that under New York law prolonged third-party custody of children creates some sort of 'squatter's rights.' And, as this Court stated in *Perry v. Sindermann, supra,* 408 U.S. at 603, 92 S.Ct. at 2700, a mere subjective 'expectancy' is not liberty or property protected by the Due Process Clause.

"This is not to say that under the law of New York foster children are the pawns of the State, who may be whisked from family to family at the whim of State officials. The Court discusses in Part III of its opinion the various State and local procedures intended to assure that agency discretion is exercised in a manner consistent with the child's best interests. Unlike the prison transfer situation in *Meachum v. Fano,* it does appear that child custody decisions can be made 'for whatever reason or for no reason at all.' 427 U.S. at 228, 96 S.Ct. at 2540. But the protection that foster children have is simply the requirement of State law that decisions about their placement be determined in the light of their best interests. See, e.g., *Bennett v. Jeffreys,* . . . 387 N.Y.S.2d 821, 356 N.E.2d 277; *In re Jewish Child Care Assn. (Sanders),* . . . , 183 N.Y.S.2d 65, 156 N.E.2d 700; *State ex rel. Wallace v. Lhotan,* . . . , 380 N.Y.S.2d 250 (2d Dept), appeal dismissed and leave to appeal denied, . . . , 384 N.Y.S.2d 1027, 349 N.E.2d 882. This requirement is not 'liberty or property' protected by the Due Process Clause, and it confers no right or expectancy of any kind in the continuity of the relationship between foster parents and children. See, e.g., *Bennett, supra,* . . . , 387 N.Y.S.2d at 829, n. 2, 356 N.E.2d at 285, n. 2: 'Third-party custodians acquire 'rights' . . . only derivitively by virtue of the child's best interests being considered. . . . '

"What remains of the appellees' argument is the theory that the relation of the foster parent to the foster child may generate emotional attachments similar to those found in natural families. The Court surmises that foster families who share these attachments might enjoy the same constitutional interest in 'family privacy' as natural families. See, e.g., *Moore v. City of East Cleveland,* 431 U.S. at 504-505, 97 S.Ct. at 1938-1939 (plurality opinion of POWELL, J.); *Roe v. Wade,* 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727, . . . ; *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . ; *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . .

"On this score, the Court hypothesizes the case of 'a child [who] has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents. . . . ' *Ante.* at 2110. The foster family might then 'hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.' *Ibid.*

"But under New York's foster care laws, any case where the foster parents had assumed the

emotional role of the child's natural parents would represent not triumph of the system, to be constitutionally safeguarded from State intrusion, but a failure. The goal of foster care, at least in New York, is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home by giving him temporary shelter in a family setting. See Part I-A of the Court's opinion, *ante,* at 2099-2102. Thus, the New York Court of Appeals has recognized that the development of close emotional ties between foster parents and a child may hinder the child's ultimate adjustment in a permanent home, and provide a basis for the termination of the foster family relationship. *In re Jewish Child Care Assn. (Sanders), supra.* See, also, *State ex rel. Wallace v. Lhotan, supra.* Perhaps it is to be expected that children who spend unduly long stays in what should have been temporary foster care will develop strong emotional ties with their foster parents. But this does not mean, and I cannot believe, that such breakdowns of the New York system must be protected or forever frozen in their existence by the Due Process Clause of the Fourteenth Amendment.

"One of the liberties protected by the Due Process Clause, the Court has held, is the freedom to 'establish a home and bring up children.' *Meyer v. Nebraska, supra,* 262 U.S. at 399, 43 S.Ct. at 626. If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the State cannot enter.' *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. . . . But this constitutional concept is simply not in point when we deal with foster families as New York law has defined them. The family life upon which the State 'intrudes' is simply a temporary status which the State itself has created. It is a 'family life' defined and controlled by the law of New York, for which New York pays, and the goals of which New York is entitled to and does set for itself.

"For these reasons I concur in the judgment of the Court."

Specht v. Patterson

386 U.S. 605, 87 S.Ct. 1209 (1967)

CIVIL COMMITMENT - (Sex Crimes) - Social History — ***A person convicted of a sex crime and sentenced under the sex statute as dangerous to the public instead of the felony statute is entitled to a hearing as to whether he is in fact dangerous. The Court may consider a social history which describes a person's individual characteristics without showing it to the defendant.***

"Mr. Justice DOUGLAS delivered the opinion of the Court.

"We held in *Williams v. People of State of New York,* 337 U.S. 241, 69 S.Ct. 1079, . . . , that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed. We said:

> 'Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.' *Id.,* 249-250, 69 S.Ct. 1084.

"That was a case where at the end of the trial and in the same proceeding the fixing of the penalty for first-degree murder was involved — whether life imprisonment or death.

"The question is whether the rule of the *Williams* case applies to this Colorado case where petitioner, having been convicted for indecent liberties under one Colorado statute that carries a maximum sentence of 10 years . . . but not sentenced under it, may be sentenced under the Sex Offenders Act, . . . , for an indeterminate term of from one day to life without notice and full hearing. The Colorado Supreme Court approved the procedure, when it was challenged by habeas corpus (. . . , 385 P.2d 423) and on motion to set aside the judgment. . . . , 396 P.2d 838. This federal habeas corpus proceeding resulted, the Court of Appeals affirming dismissal of the writ, 10 Cir., 357 F.2d 325. The case is here on a petition for *certiorari,* 385 U.S. 969, 87 S.Ct. 516, . . .

"The Sex Offenders Act may be brought into play if the trial court 'is of the opinion that any *** person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.' Sec. 1. He then becomes punishable for an indeterminate term of from one day to life on the following conditions as specified in sec. 2:

> '(2) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court; and

'(3) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; whether or not the person should be committed to the Colorado State hospital or to the State home and training schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation.'

"This procedure was followed in petitioner's case; he was examined as required and a psychiatric report prepared and given to the trial judge prior to the sentencing. But there was no hearing in the normal sense, no right of confrontation and so on.

"Petitioner insists that this procedure does not satisfy due process because it allows the critical finding to be made under sec. 1 of the Sex Offenders Act (1) without a hearing at which the person so convicted may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary; and (2) on the basis of hearsay evidence to which the person involved is not allowed access.

"We adhere to *Williams v. People of State of New York, supra;* but we decline the invitation to extend it to this radically different situation. These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, . . . , and to the Due Process Clause. We hold that the requirements of due process were not satisfied here.

"The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact *(Vanderhoof v. People of State of Colorado,* . . . , 149, 380 P.2d 903, 904) that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm. *United States v. Brown,* 381 U.S. 437, 458, 85 S.Ct. 1707, 1720, . . .

"The Court of Appeals for the Third Circuit in speaking of a comparable Pennsylvania statute said:

'It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in State criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.' *United States ex rel. Gerchman v. Maroney,* 3 Cir., 355 F.2d 302, 312.

"We agree with that view. Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' *(Graham v. State of West Virginia,* 224 U.S. 616, 625, 32 S.Ct. 583, . . .) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' *Oyler v. Boles,* 368 U.S. 448, 452, 82 S.Ct. 501, 504, . . . ; *Chandler v. Fretag,* 348 U.S. 3, 8, 75 S.Ct. 1, . . . Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. The case is therefore quite unlike the Minnesota statute we considered in *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, Minn.,* 309 U.S. 270, 60 S.Ct. 523, . . . , where in a proceeding to have a person adjudged a 'psychopathic personality' there was a hearing where he was represented by counsel and could compel the production of witnesses on his behalf. *Id.,* at 275, 60 S.Ct. at 526. None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act. We therefore hold that it is deficient in due process as measured by requirement of the Fourteenth Amendment. *Pointer v. State of Texas,* 380 U.S. 400, 85 S.Ct. 1065, . . .

"Reversed."

Stanley v. Illinois

401 U.S. 645, 92 S.Ct. 1208 (1972)

UNWED FATHERS -Termination (Hearing Required) — ***An unwed father has the same rights as a married father to the custody of his children and may not be deprived of those rights without a hearing where his unfitness is proven.***

"(p. 1210) Mr. Justice WHITE delivered the opinion of the Court.

"Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley,* . . . , 256 N.E.2d 814 (Ill. 1970).

"Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted *certiorari,* 400 U.S. 1020, 91 S.Ct. 584, . . . (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers — whether divorced, widowed, or separated — and mothers — even if unwed — the benefit of the presumption that they are fit to raise their children.

"At the outset we reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, . . . (1969). Surely, in the case before us, if there is delay between the doing and the undoing, petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

"It is clear, moreover, that Stanley does not have the means at hand promptly to erase the adverse consequences of the proceeding in the course of which his children were declared wards of the State. It is first urged that Stanley could act to adopt his children. But under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children. Neither can we ignore that in the proceeding from which this action developed, the 'probation officer,' . . . , the assistant state's attorney, . . . , and the judge charged with the case, . . . , made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings. The Illinois

Supreme Court apparently recognized some or all of these considerations, because it did not suggest that Stanley's case was undercut by his failure to petition for adoption.

"Before us, the State focuses on Stanley's failure to petition for 'custody and control' — the second route by which, it is urged, he might regain authority for his children. Passing the obvious issue whether it would be futile or burdensome for an unmarried father — without funds and already once presumed unfit — to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such cause as must be shown in a neglect proceeding against a parent. . . . He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. . . . Obviously then, even if Stanley were a mere step away from 'custody and control,' to give an unwed father only 'custody and control' would still be to leave him seriously prejudiced by reason of his status.

"We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

"Illinois has two principal methods of removing nondelinquent children from the homes of their parents. In a dependency proceeding it may demonstrate that the children are wards of the State because they have no surviving parent or guardian. . . . In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care. . . .

"The State's right — indeed, duty — to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers State officials to circumvent neglect proceedings on the theory that an unwed father is not a 'parent' whose existing relationship with his children must be considered. 'Parents,' says the State, 'means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent,' . . . , but the term does not include unwed fathers.

"Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as 'irrelevant.'

"In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' *Cafeteria and Restaurant Workers Union, Etc. v. McElroy,* 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, . . . (1961). That case explained that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' *Id.,* at 895, 81 S.Ct. at 1748; *Goldberg v. Kelly,* 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, . . .

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper,* 336 U.S. 77, 95, 60 S.Ct. 448, 458, . . . (1949) (FRANKFURTER, J., concurring).

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, . . . (1923); 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, . . . (1942); and '[r]ights far more precious . . . than property rights,'

May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, . . . (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.' *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, . . . (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra,* 316 U.S. at 541, 62 S.Ct. at 1113, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496, 85 S.Ct. 1678, . . . (1965) (GOLDBERG, J., concurring).

"Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a State statue denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy v. Louisiana,* 391 U.S. 68, 71-72, 88 S.Ct. 1509, 1511, . . . (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' *Glona v. American Guarantee & Liability Ins. Co.,* 391 U.S. 73, 75-76, 88 S.Ct. 1515, 1516, . . . (1968).

"These authorities make it clear that, at least, Stanley's interest in retaining custody of his children is cognizable and substantial.

"For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect 'the moral, emotional, mental, and physical welfare of the minor and the best interest of the community' and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . ' . . . These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.

"But we are here not asked to evaluate the legitimacy of the State ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the State interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separated children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separated his from his family.

"In *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, . . . (1971), we found a scheme pregnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia License suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.

"It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicated that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been further by leaving custody in him.

"*Carrington v. Rash,* 380 U.S. 89, 85 S.Ct. 775, . . . (1965), dealt with a similar situation. There we recognized that Texas had a powerful interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in State affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when 'more precise tests,' *id.,* at 95, 85 S.Ct. at 779, were available to distinguish members of this latter group. 'By forbidding a soldier ever to controvert the presumption of nonresidence,' *id.,* at 96, 85 S.Ct. at 780, the State, we said, unjustifiably effected

a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.

"We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But [the challenged] provision goes beyond such rules. '[T]he presumption here created is . . . definitely conclusive — incapable of being overcome by proof of the most positive character.' *Id.*, at 96, 85 S.Ct. at 780. 'All servicemen not residents of Texas before induction,' we concluded, 'come within the provision's sweep. Not one of them can ever vote in Texas, no matter what their individual qualifications.' *Ibid.* We found such a situation repugnant to the Equal Protection Clause.

"Despite *Bell* and *Carrington,* it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt effacious procedures to achieve legitimate State ends is a proper State interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

"*Bell v. Burson* held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof in specific cases before licenses were suspended.

"We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children in *di minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

"The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the State Courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

"The judgment of the Supreme Court of Illinois is reversed and the case remanded to that court for proceedings not inconsistent with this opinion. It is so ordered.

"Reversed and remanded."

"Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

"Mr. Justice DOUGLAS joins in Parts I and II of this opinion.

"Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN concurs, dissenting.

"The only constitutional issue raised and decided in the Courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of 'parents' violates the Equal Protection Cause. We granted *certiorari* to consider whether the Illinois Supreme Court

properly resolved that equal protection issue when it unanimously upheld the statute against petitioner Stanley's attack.

"No due process issue was raised in the State Courts; and no due process issue was decided by any State Court. As Mr. Justice DOUGLAS said for this Court in *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160, 65 S.Ct. 573, 577, . . . (1945), 'Since the [State] Supreme Court did not pass on the question, we may not do so.' . . .

. . .

"(p. 1219) In regard to the only issue that I consider properly before the Court, I agree with the State's argument that the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings. Quite apart from the religious or quasi-religious connotations that marriage has — and has historically enjoyed — for a large proportion of the Nations' citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never enters such a relationship. The record is silent as to whether they ever privately exchanged such promises as would have bound them in marriage under the common-law. See *Cartwright v. McGowan,* . . . , 12 N.E. 737, 739 (1887). In any event, Illinois has not recognized common-law marriages since 1905. . . . Stanley did not seek the burdens when he could have freely assumed them.

"Where there is a valid contract of marriage, the law of Illinois presumes that the husband is the father of any child born to the wife during the marriage; as the father, he has legally enforceable rights and duties with respect to that child. When a child is born to an unmarried woman, Illinois recognizes the readily identifiable mother, but makes no presumption as to the identity of the biological father. It does, however, provide two ways, one voluntary and one involuntary, in which that father may be identified. First, he may marry the mother and acknowledge the child as his own; this has the legal effect of legitimating the child and gaining for the father full recognition as a parent. . . . Second, a man may be found to be the biological father of the child pursuant to a paternity suit initiated by the mother; in this case, the child remains illegitimate, but the adjudicated father is made liable for the support of the child until the latter attains age 18 or is legally adopted by another. . . .

"Stanley argued before the Supreme Court of Illinois that the definition of 'parents,' . . . , as including 'the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, [or] . . . any adoptive parent,' violates the Equal Protection Clause in that it treats unwed mothers and unwed fathers differently. Stanley then enlarged upon his equal protection argument when he brought the case here; he argued before this Court that Illinois is not permitted by the Equal Protection Clause to distinguish between unwed fathers and any of the other biological parents included in the statutory definition of legal 'parents.'

"The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identity and locate. Many of them will deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

"Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the sociological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often causal encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose

objective is not to penalize unwed parents but to further the welfare of illegitimate children in the fulfillment of the State's obligations as *parens patriae.*

"Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children. Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of 'parents' so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

"Indeed, the nature of Stanley's own desires is less than absolutely clear from the record in this case. Shortly after the death of the mother, Stanley turned these two children over to the care of a Mr. and Mrs. Ness; he took no action to gain recognition of himself as a father, through adoption, or as a legal custodian, through a guardianship proceeding. Eventually it came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children; it was only then that the dependency proceeding here under review took place and that Stanley made himself known to the Juvenile Court in connection with these two children. Even then, however, Stanley did not ask to be charge with the legal responsibility for the children. He asked only that such legal responsibility be given to no one else. He seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.

"Not only, then, do I see no ground for holding that Illinois' statutory definition of 'parents' on its face violates the Equal Protection Clause; I see no ground for holding that any constitutional right of Stanley has been denied in the application of that statutory definition in the case at bar.

. . . "

Stanton v. Stanton

421 U.S. 7, 95 S.Ct. 1373 (1975)

SEX DISCRIMINATION - (Age) — ***It is an unconstitutional discrimination to set the age for maturely at 18 for girls and 21 for boys.***

"(p. 1375) Mr. Justice BLACKMUN delivered the opinion of the Court.

"This case presents the issue whether a State statute specifying for males a greater age of majority than it specifies for females denies, in the context of a parent's obligation for support payments for his children, the equal protection of the laws guaranteed by sec. 1 of the Fourteenth Amendment.

"Appellant Thelma B. Stanton and appellee James Lawrence Stanton, Jr., were married at Elko, Nev., in February 1951. At the suit of the appellant, they were divorced in Utah on November 29, 1960. They have a daughter, Sherri Lyn, born in February 1953, and a son Rick Arlund, born in January 1955. Sherri became 18 on February 12, 1971, and Rick on January 29, 1973.

"During the divorce proceedings in the District Court of Salt Lake County, the parties entered into a stipulation as to property, child support, and alimony. The court awarded custody of the children to their mother and incorporated provisions of the stipulation into its findings and conclusions and into its decree of divorce. . . .

"When Sherri attained 18 the appellee discontinued payments for her support. In May 1973, the appellant moved the Divorce Court for entry of judgment in her favor and against appellee for, among other things, support for the children for the periods after each respectively attained the age of 18 years. The court concluded that on February 12, 1971, Sherri 'became 18 years of age, and under the provisions of [sec.] 15-2-1 Utah Code Annotated 1953, thereby attained her majority. Defendant is not obligated to plaintiff for maintenance and support of Sherri Lyn Stanton since that date.' App. 23. An order denying the appellant's motion was entered accordingly. *Id.,* at 24-25.

"The appellant appealed to the Supreme Court of Utah. She contended, among other things, that Utah Code Ann. sec. 15-201 (1953) ** to the effect that the period of minority for males extends to age 21 and for females to age 18, is invidiously discriminatory and serves to deny due process and equal protection of the laws, in violation of the Fourteenth Amendment and of the corresponding provisions of the Utah Constitution, namely, Art. I, secs. 7 and 24, and Art IV, sec. 1. On this issue, the Utah Court affirmed. . . . , 517 P.2d 1010 (Utah 1974). The court acknowledged: 'There is no doubt that the questioned statute treats men and women differently,' but said that people may be treated differently 'so long as there is a reasonable basis for the classification, which is related to the purposes of the Act, and it applies equally and uniformly to all persons within the class.' *Id.,* at 318, 517 P.2d at 1012. The court referred to what it called some 'old notions,' namely, 'that generally it is the man's primary responsibility to provide a home and its essentials,' *ibid.;* that 'it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities,' *id.,* at 319, 517 P.2d at 1012; that 'girls tend generally to mature physically, emotionally, and mentally before boys;' and that 'they generally tend to marry earlier,' *ibid.* It concluded:

> '[I]t is our judgment that there is no basis upon which we would be justified in concluding that the statute is so beyond a reasonable doubt in conflict with constitutional provisions that it should be stricken down as invalid.' *Id.,* at 319, 517 P.2d at 1013.

If such a change were desirable, the court said, 'that is a matter which should commend itself to the attention of the legislature.' *Id.,* at 320, 517 P.2d at 1013. The appellant, thus, was held not entitled to support for Sherri for the period after she attained 18, but was entitled to support for Rick 'during his minority' unless otherwise ordered by the trial court. *Ibid.,* 517 P.2d at 1014.

. . .

"(p. 1377) We turn to the merits. The appellant argues that Utah's statutory prescription establishing different ages of majority for males and females denies equal protection; that it is a classification based solely on sex and affects a child's 'fundamental right' to be fed, clothed, and sheltered by its parents; that no compelling State interest supports the classification and that the statute can withstand no judicial scrutiny, 'close' or otherwise, for it has no relationship to any ascertainable legislative objective. The appellee contends that the test is that of rationality and that the age classification has a rational basis and endures any attack based on equal protection.

"We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect. See *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, . . . (1975); *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, . . . (1971).

"*Reed,* we feel, is controlling here. That case presented an equal protection challenge to a provision of the Idaho Probate Code which gave preference to males over females when persons otherwise of the same entitlement applied for appointment as administrator of a decedent's estate. No regard was paid under the statute to the applicants' respective individual qualifications. In upholding the challenge, the Court reasoned that the Idaho statute accorded different treatment on the basis of sex and that it 'thus establishes a classification subject to scrutiny under the Equal Protection Clause.' *Id.,* at 75, 92 S.Ct. at 253. The Clause, it was said, denies to States 'the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' *Id.,* at 75-76, 92 S.Ct. at 254. A classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 561, . . . (1920).' *Id.,* 404 U.S. at 76, 92 S.Ct. at 254. It was not enough to save the statute that among its objectives were the elimination both of an area of possible family controversy and of a hearing on the comparative merits of petitioning relatives.

"The test here, then, is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. We conclude that it does not. It may be true, as the Utah Court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males. The last mentioned factor, however, under the Utah statute loses, whatever weight it otherwise might have, for the statute States that 'all minors obtain their majority by marriage;' thus minority, and all that goes with it, is abruptly lost by marriage of a person of either sex at whatever tender age the marriage occurs.

"Notwithstanding the 'old notions' to which the Utah Court referred, we perceive nothing rational in the distinction drawn by sec. 15-2-1 which, when related to the divorce decree, results in the appellee's liability for support for Sherri only to age 18 but for Rick to age 21. This imposes 'criteria wholly unrelated to the objective of that statute.' A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. See *Taylor v. Louisiana,* 419 U.S. 522, 535, n. 17, 95 S.Ct. 692, 700, . . . (1975). Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving; if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance,

particularly when marriage, as the statute provides, terminates minority for a person of either sex.

. . .

"Our conclusion that in the context of child support the classification effectuated by sec. 15-2-1 denies the equal protection of the laws, as guaranteed by the Fourteenth Amendment, does not finally resolve the controversy as between this appellant and this appellee. With the age differential held invalid, it is not for this Court to determine *when* the appellee's obligation for his children's support, pursuant to the divorce decree, terminates under Utah law. The appellant asserts that, with the classification eliminated, the common-law applies and that at common-law the age of majority for both males and females is 21. The appellee claims that any unconstitutional inequality between males and females is to be remedied by treating males as adults at age 18, rather than by withholding the privileges of adulthood from women until they reach 21. This plainly is an issue of State law to be resolved by the Utah Courts on remand; the issue was noted, incidentally, by the Supreme Court of Utah. . . . , 517 P.2d at 1013. The appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit. See *Harrigfeld v. District Court,* . . . , 511 P.2d 822 (Idaho 1973); *Commonwealth v. Butler,* . . . , 328 S.2d 851 (Pa. 1974); *Skinner v. Oklahoma,* 316 U.S. 535, 542-543, 62 S.Ct. 1110, 1113-1114, . . . (1942).

"The judgment of the Supreme Court of Utah is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

"It is so ordered.

"Judgment reversed and case remanded.

"Mr. Justice REHNQUIST, dissenting.

"The Court views this case as requiring a determination of whether the Utah statute specifying that males must reach a higher age than females before attaining their majority denies females the equal protection of the laws guaranteed by sec. 1 of the Fourteenth Amendment to the United States Constitution. The Court regards the constitutionality of Utah Code Ann. sec. 15-2-1 (1953) as properly at issue because of the manner in which the Supreme Court of Utah approached and decided the case. But this Court is subject to constraints with respect to constitutional adjudication which may well not bind the Supreme Court of Utah. This Court is bound by the rule, 'to which it has rigidly adhered, . . . never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,' *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, . . . (1955), and we try to avoid deciding constitutional questions which 'come to us in highly abstract form,' *Rescue Army v. Municipal Court,* 331 U.S. 549, 575, 67 S.Ct. 1409, 1423, . . . (1947). Fidelity to these longstanding rules dictates that we have some regard for the factual background of this case, as fully outlined in the Court's opinion, before deciding the constitutional question that has been tendered to us."

"We examine initially the context of the PKPA with an eye toward determining Congress' perception of the law that it was shaping or reshaping. See *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 378, 102 S.Ct. 1825, 1839, . . . (1982); *Cort v. Ash, supra,* 422 U.S. at 69, 95 S.Ct. at 2084. At the time Congress passed the PKPA, custody orders held a peculiar status under the full faith and credit doctrine, which requires each State to give effect to the judicial proceedings of other States, see U.S. Const., Art. IV, sec. 1; 28 U.S.C. sec. 1738. The anomaly traces to the fact that custody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements, see, e.g., *Hooks v. Hooks,* 771 F.2d 935, 948 (CA6 1985); *McDougall v. Jenson,* 596 F.Supp. 680, 684-685 (ND Fla. 1984), aff'd 786 F.2d 1465 (CA11), cert. denied, 479 U.S. —-, 107 S.Ct. 207, . . . (1986), and this Court had declined expressly to settle the question. See *Ford v. Ford,* 371 U.S. 187, 192, 83 S.Ct. 273, 276, . . . (1962). Even if custody orders were subject to full faith and credit clause obliges States only accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest. See *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 614-615, 67 S.Ct. 903, 906, . . . (1947). For these reasons, a

parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to re-litigate the issue. This circumstance contributed to widespread jurisdictional deadlocks like this one, and more importantly, to a national epidemic of parental kidnapping. At the time the PKPA was enacted, sponsors of the Act estimated that between 25,000 and 100,000 children were kidnapped by parents who had been unable to obtain custody in a legal forum. See Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcommittee on Criminal Justice of the Judiciary Committee and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources, 96th Cong., 2d Sess., 10 (1980) (hereinafter PKPA Joint Hearing) (statement of Sen. Malcolm Wallop).

"A number of States joined in an effort to avoid these jurisdictional conflicts by adopting the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. secs. 1-28 (1979). The UCCJA prescribed uniform standards for deciding which State could make a custody determination and obligated enacting States to enforce the determination made by the State with proper jurisdiction. The project foundered, however, because a number of States refused to enact the UCCJA while others enacted it with modifications. In the absence of uniform national standards for allocating and enforcing custody determinations, noncustodial parents still had reason to snatch their children and petition the courts of any of a number of haven States for sole custody.

"The context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations. Statements made when the Act was introduced in Congress forcefully confirm that suggestion. The sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders made in accordance with the terms of the UCCJA. As Deputy Attorney General Michel testified:

> '[C]urrent law in many States encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another State to re-litigate the custody issue in a new forum. This kind of 'forum shopping' is possible because child custody orders are subject to modification to conform with changes in circumstances. Consequently, a court deciding a custody case is not, as a Federal constitutional requirement of the full faith and credit clause, bound by a decree by a court of another State even where the action involves the same parties.
>
> . . .
>
> 'In essence [the PKPA] would impose on the States a Federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other States. Such legislation would, in effect, amount to Federal adoption of key provisions of the UCCJA for all States and could eliminate the incentive for one parent to remove a minor child to another jurisdiction.' PKPA Joint Hearing 48.

"The significance of Congress' full faith and credit approach to the problem of child snatching is that the Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action. *Minnesota v. Northern Securities Co.,* 194 U.S. 48, 72, 24 S.Ct. 598, 605, . . . (1904); see 13B, C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure sec. 3563, p. 50 (1984). Rather, the clause 'only prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.' *Northern Securities, supra,* at 72, 24 S.Ct. at 605. Because Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations, the Act is most naturally construed to furnish a rule of decision for courts to use in adjudicating custody disputes and not to create an entirely new cause of action. It thus is not compatible with the purpose and context of the legislative scheme to infer a private cause of action. See *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2088.

"The language and placement of the statute reinforce this conclusion. The PKPA, 28 U.S.C. sec. 1738A, is an addendum to the full faith and credit statute, 28 U.S.C. sec. 1738. This fact alone is strong proof that the Act is intended to have the same operative effect as the full faith and credit statute. Similarly instructive is the heading to the PKPA: 'Full faith and credit

given to child custody determinations.' As for the language of the Act, it is addressed entirely to States and State Courts. Unlike statutes that explicitly confer a right on a specified class of persons, the PKPA is a mandate directed to State Courts to respect the custody decrees of sister States. See *Cannon v. University of Chicago,* 441 U.S. at 690, n. 13, 99 S.Ct. at 1954, n. 13; *Cort v. Ash, supra,* 422 U.S. at 81-82, 95 S.Ct. at 2089-2090. We agree with the Court of Appeals that '[i]t seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to State Courts to give full faith and credit to the child custody decrees of other States, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.' 798 F.2d at 1556.

Thompson v. Thompson

108 S.Ct. 513 (1988)

KIDNAPPING BY PARENT — ***The federal Parental Kidnapping Prevention Act did not confer jurisdiction on the federal courts to determine which of two conflicting State custody orders prevailed nor did it furnish an implied private cause of action in Federal Courts.***

"(p. 514) Justice MARSHALL delivered the opinion of the Court.

"We granted *certiorari* in this case to determine whether the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. sec. 1738A, furnished an implied cause of action in federal court to determine which of two conflicting State custody decisions is valid.

"The Parental Kidnapping Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. In order for a State Court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in sec. 1738A(c)(2) must be met. Briefly put, these conditions authorize the State Court to enter a custody decree if the child's home is or recently has been the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, sec. 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

"As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to 'avoid jurisdictional competition and conflict between State Courts.' . . . This case arises out of a jurisdictional stalemate that came to pass notwithstanding the strictures of the Act. In July 1978, respondent Susan Clay (then Susan Thompson) filed a petition in Los Angeles Superior Court asking the Court to dissolve her marriage to petitioner David Thompson and seeking custody of the couple's infant son, Matthew. The Court initially awarded the parents joint custody of Matthew, but that arrangement became infeasible when respondent decided to move from California to Louisiana to take a job. The Court then entered an order providing that respondent would have sole custody of Matthew once she left for Louisiana. This state of affairs was to remain in effect until the court investigator submitted a report on custody after which the Court intended to make a more studied custody determination. See App. 6.

"Respondent and Matthew moved to Louisiana in December of 1980. Three months later, respondent filed a petition in Louisiana State Court for enforcement of the California custody decree, judgment of custody, and modification of petitioner's visitation privileges. By order dated April 7, 1981, the Louisiana Court granted the petition and awarded sole custody of Matthew to respondent. Two months later, however, the California Court, having received and reviewed its investigator's report, entered an order awarding sole custody of Matthew to petitioner. Those arose the current impasse.

"In August 1983, petitioner brought this action in the District Court for the Central District of California. Petitioner requested an order declaring the Louisiana decree invalid and the California decree valid, and enjoining the enforcement of the Louisiana decree. Petitioner did not attempt to enforce the California decree in a Louisiana State Court before he filed suit in federal court. The District Court granted respondent's motion to dismiss the complaint for lack of subject matter and personal jurisdiction. . . . The Court of Appeals for the Ninth Circuit affirmed. Although it disagreed with the District Court's jurisdictional analyses, the Court of

Appeals affirmed the dismissal of the complaint on the ground that petitioner had failed to state a claim upon which relief could be granted. 798 F.2d (CA9 1986). Canvassing the background, language, and legislative history of the PKPA, the Court of Appeals held that the Act does not create a private right of action in federal court to determine the validity of two conflicting custody decrees. *Id.,* at 1552-1559. . . .

"In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, . . . (1975), along with other tools of statutory construction. See *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 535-536, 104 S.Ct. 831, 838, . . . (1984); *California v. Sierra Club,* 451 U.S. 287, 293, 101 S.Ct. 1775, 1779, . . . (1981); *Touche Ross & Co. v. Reddington,* 442 U.S. 560, 575-576, 99 S.Ct. 2479, 2488-2489, . . . (1979). Our focus on congressional intent does not mean that we require evidence that members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, 'the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.' *Cannon v. University of Chicago,* 441 U.S. 677, 694, 99 S.Ct. 1946, 1956, . . . (1979). We therefore have recognized that Congress' 'intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.' *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 18, 100 S.Ct. 242, 246, . . . (1979). The intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.' *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 94, 101 S.Ct. 1571, 1582, . . . (1981). In this case, the essential predicate for implication of a private remedy plainly does not exist. None of the factors that have guided our inquiry in this difficult area points in favor of inferring a private cause of action. Indeed, the context, language, and legislative history of the PKPA all point sharply away from the remedy petitioner urges us to infer.

"Finally, the legislative history of the PKPA provides unusually clear indication that Congress did not intend the federal courts to play the enforcement role that petitioner urges. Two passages are particularly revealing. The first of these is a colloquy between Congressmen Conyers and Fish. Congressman Fish had been the sponsor of a competing legislative proposal — ultimately rejected by Congress — that would have extended the District Courts' diversity jurisdiction to encompass actions for enforcement of State custody orders. In the following exchange, Congressman Conyers questioned Congressman Fish about the differences between his proposal and 'the Bennett proposal,' which was a precursor to the PKPA.

'*Mr. Conyers:* Could I just interject, the difference between the Bennett proposal and yours: You would have, enforcing the full faith and credit provision, the parties removed to a Federal court. Under the Bennett provision, his bill would impose the full faith and credit enforcement on the State Court.

'It seems to me that that is a very important difference. The Federal jurisdiction, could it not, Mr. Fish, result in the Federal court litigating between two State Court decrees; whereas, in an alternate method previously suggested, we would be imposing the responsibility of the enforcement upon the State Court, and thereby reducing, it seems to me, the amount of litigation.

'Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?

'*Mr. Fish:* Well, I really think that it is easier on the parent that has custody of the child to go to the nearest federal District Court. . . .

'*Mr. Conyers:* Of course you know that the federal courts have no experience in these matters, and they would be moving into this other area. I am just thinking of the fact that they have [many areas of federal concern and] on the average of a 21-month docket, you would now be imposing custody matters which it seems might be handled in the courts that normally handle

that . . . ' Parental Kidnapping: Hearing on H.R. 1290 Before the Subcommittee on the Judiciary, 96th Cong., 2d Sess., 14 (1980).

This exchange suggests that Congress considered and rejected an approach to the problem that would have resulted in a '[f]ederal court litigating between two State Court decrees.' *Ibid.*

"The second noteworthy entry in the legislative history is a letter from then Assistant Attorney General Patricia Wald to the Chairman of the House Judiciary Committee, which was referred to extensively during the debate on the PKPA. The letter outlines a variety of solutions to the child-snatching problem. It specifically compared proposals that would 'grant jurisdiction to the federal courts to enforce State custody decrees' with an approach, such as was proposed in the PKPA, that would 'impose on states a federal duty, under enumerated standards derived generally from the UCCJA, to give full faith and credit to the custody decrees of other States.' Addendum to Joint Hearing 103. The letter endorsed the full faith and credit approach that eventually was codified in the PKPA. More importantly, it 'strongly oppose[d] . . . the creation of a federal forum for resolving custody disputes.' *Id.*, at 108. Like Congressman Conyers, the Justice Department reasoned that federal enforcement of State custody decrees would increase the workload of the federal courts and entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States. That the views of the Justice Department and Congressman Conyers prevailed, and that Congress explicitly opted for a full faith and credit approach over reliance on enforcement by the federal courts, provide strong evidence against inferring a federal cause of action. Cf. *Cort v. Ash,* 422 U.S. at 82, 95 S.Ct. at 2090 (Congressional determination is dispositive).

"Petitioner discounts these portions of the legislative history. He argues that the cause of action that he asks us to infer arises only in cases of an actual conflict between two State custody decrees, and thus is substantially narrower than the cause of action proposed by Congressman Fish and rejected by Congress. The Fish bill would have extended federal-diversity jurisdiction to permit federal courts to enforce custody orders in the first instance, before a second State had created a conflict by refusing to do so. This cause of action admittedly is farther reaching than that which we reject today. But the considerations that prompted Congress to reject the Fish bill also militate against the more circumscribed role for the federal courts that petitioner proposes. See *Rogers v. Platt,* 259 U.S.App.D.C. 154, 164, 814 F.2d 683, 693 (1987). Instructing the federal courts to play Solomon where two State Courts have issued conflicting custody orders would entangle them in traditional State law questions that they have little expertise to resolve. This is a cost that Congress made clear it did not want the PKPA to carry.

"In sum, the context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting State custody decrees is valid. Against this impressive evidence, petitioner relies primarily on the argument that failure to infer a cause of action would render the PKPA nugatory. We note, as a preliminary response, that ultimate review remains available in this Court for truly intractable jurisdictional deadlocks. In addition, the unspoken presumption in petitioner's argument is that the States are either unable or unwilling to enforce the provisions of the Act. This is a presumption we are not prepared to indulge. State Courts faithfully administer the Full Faith and Credit Clause every day; now that Congress has extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant. Should State Courts prove as obstinate as petitioner predicts, Congress may choose to revisit the issue. But any more radical approach to the problem will have to await further legislative action; we 'will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.' *California v. Sierra Club,* 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, . . . (1981). The judgment of the Court of Appeals is affirmed.

"It is so ordered.

"Justice O'CONNOR, concurring in part and concurring in the judgment.

"For the reasons expressed by Justice SCALIA in Part I of his opinion in this case, I join all but the first full paragraph of Part II of the Court's opinion and judgment.

"Justice SCALIA, concurring in the judgment.

"I write separately because in my view the Court is not being faithful to current doctrine in its dictum denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, . . . (1975), as though its

analysis had not been effectively overruled by our later opinions. I take the opportunity to suggest, at the same time, why in my view the law revision that the Court's dicta would undertake moves in precisely the wrong direction.

"I agree that the Parental Kidnapping Prevention Act, 28 U.S.C. sec. 1738A (1982), does not create a private right of action in federal court to determine which of two conflicting child custody decrees is valid. I disagree, however, with the portion of the Court's analysis that flows from the following statement:

> 'Our focus on congressional intent does not mean that we require evidence that members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action.

I am at a loss to imagine what congressional intent to create a private right of action might mean, if it does not that Congress had in mind the creation of a private right of action. Our precedents, moreover, give no indication of a secret meaning, but to the contrary seem to use 'intent' to mean 'intent.' For example:

> '[T]he focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn. Inc. v. Coutu,* 450 U.S. [754], at 771-772 [101 S.Ct. 1451, at 1462, . . . (1981)]; *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. at 23-24, [100 S.Ct. at 249]; *Touche Ross & Co. v. Reddington,* [442 U.S.] at 575-576, [99 S.Ct. at 2488-2489]. The federal judiciary will not engraft a remedy on a statue, no matter how salutary, that Congress did not intend to provide.

California v. Sierra Club, 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, . . . (1981) . . . We have said, to be sure, that the existence of intent may be inferred from various indicia; but that is worlds apart from today's delphic pronouncement that intent is required but need not really exist.

"I also find misleading the Court's statement that, in determining the existence of a private right of action, 'we have relied on the four factors set out in *Cort v. Ash,* . . . along with other tools of statutory construction.' *Ante,* at 516. That is not an accurate description of what we effectively overrule in the *Cort v. Ash* analysis in *Touch Ross & Co. v. Reddington,* 442 U.S. 560, 575-76, 99 S.Ct. 2479, 2488-89, . . . (1979) and *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 18, 100 S.Ct. 242, 246, . . . (1979), converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence. Compare *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2088, with *Transamerica,* 444 U.S. at 23-24, 100 S.Ct. at 249.

"Finally, the Court's opinion conveys a misleading impression of current law when it proceeds to examine the 'context' of the legislation for indication of intent to create a private right of action, after having found no such indication in either text or legislative history. In my view that examination is entirely superfluous, since context alone cannot suffice. We have held context to be relevant to our determination in only two cases —both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment, had been held to create private rights of action. See *Cannon v. University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, . . . (1979); *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 102 S.Ct. 1825, . . . (1982). Since this is not a case where such textual support exists, or even where there is any support in legislative history, the 'context' of the enactment is immaterial.

"Contrary to what the language of today's opinion suggests, this Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since Justice CLARK's opinion for the Court in *J. I. Case Co. v. Borak,* 377 U.S. 426, 84 S.Ct. 1555, . . . (1964), we have twice narrowed the test for implying a private right, first in *Cort v. Ash, supra,* itself, and then again in *Touche Ross & Co. v. Reddington, supra,* and *Transamerica Mortgage Advisers, Inc. v. Lewis, supra.* See, also, *Cannon v. University of Chicago,* 441 U.S. 677, 730, 99 S.Ct. 1946, 1974-1975, . . . (1979) (POWELL, J. dissenting); and *California v. Sierra Club,* 451 U.S. 287, 301, 101 S.Ct. 1775, 1783, . . . (1981) . . . The recent history of our holdings is one of repeated rejection of claims of an implied right. This has been true in nine of eleven recent private right of action cases heard by this Court, including the instant case. See *Touche Ross, supra; Transamerica, supra; University Research Assn. Inc. v. Coutu,* 450 U.S. 754, 101 S.Ct.

1451, . . . (1981); *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 91-94, 101 S.Ct. 1571, 1580-1581, . . . (1981); *California v. Sierra Club, supra; Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 639-640, 101 S.Ct. 2061, 2066-2067, . . . (1981); *Middlesex County Sewage Authority v. National Sea Clammers Assn.,* 453 U.S. 1, 13-18, 101 S.Ct. 2615, 2622-2625, . . . (1981); *Daily Income Fund v. Fox,* 464 U.S. 523, 535-536, 104 S.Ct. 831, 838, . . . (1984); and *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 145-148, 105 S.Ct. 3085, 3092-3094, . . . (1985). But see *Merrill Lynch, supra;* and *Cannon, supra.* The Court's opinion exaggerates the difficulty of establishing an implied right when it surmises that '[t]he implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action.' *Ante,* at 516. That statement rests upon the erroneous premise that one never implies anything except when he forgets to say it ex[pressly]. It is true, however, that the congressional intent test for implying private rights of action as it has evolved since the repudiation of *Cort v. Ash* is much more stringent than the Court's dicta in the present case suggests.

"I have found the Court's dicta in the present case particularly provocative of response because it is my view that, if the current state of the law were to be changed, it should be moved in precisely the opposite direction — away from our current congressional intent test to the categorical position that federal private rights of action will not be implied.

"As Justice POWELL observed in his dissent in *Cannon, supra,* 441 U.S. at 730-731, 99 S.Ct. at 1975;

> 'Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction, (footnote omitted).

It is, to be sure, not beyond imagination that in a particular case Congress may intend to create a private right of action, but choose to do so by implication. One must wonder, however, whether the good produced by a judicial rule that accommodates this remote possibility is outweighed by its adverse effects. An enactment by implication cannot realistically be regarded as the product of the difficult law-making process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen, *ante,* at 519, are frail substitute for bicameral vote upon the text of a law and its presentment to the President. See generally, *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, (1983). It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

"I suppose all this could be said, to a greater or lesser degree, of *all* implications that courts derive from statutory language, which are assuredly numerous as the stars. But as the likelihood that Congress would leave the matter to implication decreases, so does the justification for bearing the risk of distorting the constitutional process. A legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured.

"If we were to announce a flat rule that private rights of action will not be implied in statutes hereafter enacted, the risk that that course would occasionally frustrate genuine legislative intent of minimal to virtually zero. It would then be true that the opportunity for frustration of intent 'would be a virtual dead letter[,] . . . limited to . . . drafting errors when Congress simply forgot to codify its . . . intention to provide a cause of action.' *Ante,* at 516. I believe, moreover, that Congress would welcome the certainty that such a rule would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.

"If a change is to be made, we should get out of the business of implied private rights of action altogether."

Vitek v. Jones

445 U.S. 480, 100 S.Ct. 1254 (1980)

CIVIL COMMITMENT - (Prison/Hospital Transfer) — ***A transfer from a State prison to a State mental hospital involves a sufficient additional loss of liberty to require due process protections.***

"(p. 1258) Mr. Justice WHITE delivered the opinion of the Court, except as to Part IV-B.

"The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a State mental hospital for treatment of a mental disease of defect.

"Nebraska Rev.Stat. sec. 83-176(2) (1976) authorizes the Director of Correctional Services to designate any available, suitable, and appropriate residence facility or institution as a place of confinement for any State prisoner and to transfer a prisoner from one place of confinement to another. Section 83-180(1), however, provides that when a designated physician or psychologist finds that a prisoner 'suffers from a mental disease or defect' and 'cannot be given proper treatment in that facility,' the director may transfer him for examination, study, and treatment to another institution within or without the Department of Correction Services. Any prisoner so transferred to a mental hospital is to be returned to the Department if, prior to the expiration of his sentence, treatment is no longer necessary. Upon expiration of sentence, if the State desires to retain the prisoner in a mental hospital, civil commitment proceedings must be promptly commenced. Sec. 83-180(3).

"On May 31, 1974, Jones was convicted of robbery and sentenced to a term of three-to-nine years in State prison. He was transferred to the penitentiary hospital in January 1975. Two days later he was placed in solitary confinement, where he set his mattress on fire, burning himself severely. He was treated in the burn unit of a private hospital. Upon his release and based on findings required by sec. 83-180 that he was suffering from a mental illness or defect and could not receive proper treatment in the penal complex, he was transferred to the security unit of the Lincoln Regional Center, a State mental hospital under the jurisdiction of the Department of Public Institutions.

"Jones then intervened in this case, which was brought by other prisoners against the appropriate State officials (the State) challenging on procedural due process grounds the adequacy of the procedures by which the Nebraska statutes permit transfers from the prison complex to a mental hospital. On August 17, 1976, a three-judge District Court . . . denied the State's motion for summary judgment and trial ensued. On September 12, 1977, the District Court declared sec. 83-180 unconstitutional as applied to Jones, holding that transferring Jones to a mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decision-maker, a written statement by the fact-finder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. *Miller v. Vitek,* 437 F.Supp. 569 (D.C.Neb. 1977). Counsel was requested to suggest appropriate relief.

"In response to this request, Jones revealed that on May 27, 1977, prior to the District Court's decision, he had been transferred from Lincoln Regional Center to the psychiatric ward of the penal complex but prayed for an injunction against further transfer to Lincoln Regional Center. The State conceded that an injunction should be entered if the District Court was firm in its belief that the section was unconstitutional. The District Court then entered its judgment

declaring sec. 83-180 unconstitutional as applied to Jones and permanently enjoining the State from transferring Jones to Lincoln Regional Center without following the procedures prescribed in its judgment.

. . .

"(p. 1261) On the merits, the threshold question in this case is whether the involuntary transfer of a Nebraska State prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause. The District Court held that it did and offered two related reasons for its conclusion. The District Court first identified a liberty interest rooted in sec. 83-180(1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in the correctional facility. Second, the District Court was convinced that characterizing Jones as a mentally ill patient and transferring him to the Lincoln Regional Center had 'some stigmatizing' consequences which, together with mandatory behavior modification treatment to which Jones would be subject at the Lincoln Center, constituted a major change in the condition of confinement amounting to a 'grievous loss' that should not be imposed without the opportunity for notice and an adequate hearing. We agree with the District Court in both respects.

"We have repeatedly held that State statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no 'constitutional or inherent right' to parole, *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, . . . (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 1593, . . . (1972). The same is true of the revocation of probation. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, . . . (1973). In *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, . . . (1974), we held that a state-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose 'solitary' confinement because '[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct.' *Id.,* at 571-572, n. 19, 94 S.Ct. at 2982, n. 19. Once a State has granted prisoners a liberty interest, we held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.' *Id.,* at 557, 94 S.Ct. at 2975.

"In *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, . . . (1976), and *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, . . . (1976), we held that the transfer of a prisoner from one prison to another does not infringe a protected liberty interest. But in those cases transfers were discretionary with the prison authorities, and in neither case did the prisoner possess any right to justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events. Hence, 'the predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff v. McDonnell* [was] totally nonexistent.' . . .

"Following *Meachum v. Fano* and *Montanye v. Haymes,* we continued to recognize that State statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons. *Enomoto v. Wright,* 434 U.S. 1052, 98 S.Ct. 1223, . . . (1978). . . . Similarly in *Greenholtz v. Nebraska Penal Inmates, supra,* we held that State law granted petitioners a sufficient expectancy of parole to entitle them to some measure of constitutional protection with respect to parole decisions.

"We think the District Court properly understood and applied these decisions. Section 83-180(1) provides that if a designated physician finds that a prisoner 'suffers from a mental disease or defect' that 'cannot be given proper treatment' in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital. The District Court also found that in practice prisoners are transferred to a mental hospital only if it is determined that they suffer from a mental disease or defect that cannot adequately be treated within the penal complex. This 'objective expectation, firmly fixed in State law and official penal complex practice,' that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the

benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital. Under our cases, this conclusion of the District Court is unexceptionable.

"Appellants maintain that any state-created liberty interest that Jones had was completely satisfied once a physician or psychologist designated by the director made the findings required by sec. 83-180(1) and that Jones was not entitled to any procedural protections. But if the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.' *Wolff v. McDonnell,* 418 U.S. at 558, 94 S.Ct. at 2976. These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. In *Morrissey, Gagnon,* and *Wolff,* the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution.

"The District Court was also correct in holding that independent of sec. 83-180(1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. The issue is whether after a conviction for robbery, Jones retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process.

"We have recognized that for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty,' *Humphrey v. Cady,* 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, . . . 1972), and in consequence 'requires due process protection.' *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, . . . (1979); *O'Connor v. Donaldson,* 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, . . . (1975) (BURGER,C. J., concurring). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from commitment. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.' *Addington v. Texas, supra,* at 425-526, 99 S.Ct. at 1809. See, also, *Parham v. J.R.,* 442 U.S. 584, 600, 99 S.Ct. 2493, 2503, . . . (1979). Also, '[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.' *Ingraham v. Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, . . . (1977). Compelled treatment in the form of mandatory behavior modification programs, to which the District Court found Jones was exposed in this case, was a proper factor to be weighed by the District Court. Cf. *Addington v. Texas, supra,* at 427, 99 S.Ct. at 1810.

"The District Court, in its findings, was sensitive to these concerns:

> '[T]he fact of greater limitations of freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a 'major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate.' *Miller v. Vitek,* 437 F.Supp. at 573.

"Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause. We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital.

. . .

"(p. 1264) The District Court held that to afford sufficient protection to the liberty interest it had identified, the State was required to observe the following minimum procedures before transferring a prisoner to a mental hospital:

'A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

'B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

'C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

'D. An independent decision-maker;

'E. A written statement by the fact-finder as to the evidence relied on and the reasons for transferring the inmate;

'F. Availability of legal counsel, furnished by the State, if the inmate is financially unable to furnish his own; and

'G. Effective and timely notice of all the foregoing rights.' 437 F.Supp. at 575.

"We think the District Court properly identified and weighed the relevant factors in arriving at its judgment. Concededly the interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however; and as the District Court found, the risk of error in making the determinations required by sec. 83-180 is substantial enough to warrant appropriate procedural safeguards against error.

"We recognize that the inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially medical. The question whether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.' *Addington v. Texas,* 441 U.S. at 429, 99 S.Ct. at 1811. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings. *Id.,* at 430, 99 S.Ct. at 1811.

. . .

"(p. 1266) Mr. Justice POWELL, concurring in part.

"I join the opinion of the Court except . . . that the requirement of independent assistance demands that a licensed attorney be provided.

. . . "

Wheeler v. U.S.

159 U.S. 523, ____ S.Ct. ____ (1895)

WITNESSES (Competence of Infants) — *The capacity of a child to testify depends not so much on his age as on his capacity and intelligence, his ability to differentiate truth and falsehood, and his recognition of a duty to tell the truth.*

"(p. 245) Mr. Justice BREWER delivered the opinion of the Court.

"On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder and sentenced to be hanged. Whereupon he sued out this writ of error. Three errors are alleged:

"The remaining objection is to the action of the Court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his *voir dire,* said, among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in Court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to 'tell no lie,' and in response to a question as to what the clerk said to him, when he held up his hand, he answered, 'Don't you tell no story.' Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

x'That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily *with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decision, and there seems to be no dissent among the recent authorities. In *Rex v. Brasier,* 1 Leach, C.C. 199, it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion 'that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court.'

"These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question *is one of life or death. On the other hand to exclude from the witness stand one who shows himself

capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

"We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed."

In re Winship

397 U.S. 358, 90 S.Ct. 1068 (1970)

BURDEN OF PROOF (Delinquency) — *In delinquency matters, the State must prove its case beyond a reasonable doubt.*

"(p. 1069) Mr. Justice BRENNAN delivered the opinion of the Court.

"Constitutional questions decided by this Court concerning the juvenile process have centered on the adjudicatory stage at 'which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a State institution.' *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . (1967). *Gault* decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.' *Id.,* at 30, 87 S.Ct. at 1445. This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.

"Section 712 of the New York Family Court Act defines a juvenile delinquent as 'a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime.' During a 1967 adjudicatory hearing . . . a judge in New York Family Court found that appellant, then a 12-year-old boy, had entered a locker and stolen $112 from a woman's pocketbook. The petition which charged appellant with delinquency alleged that his act, 'if done by an adult, would constitute the crime or crimes of larceny.' The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant's contention that such proof was required by the Fourteenth Amendment. The judge relied instead on . . . the New York Family Court Act which provides that '[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence.' During a subsequent dispositional hearing, appellant was ordered placed in a training school for an initial period of 18 months, subject to annual extensions of his commitment until his 18th birthday — six years in appellant's case. The Appellate Division of the New York Supreme Court, First Judicial Department, affirmed without opinion, . . . , 291 N.Y.S.2d 1005 (1968). The New York Court of Appeals then affirmed by a four-to-three vote, expressly sustaining the constitutionality of sec. 744 (b), . . . , 299 N.Y.S.2d 414, 247 N.E.2d 253 (1969). We noted probable jurisdiction. . . . We reverse.

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common-law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence, sec. 321, p. 681-682 (1954); see also 9 J. Wigmore, Evidence, sec. 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' *Duncan v. Louisiana,* 391 U.S. 145, 155, 88 S.Ct. 1444, 1451, . . . (1968).

"Expressions in many opinions of this Court indicate that it has been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. . . . *Davis v. United States,* 160 U.S. 469, 488, 16 S.Ct. 353, 358, . . . (1895). . . . *Brinegar v. United States,* 338 U.S.

160, 174, 69 S.Ct. 1302, 1310, . . . (1949); *Leland v. Oregon,* 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, . . . (1952); . . . Mr. Justice FRANKFURTER stated that '[i]t is the duty of the government to establish *** guilt beyond a reasonable doubt. This notion — basic in our law anrightly one of the boasts of a free society — is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.' *Leland v. Oregon, supra,* 343 U.S. at 802-803, 73 S.Ct. at 1009 (dissenting opinion). In a similar vein, the Court said in *Brinegar v. United States, supra,* 338 U.S. at 174, 69 S.Ct. at 1310, that '[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that with long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.' *Davis v. United States, supra,* 160 U.S. at 488, 16 S.Ct. at 358 stated that the requirement is implicit in constitutions *** [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty.' In *Davis* a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: 'On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing a crime. *** No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them *** is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.' *Id.,* at 484, 493, 16 S.Ct. at 357, 360.

" . . . As the dissenters in the New York Court of Appeals observed, and we agree, 'a person accused of a crime *** would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' . . . , 299 N.Y.S.2d at 422, 247 N.E.2d at 259.

" . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of *** convincing the fact-finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, In re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, 1, 26 (1967).

"Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.

"Lest there remain any doubt about the constitutional statute of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every crime with which he is charged.

"We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child. We do not find convincing the contrary arguments of the New York Court of Appeals, *Gault* rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of sec. 744(b). The Court of Appeals indicated that a delinquency adjudication 'is not a 'conviction' . . . ; that it affects no right or privilege, including the right to hold public office or to obtain a license . . . ; and a cloak of protective confidentiality is thrown around all the proceedings . . . ' . . . , 299 N.Y.S.2d at 417-418, 247 N.E.2d at 255-256. The court said further: 'The delinquency status is not a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision [challenged by appellant] ***.' . . . , 299 N.Y.S.2d at 420, 247 N.E.2d at 257. In effect, the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the 'civil' label-of-convenience which has been attached to juvenile

proceedings.' 387 U.S. at 50, 87 S.Ct. at 1455. But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U.S. at 50-51, 87 S.Ct. at 1455, 1456. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed 'not to punish, but to save the child.' . . . , 299 N.Y.S.2d at 415, 247 N.E.2d at 254. Again, however, *Gault* expressly rejected this justification. 387 U.S. at 27, 87 S.Ct. at 1443. We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in Juvenile Courts, for '[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.' *Id.,* at 36, 87 S.Ct. at 1448.

"Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the of the hearing at which the fact-finding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.

"The Court of Appeals observed that 'a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the Juvenile Court.' 24 N.Y.2d at 199, 299 N.Y.S.2d at 417, 247 N.E.2d at 255. It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare that calls for judicial intervention. But that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.

"We conclude, as we concluded regarding the essential due process safeguards applied in *Gault,* that the observance of the standard of proof beyond a reasonable doubt 'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.' *Gault, supra,* at 21, 87 S.Ct. at 1440.

"Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that 'the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.' Dorsen & Rezneck, *supra,* at 26-27.

"In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* — notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, 'that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process *** the case against him must be proved beyond a reasonable doubt.' . . . , 299 N.Y.S.2d at 423, 247 N.E.2d at 260.

"Reversed.

"Mr. Justice HARLAN, concurring.

"No one, I dare say, would contend that State Juvenile Court trials are subject to *no* federal constitutional limitations. Differences have existed, however, among the members of this Court as to *what* constitutional protections do apply. See *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, . . . (1967).

"The present case draws in question the validity of a New York statute that permits a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof that is less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case. While I am in full agreement that this statutory provision offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment, I am constrained to add something to what by Brother BRENNAN has written for the Court, lest the true nature of the constitutional problem presented become obscured or the impact on State Juvenile Court systems of what the Court holds today be exaggerated.

"Professor Wigmore, in dissenting the various attempts by courts to define how convinced one must be to be convinced beyond a reasonable doubt, wryly observed: 'The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly *** a sound method of self-analysis for one's belief,' 9 J. Wigmore, *Evidence,* 325 (3d ed. 1940).

"Notwithstanding Professor Wigmore's skepticism, we have before us a case where the choice of the standard of proof has made a difference: the Juvenile Court judge below forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt, that appellant stole $112 from the complainant's pocketbook. Moreover, even though the labels used for alternative standards of proof are vague and not a very sure guide to decision-making, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.

"To explain why I think this so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what *probably* happened. The intensity of this belief — the decree to which a fact-finder is convinced that a given act actually occurred — can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

"A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

"The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparable social disutility of each.

"When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard, therefore, seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor to persuade the [judge] of the fact's existence.'

"In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice BRENNAN wrote for the Court in *Speiser v. Randall,* 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, . . . (1958):

> 'There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced to him by the process of placing on the other party the burden *** of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.'

"In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilt man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

"When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that, while the consequences are not identical to those in a criminal case, the differences will not support a distinction in the standard of proof. First, and of paramount importance, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends. And, second, a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime. Although there are no doubt costs to society (and possibly even to the youth himself) in letting a guilty youth go free, I think here, as in a criminal case, it is far worse to declare an innocent youth a delinquent. I therefore agree that a Juvenile Court judge should be no less convinced of the factual conclusion that the accused committed the criminal act with which he is charged than would be required in a criminal trial.

"I wish to emphasize, as I did in my separate opinion in *Gault,* 387 U.S. 1, 65, 87 S.Ct. 1428, 1463, that there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases. It is of great importance, in my view, that procedural strictures not be constitutionally imposed that jeopardize 'the essential elements of the State's purpose' in creating Juvenile Courts, *id.,* at 72, 87 S.Ct. at 1467. In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found to be a delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a 'criminal' because he has been found to be a delinquent, or (3) burden the Juvenile Courts with a procedural requirement that will make juvenile adjudications significantly more time-consuming, or rigid. Today's decision simply requires a Juvenile Court judge to be more confident in his belief that the youth did the act with which he has been charged.

"With these observations, I join the Court's opinion, subject only to the constitutional reservations expressed in my opinion in *Gault.*

"Mr. Chief Justice BURGER, with whom Mr. Justice STEWART joins, dissenting.

"The Court's opinion today rests entirely in the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations. This derived from earlier holdings, which like today's holding, were steps eroding the differences between Juvenile Courts and traditional criminal courts. The original concept of the Juvenile Court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders. Since I see no constitutional requirement of due process sufficient to overcome the legislative judgment of the States in this area, I dissent from further strait-jacketing of an already overly restricted system. What the Juvenile Court system needs is not more but less of the trappings of legal procedure and judicial formalism; the Juvenile Court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.

"Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate Juvenile Court staffs and facilities; we 'burn down the stable to get rid of the mice.' The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many, if not most, Juvenile Courts. Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases.

"My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. I cannot regard it as a manifestation of the progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.

"Mr. Justice BLACK, dissenting.

"The majority states that 'many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.' *Ante,* at 1071. I have joined in some of those opinions, as well as the dissenting opinion of Mr. Justice FRANKFURTER in *Leland v. Oregon,* 343 U.S. 790, 802, 72 S.Ct. 1002, 1009, . . . (1952). The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution. The Bill of Rights, which in my view is made fully applicable to the States by the Fourteenth Amendment, see *Adamson v. California,* 332 U.S. 46, 71-75, 67 S.Ct. 1672, 1686-1688, . . . (1947) (dissenting opinion), does by express language provide for, among other things, a right to counsel in criminal trials, a right to indictment, and the right of a defendant to be informed of the nature of the charges against him. And in two places the Constitution provides for trial by jury, but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. The Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas of 'fairness' for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, and right. That this old 'shock-the-conscience' test is what the Court is relying on, rather than the words of the Constitution, is clearly enough revealed by the reference of the majority to 'fair treatment' and to the statement by the dissenting judges in the New York Court of Appeals that failure to require proof beyond a reasonable doubt amounts to a 'lack of fundamental fairness.' *Ante,* at 1070, 1072. As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

"Our Constitution provides that no person shall be 'deprived of life, liberty, or property, without due process of law.' The four words — due process of law — have been the center of substantial legal debate over the years. See *Chambers v. Florida,* 309 U.S. 227, 235-236, and n. 8, 60 S.Ct. 472, 476-477, . . . (1940). Some might think that the words themselves are vague. But any possible ambiguity disappears when the phrase is viewed in the light of history and the accepted meaning of those words prior to and at the time our Constitution was written.

"'Due process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing. The Magna Charta provided that:

> 'No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgement of his Peers, or by Law of the Land.'

Later English statutes reinforced and confirmed these basic freedoms. In 1350, a statute declared that 'it is contained in the Great Charter of the Franchises of England that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Lands ***.' Four years later another statute provided '[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned,

nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.' And in 1363, it was provided 'that no man be taken or imprisoned, nor put out of his Freehold, without process of law.'

"Drawing on these and other sources, Lord Coke, in 1642, concluded that 'due process of law' was synonymous with the phrase 'by law of the land.' One of the earliest cases in this Court to involve the interpretation of the Due Process Clause of the Fifth Amendment declared that '[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in the Magna Charta.' *Murray's Lessee v. Hoboken Land & Improv. Co.,* 18 How. 272, 276, . . . (1856).

"While it is thus unmistakably clear that 'due process of law' means according to 'the law of the land,' this Court has not consistently defined what 'the law of the land' means and in my view members of this Court frequently continue to misconceive the correct interpretation of that phrase. In *Murray's Lessee, supra,* Mr. Justice CURTIS, speaking for the Court, stated:

> 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.' *Id.,* at 276-277.

Later in *Twinning v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, . . . (1908), Mr. Justice MOODY, again speaking for the Court, reaffirmed that 'due process of law' meant 'by law of the land,' but he went on to modify Mr. Justice CURTIS' definition of the phrase. He stated:

> 'First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. ***
>
> 'Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. ***
>
> 'Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.' *Id.,* at 100-101, 29 S.Ct. at 20.

In those words is found the kernel of the 'natural law due process' notion by which this Court frees itself from the limits of a written Constitution and sets itself loose to declare any law unconstitutional that 'shocks its conscience,' deprives a person of 'fundamental fairness,' or violates the principles 'implicit in the concept of ordered liberty.' See *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 210, . . . (1952); *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, . . . (1937). While this approach has been frequently used in deciding so-called 'procedural' questions, it has evolved into a device as easily invoked to declare invalid 'substantive' laws that sufficiently shock the conscience of at least five members of this Court. See, e.g., *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, . . . (1905); *Coppage v. Kansas,* 236

U.S. 1, 35 S.Ct. 240, . . . (1915); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, . . . (1965). I have set forth at length in prior opinions my own views that this concept is completely at odds with the basic principle that our Government is one of limited powers and that such an arrogation of unlimited authority by the judiciary cannot be supported by the language or the history of any provision of the Constitution. . . .

"In my view both Mr. Justice CURTIS and Mr. Justice MOODY gave 'due process of law' an unjustifiably broad interpretation. For me the only correct meaning of that phrase is that our Government must proceed according to the 'law of the land' — that is, according to written constitutional and statutory provisions as interpreted by Court decisions. The Due Process Clause, in both the Fifth and Fourteenth Amendments, in and of itself does not add to those provisions, but in effect states that our governments are governments of law and constitutionally bound to act only according to law. To some that view may seem a degrading and niggardly view of what is undoubtedly a fundamental part of our basic freedoms. But that criticism fails to note the historical importance of our Constitution and the virtual revolution in the history of the government of nations that was achieved by forming a government that from the beginning had its limits of power set forth in one written document that also made it abundantly clear that all governmental actions affecting life, liberty, and property were to be according to law.

"For years our ancestors had struggled in an attempt to bring England under one written constitution, consolidating in one place all the threads of the fundamental law of that nation. They almost succeeded in that attempt, but it was not until after the American Revolution that men were able to achieve that long-sought goal. But the struggle had not been simply to put all the constitutional law in one document, it was also to make certain that men would be governed by *law,* not the arbitrary fiat of the man or men in power. Our ancestors had known tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Charta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase 'due process of law.' The many decisions of this Court that have found in that phrase a blanket authority to govern the country according to the views of at least five members of this institution have ignored the essential meaning of the very words they invoke. When this Court assumes for itself the power to declare any law — State or federal — unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.'

. . .

"(p. 1084) I admit a strong, persuasive argument can be made for a standard of proof beyond a reasonable doubt in criminal cases — and the majority has made that argument well —but it is not for me as a judge to say that Congress or the States are without constitutional power to establish another standard that the Constitution does not otherwise forbid. It is quite true that proof beyond a reasonable doubt has been required in federal criminal trials. It is also true that this requirement is almost universally found in the governing laws of the States. And as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard. See *Turner v. United States.* 396 U.S. 398, 430, 90 S.Ct. 642, . . . (1970) (BLACK, J., dissenting). But when, as here, a State through its duly constituted legislative branch decides to apply a different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the 'law of the land.' The State of New York has made such a decision, and in my view nothing in the Due Process Clause invalidates it."

Wisconsin v. Yoder

406 U.S. 205, 92 S.Ct. 1526 (1972)

SCHOOLS - Religion — ***A State cannot compel a child to attend school after the eighth grade if it is against the child's religion.***

"(p. 1529) Mr. Chief Justice BURGER delivered the opinion of the Court.

"On petition of the State of Wisconsin, we granted the writ of *certiorari* in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

"Respondents, Jonas Yoder and Wallace Miller, are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade. The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law, and they are conceded to be subject to the Wisconsin statute.

"On complaint of the school district administrator for the public schools, respondents were charged, tired, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each. Respondents defended on the ground that the application of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

"In support of their position, respondents presented as expert witnesses, scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th Century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life away from the world and its values is central to their faith.

"A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely-related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their

conduct is regulated in great detail by the *Ordnung,* or rule, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.

"Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than integration with contemporary worldly society.

"Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent perioof life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith — may even be hostile to it — interposes a serious barrier to the integration of the Amish child into the Amish community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

"The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local school of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

"On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high-school-age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as 'ideal' and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society.

"Although the trial court in its careful findings determined that the Wisconsin compulsory school-attendance law 'does interfere with the freedom of the defendants to act in accordance with their sincere religious belief' it also concluded that the requirement of high school attendance until age 16 was a 'reasonable and constitutional' exercise of governmental power, and therefore denied the motion to dismiss the charges. The Wisconsin Circuit Court affirmed the convictions. The Wisconsin Supreme Court, however, sustained respondents' claim under the Free Exercise Clause of the First Amendment and reversed the convictions. A majority of the Court was of the opinion that the State had failed to make an adequate showing that its interest

in 'establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.' . . . , 182 N.W.2d 539, 547 (Wisc. 1971).

"There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., *Pierce v. Society of Sisters,* 268 U.S. 510, 534, 45 S.Ct. 571, 573, . . . (1925), providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce,* made to yield to the rights of parents to provide an equivalent education in a privately-operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. See, also, *Ginsberg v. New York,* 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, . . . (1968); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . (1923); cf. *Rowan v. United States Post Office Dept.,* 397 U.S. 728, 90 S.Ct. 1484, . . . (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce,* 'prepare [them] for additional obligations.' 268 U.S. at 535, 45 S.Ct. at 573.

"It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a State interest claiming of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and formally fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial school by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, . . . (1971); *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, . . . (1971). See, also, *Everson v. Board of Education,* 330 U.S. 1, 18, 67 S.Ct. 504, 513, . . . (1947).

"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests, e.g., *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, . . . (1963); *McGowan v. Maryland,* 366 U.S. 420, 459, 81 S.Ct. 1101, 1122, . . . (1961) (separate opinion of FRANKFURTER, J.); *Prince v. Massachusetts,* 321 U.S. 158, 165, 64 S.Ct. 438, 441, . . (1944).

"We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable State regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept or ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective

evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

"Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Apostle of Paul to the Romans, 'be not conformed to this world . . . ' This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

"The record shows that the respondents' religious beliefs and attitudes toward life, family, and home have remained constant — perhaps some would say static — in a period of unparalleled progress in human knowledge generally, and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call 'life style' have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and 'worldly' influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

"As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a near by rural school-house, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

"The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See *Braunfeld v. Brown,* 336 U.S. 599, 605, 81 S.Ct. 1144, 1147, . . . (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

"In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of

the State's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs.

"Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion — indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

"Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'action,' even though religiously-grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously-grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously-based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, e.g., *Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, . . . (1971); *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, . . . (1961); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, . . . (1944); *Reynolds v. United States,* 98 U.S. 145, . . . (1879). But to agree that religiously-grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability, e.g., *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, . . . (1963); *Murdock v. Pennsylvania,* 319 U.S. 269, 303-304, 60 S.Ct. 900, 903, . . . (1940). This case, therefore, does not become easier because respondents were convicted for their 'action' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. *Lemon v. Kurtzman,* 403 U.S. at 612, 91 S.Ct. at 2111, . . .

"Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Sherbert v. Verner, supra;* cf. *Walz v. Tax Commission,* 397 U.S. 664, 90 S.Ct. 1409, . . . (1970). The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception, no matter how vital it may be, to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses

> 'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed.' *Walz v. Tax Commission, supra,* at 672, 90 S.Ct. at 1413.

"We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. See, e.g., *Sherbert v. Verner, supra; Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, . . . (1943); *Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146, . . . (1939).

"The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares

individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

"However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents and experts testified at trial, without challenge, that the value of all education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. See *Meyer v. Nebraska,* 262 U.S. at 400, 43 S.Ct. at 627, . . .

"The State attacks respondents' position as one fostering 'ignorance' from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

"It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period of religious development. Dr. Donald Erickson, for example, testified that their system of learning-by-doing was an 'ideal system' of education in terms of preparing Amish children for life as adults in the Amish community, and that 'I would be inclined to say they do a better job in this than most of the rest of us do.' As he put it, 'These people aren't purporting to be learned people, and it seems to me the self-sufficiency of the community is the best evidence I can point to — whatever is being done seems to function well.'

"We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

"The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish community adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in 'ignorance.' To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal' vocational education for their children in the adolescent years.

"There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis on the record to warrant a finding that an additional one or two years of formal education beyond the eighth grade would serve to eliminate any such problem that might exist.

"Insofar as the State's claim rests on the view that a brief additional period of formal

education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable, and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

"The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed. The independence and successful social functioning of the Amish community for a period approaching more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one to two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

"We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts, and that the age limits of both laws have been coordinated to achieve their related objectives. In the context of this case, such considerations, if anything, support rather than detract from respondents' position. The origins of the requirement for school attendance to age 16, an age falling after the completion of elementary school but not before completion of high school, are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938. It is true, then, that the 16-year child labor age limit may to some degree derive from a contemporary impression that children should be in school until that age. But at the same time, it cannot be denied that, conversely, the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in world that should be performed by adults.

"The requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced idleness. The two kinds of statutes — compulsory school attendance and child labor laws — tend to keep children of certain ages off the labor market and in school; this regimen in turn provides opportunity to prepare for a livelihood of a higher order than that which children could pursue without education and protects their health in adolescence.

"In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally. For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws. There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

"Finally, the State, on authority of *Prince v. Massachusetts,* argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes

of their parents. Taken at its broadest sweep, the Court's language in *Prince* might be read to give support to the State's position. However, the Court was not confronted in *Prince* with a situation comparable to that of the Amish as revealed in this record; this is shown by the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. 321 U.S. at 169-170, 64 S.Ct. at 443-444. The Court later took great care to confine *Prince* to a narrow scope in *Sherbert v. Verner,* when it stated:

> 'On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld v. Brown,* 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, . . . The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., *Reynolds v. United States,* 98 U.S. 145, . . . ; *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, . . . ; *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, . . . ' 374 U.S. at 402-403, 83 S.Ct. at 1793.

"This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence.

"Contrary to the suggestion of the dissenting opinion of Mr. Justice DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not *be* prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents — that is, without regard to the wishes of the child. That is the claim we reject today.

"Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate State Court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . (1925). On this record we neither reach nor decide those issues.

"The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parents' faith.

"Indeed it seems clear if the State is empowered, as *parens patriae,* to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince,* therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and

education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters,* in which the Court observed:

> 'Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S. at 534-535, 45 S.Ct. at 573.

"The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. *Pierce,* of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

"However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subjected to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicated that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

"In fact of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

"For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection on performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.

"Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by

the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and that the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. *Sherbert v. Verner, supra.*

"Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that State regulations are not inconsistent with what we have said in this opinion.

"Affirmed.

"Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

"Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, concurring.

"This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously-based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following *their* religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.

"This case in no way involves any questions regarding the right of the children of Amish parents to attend public high school, or any other institutions of learning, if they wish to do so. As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents. Only one of the children testified. The last two questions and answers on her cross-examination accurately sum up her testimony:

'Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of *your* religion?

'A. Yes.

'Q. That is the only reason?

'A. Yes.' (Emphasis supplied.)

"It is clear to me, therefore, that this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of Mr. Justice DOUGLAS. With this observation, I join the opinion of the Court.

"Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice STEWART join, concurring.

"Cases such as this one inevitably call for a delicate balancing of important but conflicting interests. I join the opinion and judgment of the Court because I cannot say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.

"This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory-education law is relatively slight, I conclude that respondents' claim must prevail, largely because 'religious freedom — the freedom

to believe and to practice strange and, it may be, foreign creeds — has been classically been one of the highest values of our society.' *Braunfeld v. Brown,* 366 U.S. 599, 612, 81 S.Ct. 1144, 1150, . . . (1961) (BRENNAN, J., concurring and dissenting).

"The importance of the State interest asserted here cannot be denigrated, however:

> 'Today, education is perhaps the most important function of State and local governments. Compulsory school-attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment.' *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, . . . (1954).

As recently as last Term, the Court re-emphasized the legitimacy of the State's concern for enforcing minimal educational standards, *Lemon v. Kurtzman,* 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, . . . (1971). *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, . . . (1925), lends no support to the contention that parents may replace State educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce,* both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not preempt the educational process by requiring children to attend public school. In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age. A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking that they may later choose, or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.

"Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise central program instituted to foster some permissible, nonreligious State objective. I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.

"Mr. Justice DOUGLAS, dissenting in part.

"I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

"It is assumed that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious

freedom to defy a State criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

"First, respondents' motion to dismiss in the trial court expressly asserts, not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their children as a defense. Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

"Second, it is essential to reach the question to decide the case, not only because the question was squarely raised in the motion to dismiss, but also because no analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As in *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, . . . , it is an imposition resulting from this very litigation. As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously-motivated objections.

"Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has, in fact, testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy and Wallace Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller, as their motion to dismiss also raised the question of their children's religious liberty.

"This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. See *Pierce v. Society of Sisters,* 268 U.510, 45 S.Ct. 571, . . . ; *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, . . . And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. See *Prince v. Massachusetts, supra.* Recent cases, however, have clearly held that the children themselves have constitutionally protectable interests.

"These children are 'persons' within the meaning of the Bill of Rights. We have so held over and over again. In *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302, . . . , we extended the protection of the Fourteenth Amendment in a State trial of a 15-year-old boy. *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, . . . , we held that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' In *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, . . . , we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

"In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, . . . , we dealt with 13-year-old, 15-year-old and 16-year-old students who wore arm bands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

> 'Students in school, as well as out of school, are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.' *Id.,* at 511, 89 S.Ct. at 737.

"In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, . . . , we held that school-children, whose religious beliefs collided with a school rule requiring them to salute the flag, could not be required to do so. While the sanction included expulsion of the students and prosecution of the parents, *id.,* at 630, 63 S.Ct. at 1181, the vice of the regime was its interference with the child's free exercise of religion. We said: 'Here . . . we are dealing with a compulsion of students to declare a belief.' *Id.,* at 631, 63 S.Ct. at 1182. In emphasizing the important and delicate task of boards of education we said:

'That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.' *Id.*, at 637, 63 S.Ct. at 1185.

"On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.

"It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

"The views of the two children in question were not canvassed by the Wisconsin Courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.

"I think the emphasis of the Court on the 'law and order' record of the Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, Baptists, Jehovah's Witnesses, Unitarians, and my Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 822, . . . But no such factors are present here, and the Amish, whether with a high or low criminal record, certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

"The Court rightly rejects the notion that actions, even though religiously-grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds v. United States,* 98 U.S. 145, 164, . . . , where it was said concerning the reach of the Free Exercise Clause of the First Amendment, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subservice of good order.' In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, 'It matters not that his belief [in polygamy] was a part of his professed religion; it was still belief and belief only.' *Id.,* at 167, . . .

"Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

"In another way, however, the Court retreats when in reference to Henry Thoreau it says his 'choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.' That is contrary to what we held in *United States v. Seeger,* 380 U.S. 163, 85 S.Ct. 850, . . . , where we were concerned with the meaning of the words 'religious training and belief' in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

'Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within thestatutory definition. This construction avoids imputing to Congress an intent to

classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.' *Id.,* at 176, 85 S.Ct. at 859.

"*Welsh v. United States,* 398 U.S. 333, 90 S.Ct. 1792, . . . , was in the same vein, the Court saying:

'In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

'I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.' Id.,* at 342, 90 S.Ct. at 1797.

"The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words:

'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary, *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.' *Id.,* at 343, 90 S.Ct. at 1798.

"I adhere to these exalted views of 'religion' and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race. *United States v. Seeger,* 380 U.S. at 192-193, 85 S.Ct. at 867-868 (concurring opinion).

Youngberg v. Romeo

457 U.S. 205, 92 S.Ct. 1526 (1972)

CIVIL COMMITMENT - (Patient's Rights) — ***A person civilly committed as mentally retarded has constitution rights to (a) reasonably safe conditions of confinement, (b) no unreasonable bodily restraints, (c) reasonable training to cope. Professional judgment as to whether these rights have been met is presumptively valid.***

"(p. 2454) Justice POWELL delivered the opinion of the Court.

"The question presented is whether respondent, involuntarily committed to a State institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or 'rehabilitation.' Respondent sued under 42 U.S.C. sec. 1983 three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

"Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was unable to care for him. Within two weeks of the father's death, respondent's mother sought his temporary admission to a nearby Pennsylvania hospital.

"Shortly thereafter, she asked the Philadelphia County Court of Common Pleas to admit Romeo to a State facility on a permanent basis. Her petition to the Court explained that she was unable to care for Romeo or control his violence. As part of the commitment process, Romeo was examined by a physician and a psychologist. They both certified that respondent was severely mentally retarded and unable to care for himself. . . . On June 11, 1974, the Court of Common Pleas committed respondent to the Pennhurst State School and Hospital, pursuant to the applicable involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act, . . .

"At Pennhurst, Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to him. Respondent's mother became concerned about these injuries. After objecting to respondent's treatment several times, she filed this complaint on November 4, 1976, in the United States District Court for the Eastern District of Pennsylvania as his next friend. The complaint alleged that '[d]uring the period July, 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions.' The complaint originally sought damages and injunctive relief from Pennhurst's director and two supervisors; it alleged that these officials knew, or should have known, that Romeo was suffering injuries and that they failed to institute appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments.

"Thereafter, in late 1976, Romeo was transferred from his ward to the hospital for treatment of a broken arm. While in the infirmary, and by order of a doctor, he was physically restrained during portions of each day. These restraints were ordered by Dr. Gabroy, not a defendant here, to protect Romeo and others in the hospital, some of whom were in traction or were being treated intravenously. . . . The second amended complaint also added a claim for damages to compensate Romeo for the defendants' failure to provide him with appropriate 'treatment or programs for his mental retardation.' All claims for injunctive relief were dropped prior to trial because respondent is a member of the class seeking such relief in another action.

"An 8-day jury trial was held in April 1978. Petitioners introduced evidence that respondent participated in several programs teaching basic self-care skills. A comprehensive

behavior-modification program was designed by staff members to reduce Romeo's aggressive behavior, but that program was never implemented because of his mother's objections. Respondent introduced evidence of his injuries and conditions in his unit.

"At the close of the trial, the court instructed the jury that 'if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo,' such failure deprived him of constitutional rights. . . . The jury also was instructed that if the defendants shackled Romeo or denied him treatment 'as punishment for filing this law suit,' his constitutional rights were violated under the Eighth Amendment. . . . Finally, the jury was instructed that only if they found the defendants 'deliberate[ly] indifferen[t] to the serious medical [and psychological] needs' of Romeo could they find that his Eighth and Fourteenth Amendment rights had been violated. . . . The jury returned a verdict for the defendants, on which judgment was entered.

"The Court of Appeals for the Third Circuit, sitting *en banc,* reversed and remanded for a new trial. 644 F.2d 147 (1980). The court held that the Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed. Rather, the Fourteenth Amendment and the liberty interest protected by that Amendment provided the proper constitutional basis for these rights. In applying the Fourteenth Amendment, the Court found that the involuntarily committed retain liberty interests in freedom of movement and in personal security. These were 'fundamental liberties' that can be limited only by an 'overriding, nonpunitive' State interest. . . . It further found that the involuntarily committed have a liberty interest in habilitation designed to 'treat' their mental retardation. . . .

"The *en banc* Court did not, however, agree on the relevant standard to be used in determining whether Romeo's rights had been violated. Because physical restraint 'raises a presumption of a punitive sanction,' the majority of the Court of Appeals concluded that it can be justified only by 'compelling necessity.' . . . A somewhat different standard was appropriate for the failure to provide for a resident's safety. The majority considered that such a failure must be justifies by a showing of 'substantial necessity.' . . . Finally, the majority held that when treatment has been administered, those responsible are liable only if the treatment is not 'acceptable in the light of present medical or other scientific knowledge.' . . .

"Chief Judge Seitz, concurring in the judgment, considered the standards articulated by the majority as indistinguishable from those applicable to medical malpractice claims. In Chief Judge Seitz' view, the Constitution 'only requires that the courts make certain that professional judgment in fact was exercised.' . . . He concluded that the appropriate standard was whether the defendants' conduct was 'such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment.' . . .

"We granted the petition for *certiorari* because of the importance of the question presented to the administration of State institutions for the mentally retarded. . . .

"We consider here for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution. In this case, respondent has been committed under the laws of Pennsylvania, and he does not challenge the commitment. Rather, he argues that he has a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by failing to provide constitutionally required conditions of confinement.

"The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment. See, e.g., *Vitek v. Jones,* 445 U.S. 480, 491-494, 100 S.Ct. 1254, 1262-1264, . . . (1980). Indeed, the State concedes that respondent has a right to adequate food, shelter, clothing, and medical care. We must decide whether liberty interests also exist in safety, freedom of movement, and training. If such interests do exist, we must further decide whether they have been infringed in this case.

"Respondent's first two claims involve liberty interests recognized by prior decisions of this Court; interests that involuntary commitment proceedings do not extinguish. The first is a claim to safe conditions. In the past, this Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause. *Ingraham v. Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, . . . (1977). And that right is not extinguished by lawful confinement, even for penal purposes. See *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565,

. . . (1978). If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed -- who may not be punished at all — in unsafe conditions.

"Next, respondent claims a right to freedom from bodily restraint. In other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 18, 99 S.Ct. 2100, 2109, . . . (1979). . . . This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment.

"Respondent's remaining claim is more troubling. In his words, he asserts a 'constitutional right to minimally adequate habilitation.' . . . This is a substantive due process claim that is said to be grounded in the liberty component of the Due Process Clause of the Fourteenth Amendment. The term 'habilitation,' used in psychiatry, is not defined precisely or consistently in the opinions below or in the briefs of the parties or the *amici.* As noted previously, . . . the term refers to 'training and development of needed skills.' Respondent emphasizes that the right he asserts is for 'minimal' training, . . . and he would leave the type and extent of training to be determined on a case-by-case basis' in light of present medical or other scientific knowledge.' . . .

"In addressing the asserted right to training, we start from established principles. As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. See *Harris v. McRae,* 448 U.S. 297, 318, 100 S.Ct. 2671, 2689, . . . (1980) (publicly-funded abortions); *Maher v. Roe,* 432 U.S. 464, 469, 97 S.Ct. 2376, 2380, . . . (1977) (medical treatment). When a person is institutionalized — and wholly dependent on the State — it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities. See *Richardson v. Belcher,* 404 U.S. 78, 83-84, 92 S.Ct. 254, 258-259, . . . (1971); *Dandridge v. Williams,* 397 U.S. 471, 478, 90 S.Ct. 1153, 1158, . . . (1970). Nor must a State 'choose between attacking every aspect of a problem or not attacking the problem at all.' *Id.,* at 486-487, 90 S.Ct. at 1162-1163.

"Respondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release. And he does not argue that if he were still at home, the State would have no obligation to provide training at its expense. . . . The record reveals that respondent's primary needs are bodily safety and a minimum of physical restraint, and respondent clearly claims training related to these needs. As we have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint, *supra,* at 2458, training may be necessary to avoid unconstitutional infringement of those rights. On the basis of the record before us, it is quite uncertain whether respondent seeks any 'habilitation' or training unrelated to safety and freedom from bodily restraints. In his brief to this Court, Romeo indicates that even the self-care programs he seeks are needed to reduce his aggressive behavior. . . . And in his offer of proof to the trial court, respondent repeatedly indicated that, if allowed to testify, his experts would show that additional training programs, including self-care programs, were needed to reduce his aggressive behavior. . . . If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a State institution, has some general constitutional right to training *per se,* even when no type or amount of training would lead to freedom.

"Chief Judge Seitz, in language apparently adopted by respondent, observed:

> 'I believe that the plaintiff has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition.' 644 F.2d at 176.

Chief Judge Seitz did not identify or otherwise define — beyond the right to reasonable safety and freedom from physical restraint — the 'minimally adequate care and treatment' that appropriately may be required for this respondent. In the circumstances presented by this case, and on the basis of the record developed to date, we agree with the view and conclude that respondent's liberty interests require the State to provide minimally adequate or reasonable

training to ensure safety and freedom from undue restraint. In view of the kinds of treatment sought by respondent and the evidence of record, we need go no further in this case.

"We have established that Romeo retains liberty interest in safety and freedom from bodily restraint. Yet these interests are not absolute; indeed to some extent they are in conflict. In operating an institution such as Pennhurst, there are occasions in which it is necessary for the State to restrain the movement of residents — for example, to protect them as well as others from violence. Similar restraints may also be appropriate in a training program. And an institution cannot protect its residents from all danger of violence if it is to permit them to have any freedom of movement. The question then is not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process.

"In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' *Poe v. Ullman,* 367 U.S. 497, 542, 81 S.Ct. 1752, 1776, . . . (1961). . . . In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. In *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, . . . (1979), for example, we considered a challenge to pretrial detainees' confinement conditions. We agreed that the detainees, not yet convicted of the crime charged, could not be punished. But we upheld those restrictions on liberty that were reasonably related to legitimate government objectives and not tantamount to punishment. See *id.,* at 539, 99 S.Ct. at 1874. We have taken a similar approach in deciding procedural due process challenges to civil commitment proceedings. In *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, . . . (1979), for example, we considered a challenge to State procedures for commitment of a minor with parental consent. In determining that *procedural* due process did not mandate an adversarial hearing, we weighed the liberty interests of the State, including the fiscal and administrative burdens additional procedures would entail. *Id.,* at 599-600, 99 S.Ct. at 2502, 2503.

"Accordingly, whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant State interests. If there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge or jury. We therefore turn to consider the proper standard for determining whether a State adequately has protected the rights of the involuntarily committed mentally retarded.

"We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that the Courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally-acceptable choices should have been made.' 644 F.2d at 178. Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinements than criminals whose conditions of confinement are designed to punish. Cf. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, . . . (1976). At the same time, this standard is lower than the 'compelling' or 'substantial' necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of the professional judgment as to the needs of residents.

"Moreover, we agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is 'reasonable' — in this and in any case presenting a claim for training by a State — we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in State institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. See *Parham v. J.R., supra,* at 607, 99 S.Ct. at 2506-2507; *Bell v. Wolfish, supra,* at 544, 99 S.Ct. at 1877 (courts should not 'second-guess the expert administrators on matters on which they are better informed'). For these

reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment. In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability. . . .

"In deciding this case, we have weighed those post-commitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate State interests and in light of the constraints under which most State institutions necessarily operate. We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.

"Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. Such conditions of confinement would comport fully with the purpose of respondent's commitment. Cf. *Jackson v. Indiana,* 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, . . . (1972); see n. 27, *supra.* In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type — often, unfortunately, overcrowded and understaffed — to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages. In this case, we conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment. We vacate the decision of the Court of Appeals and remand for further proceedings consistent with this decision.

"So ordered.

"Justice BLACKMUN, with whom Justice BRENNAN and Justice O'CONNOR join, concurring.

"I join the Court's opinion. I write separately, however, to make clear why I believe that opinion properly leaves unresolved two difficult and important issues.

"The first is whether the Commonwealth of Pennsylvania could accept respondent for 'care and treatment,' as it did under the Pennsylvania Mental Health and Mental Retardation Act . . . and then constitutionally refuse to provide him any 'treatment,' as that term is defined by State law. Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse. I therefore do not find that issue to be a 'frivolous' one, as THE CHIEF JUSTICE does, *post,* at 2466, . . .

"In *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, . . . (1972), this Court, by unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly committed person's confinement: 'At least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' *Id.,* at 738, 92 S.Ct. at 1858. Under this standard, a State could accept a person for 'safekeeping,' then constitutionally refuse to provide him treatment. In such a case, commitment without treatment would bear a reasonable relation to the goal for which the person was confined.

"If a State Court orders a mentally retarded person committed for 'care *and* treatment,' however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any 'treatment' whatsoever would not bear a reasonable relation to the purposes of the person's confinement.

"In respondent's case, the majority and principal concurring opinion in the Court of Appeals agreed that '[b]y basing [respondent's] deprivation of liberty, at least partially, upon a promise of treatment, the State ineluctably has committed the community's resources to providing minimal treatment.' 644 F.2d 147, 168 (CA3 1980). Neither opinion clarified, however, whether respondent in fact had been totally denied 'treatment,' as that term is defined under Pennsylvania law. To the extent that the majority addressed the question, it found that 'the evidence in the record, although somewhat contradictory, suggests not so much a total failure to treat as an inadequacy of treatment.' *Ibid.*

"This Court's reading of the record, *ante,* at 2456, . . . , supports that conclusion. Moreover, the Court today finds that respondent's entitlement to 'treatment' under Pennsylvania law was not properly raised below. See *ante,* at 2458, . . . Given this uncertainty in the record, I am in accord with the Court's decision not to address the constitutionality of a State's total failure to provide 'treatment' to an individual committed under State law for 'care and treatment.'

"The second difficult question left open today is whether respondent has an independent constitutional claim, grounded in the Due Process Clause of the Fourteenth Amendment, to that 'habilitation' or training necessary to preserve those basic self-care skills he possessed when he first entered Pennhurst — for example, the ability to dress himself and care for his personal hygiene. In my view, it would be consistent with the Court's reasoning today to include within the 'minimally adequate training required by the Constitution,' *ante,* at 2461, such training as is reasonably necessary to prevent a person's pre-existing self-care skills from deteriorating because of his commitment.

"The Court makes clear, *ante,* at 2458, and 2462-2463, that even after a person is committed to a State institution, he is entitled to such training as is necessary to prevent unreasonable losses of additional liberty as a result of his confinement — for example, unreasonable bodily restraints or unsafe institutional conditions. If a person could demonstrate that he entered a State institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then, it seems to me, he has allowed a loss of liberty quite distinct from — and as serious as — the loss of safety and freedom from unreasonable restraints. For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they will ever know.

"Although respondent asserts a claim of this kind, I agree with the Court that '[o]n the basis of the record before is, it is quite uncertain whether respondent [in fact] seeks any 'habilitation' or training unrelated to safety and freedom from bodily restraints.' *Ante,* at 2459. Since the Court finds respondent constitutionally entitled at least to 'such training as may be reasonable in light of [his] liberty interests in safety and freedom from unreasonable restraints,' *ante,* at 2461, I accept its decision not to address respondent's additional claim.

"If respondent actually seeks habilitation in self-care skills not merely to reduce his aggressive tendencies, but also to maintain those basic self-care skills necessary to his personal autonomy within Pennhurst, I believe he is free on remand to assert that claim. Like the Court, I would be willing to defer to the judgment of professionals as to whether or not, and to what extent, institutional training would preserve respondent's pre-existing skills. Cf. *ante,* at 2461-2462. As the Court properly notes, '[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible.' *Ante,* at 2458, . . .

"If expert testimony reveals that respondent was so retarded when he entered the institution that he had no basic self-care skills to preserve, or that institutional training would not have preserved whatever skills he did have, then I would agree that he suffered no additional loss of liberty even if petitioners failed to provide him training. But if the testimony establishes that respondent possessed certain basic self-care skills when he entered the institution, and was sufficiently educable that he could have maintained those skills with a certain degree of training, then I would be prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training, even if respondent's safety and mobility were not threatened by their failure to do so.

"The Court finds it premature to resolve this constitutional question on this less-than-fully-developed record. Because I agreed with that conclusion, I concur in the Court's opinion.

"Chief Justice BURGER, concurring in the judgment.

"I agree with much of the Court's opinion. However, I would hold flatly that respondent has no constitutional right to training, or 'habilitation,' *per se.* The parties, and the Court, acknowledge that respondent cannot function outside the State institution, even with the assistance of relatives. Indeed, even now neither respondent nor his family seeks his discharge from State care. Under these circumstances, the State's provision of food, shelter, medical care, and living conditions as safe as the inherent nature of the institutional environment reasonably allows, serves to justify the State's custody of respondent. The State is not seeking custody of respondent; his family understandably sought the State's aid to meet a serious need.

"I agree with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from restraint; but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation — even such as might be encompassed under the essentially standardless rubric 'minimally adequate training,' to which the Court refers. See *ante,* at 2460, . . . Cf. 644 F.2d 147, 176 (CA3 1980) (Seitz, C.J., concurring in judgment). Since respondent asserts a right to 'minimally adequate' habilitation '[q]uite apart from its relationship to decent care,' Brief for Respondent 23, unlike the Court I see no way to avoid the issue. Cf. *ante,* at 2459.

"I also point out that, under the Court's own standards, it is largely irrelevant whether respondent's experts were of the opinion that 'additional training programs, including self-care programs, were needed to reduce [respondent's] aggressive behavior,' *ibid.* — a prescription far easier for 'spectators' to give than for an institution to implement. The training program devised for professionals at Pennhurst was, according to the Court's opinion, 'presumptively valid'; and 'liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.' *Ante,* at 2462. Thus, even if respondent could demonstrate that the training programs at Pennhurst were inconsistent with generally accepted or prevailing professional practice — if indeed there be such — this would not avail him so long as his training regimen was actually prescribed by the institution's professional staff.

"Finally, it is worth noting that the District Court's instructions in this case were on the whole consistent with the Court's opinion today; indeed, some instructions may have been overly generous to respondent. Although the District Court erred in giving an instruction incorporating an Eighth Amendment 'deliberate indifference' standard, the court also instructed, for example, that petitioners could be held liable if they 'were aware of and failed to take all reasonable steps to prevent repeated attacks upon' respondent. See *ante,* at 2456. Certainly, if petitioners took *'all* reasonable steps' to prevent attacks on respondent, they cannot be said to have deprived him either of reasonably safe conditions or of training necessary to achieve reasonable safety."

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Supplement to
A Digest of Cases
of
THE UNITED STATES SUPREME COURT
as to
JUVENILE AND FAMILY LAW

addressing the 1988 --1990 terms

National Council of Juvenile & Family Court Judges

Dean Louis W. McHardy
Executive Director
Reno, Nevada

EDITORIAL STAFF

John E. B. Myers
Professor of Law
Editor

Marie R. Mildon
NCJFCJ Editor

Cheri L. Briggs
Production Editor

National Council of Juvenile and Family Court Judges
P.O. Box 8970, Reno, NV 89507

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TABLE OF CASES

Baltimore City Department of Social Services v. Bouknight

110 S.Ct. 900 (1990)

Self-Incrimination -- ***In this case a child's parent was not permitted to invoke the Fifth Amendment privilege against self-incrimination to resist an order of the juvenile court to produce the child. The Supreme Court assumed that producing the child could constitute a testimonial assertion sufficiently incriminating to implicate the Fifth Amendment. The Court compared the parent's situation to a line of Supreme Court decisions in which individuals are precluded from asserting the privilege against self-incrimination to resist production of documents that are maintained as part of a state's noncriminal regulatory powers. The Court ruled that the parent could not invoke the privilege because: (1) the child was a ward of the juvenile court, having previously been adjudicated an abused child, (2) the parent accepted custody of the child subject to conditions established by the juvenile court's dispositional order (including a requirement to cooperate with CPS), and (3) concern for the child's safety -- rather than an effort to prosecute the parent -- underlay efforts to gain access to the child and then to compel the child's production. Under such circumstances, the parent submitted to the routine operation of the state's noncriminal system for protecting maltreated children, and accepted the obligation to subject the child to state inspection. Under such circumstances, the parent's ability to invoke the privilege against self-incrimination was lessened. The juvenile court could properly order production of the child, and could enforce its order through the contempt power. If criminal prosecution is commenced following production of the child, there may be limits on the state's ability to use the testimonial aspects of the parent's act of producing the child.***

"Justice O'CONNOR delivered the opinion of the Court."

"In this action, we must decide whether a mother, the custodian of a child pursuant to a court order, may invoke the Fifth Amendment privilege against self-incrimination to resist an order of the Juvenile Court to produce the child. We hold that she may not.

I

"Petitioner Maurice M. is an abused child. When he was three months old, he was hospitalized with a fractured left femur, and examination revealed several partially healed bone fractures and other indications of severe physical abuse. In the hospital, respondent Bouknight, Maurice's mother, was observed shaking Maurice, dropping him in his crib despite his spica cast, and otherwise handling him in a manner inconsistent with his recovery and continued health. Hospital personnel notified Baltimore City Department of Social Services (BCDSS), petitioner in No. 88-1182, of suspected child abuse. In February 1987, BCDSS secured a court order removing Maurice from Bouknight's control and placing him in shelter care. Several months later, the shelter care order was inexplicably modified to return Maurice

to Bouknight's custody temporarily. Following a hearing held shortly thereafter, the Juvenile Court declared Maurice to be a 'child in need of assistance'; thus asserting jurisdiction over Maurice and placing him under BCDSS's continuing oversight. BCDSS agreed that Bouknight could continue as custodian of the child, but only pursuant to extensive conditions set forth in a court-approved protective supervision order. The order required Bouknight to 'cooperate with BCDSS,' 'continue in therapy,' participate in 'parental aid and training programs,' and 'refrain from physically punishing [Maurice].' . . . The order's terms were 'all subject to the further Order of the Court.' . . . Bouknight's attorney signed the order, and Bouknight in a separate form set forth her agreement to each term.

"Eight months later, fearing for Maurice's safety, BCDSS returned to Juvenile Court. BCDSS caseworkers related that Bouknight would not cooperate with them and had in nearly every respect violated the terms of the protective order. BCDSS stated that Maurice's father had recently died in a shooting incident and that Bouknight in light of the results of a psychological examination and her history of drug use, could not provide adequate care for the child. On April 20, 1988, the Court granted BCDSS's petition to remove Maurice from Bouknight's control for placement in foster care. BCDSS officials also petitioned for judicial relief from Bouknight's failure to produce Maurice or reveal where he could be found. The petition recounted that on two recent visits by BCDSS officials to Bouknight's home, she had refused to reveal the location of the child or had indicated that the child was with an aunt whom she would not identify. The petition further asserted that inquiries of Bouknight's known relatives had revealed that none of them had recently seen Maurice and that BCDSS had prompted the police to issue a missing persons report and referred the case for investigation by the police homicide division. Also on April 20, the Juvenile Court, upon a hearing on the petition, cited Bouknight for violating the protective custody order and for failing to appear at the hearing. Bouknight had indicated to her attorney that she would appear with the child, but also expressed fear that if she appeared the state would 'snatch the child.' The court issued an order to show cause why Bouknight should not be held in civil contempt for failure to produce the child. Expressing concern that Maurice was endangered or perhaps dead, the court issued a bench warrant for Bouknight's appearance.

"Maurice was not produced at subsequent hearings. At a hearing one week later, Bouknight claimed that Maurice was with a relative in Dallas. Investigation revealed that the relative had not seen Maurice. The next day, following another hearing at which Bouknight again declined to produce Maurice, the Juvenile Court found Bouknight in contempt for failure to produce the child as ordered. There was and has been no indication that she was unable to comply with the order. The court directed that Bouknight be imprisoned until she 'purge[d] herself of contempt by either producing [Maurice] before the court or revealing to the court his exact whereabouts.'

"The Juvenile Court rejected Bouknight's subsequent claim that the contempt order violated the Fifth Amendment's guarantee against self-incrimination. The court stated that the production of Maurice would purge the contempt and that '[t]he contempt is issued not because she refuse[d] to testify in any proceeding . . . [but] because she has failed to abide by the Order of this Court, mainly [for] the production of Maurice M.' While that decision was being appealed, Bouknight was convicted of theft and sentenced to 18 months' imprisonment in separate proceedings. The Court of Appeals of Maryland vacated the Juvenile Court's judgment upholding the contempt order. *In re Maurice M.*, 314 Md. 391, 550 A.2d 1135 (1988). The Court of Appeals found that the contempt order unconstitutionally com-

pelled Bouknight to admit through the act of production 'a measure of continuing control and dominion over Maurice's person' in circumstances in which Bouknight has a reasonable apprehension that she will be prosecuted.' *Id.*, at 403-404, 550 A.2d, at 1141. Chief Justice REHNQUIST granted BCDSS's application for a stay of the judgment and mandate of the Maryland Court of Appeals, pending disposition of the petition of a writ of *certiorari*. 488 U.S. ---, 109 S.Ct. 571, 102 L.Ed.2d 682 (1988) (in chambers). We granted *certiorari*, 490 U.S. ---109 S.Ct. 1636, 104 L.Ed.2d 152 (1989), and we now reverse.

II

"The Fifth Amendment provides that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' U.S. Const., Amdt. 5. The Fifth Amendment's protection 'applies only when the accused is compelled to make a *testimonial* communication that is incriminating.' . . . The courts below concluded that Bouknight could comply with the order through the unadorned act of producing the child, and we thus address that aspect of the order. When the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].' . . . The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced. . . . But a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded. Bouknight therefore cannot claim the privilege based upon anything that examination of Maurice might reveal, nor can she assert the privilege upon the theory that compliance would assert that the child produced is in fact Maurice (a fact the state could readily establish, rendering any testimony regarding existence or authenticity insufficiently incriminating. . . . Rather, Bouknight claims the benefit of the Privilege because the act of production would amount to testimony regarding her control over and possession of Maurice. Although the state could readily introduce evidence of Bouknight's continuing control over the child -- *e.g.*, the custody order, testimony of relatives, and Bouknight's own statements to Maryland officials before invoking the privilege -- her implicit communication of control over Maurice at the moment of production might aid the state in prosecuting Bouknight.

"The possibility that a production order will compel testimonial assertions that may prove incriminating does not in all contexts, justify invoking the privilege to resist production. Even assuming that this limited testimonial assertion is sufficiently incriminating and 'sufficiently testimonial for purposes of the privilege,' . . . Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.

"The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the state's public purposes unrelated to the enforcement of its criminal laws. In *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), the Court considered an application of the Emergency Price Control Act and a regulation issued thereunder which required licensed businesses to maintain records and make them available for inspection by administrators. The Court indicated that no Fifth Amendment protection attached to production of the 'required records,' which the 'defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.' *Id.*, at 17-18, 68 S.Ct, at 1384-1385 (quoting *Wilson v. United States*, 221 U.S. 361, 381, 31 S.Ct 538, 544, 55 L.Ed. 771 (1911)). The Court's discussion of the constitutional implications of the scheme focused

upon the relation between the government's regulatory objectives and the government's interest in gaining access to the records in Shapiro's possession:

> "It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked where there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the administrator." 335 U.S., at 32, 68 S.Ct., at 1391.

"See also *In re Harris*, 221 U.S. 274, 279, 31 S.Ct. 557, 558, 55 L.Ed. 732 (1911) (HOLMES, J.) (regarding a court order that a bankrupt produce account books, '[t]he question is not of testimony but of surrender -- not of compelling the bankrupt to be a witness against himself in a criminal case, past or future, but of compelling him to yield possession of property that he no longer is entitled to keep'). The Court has since refined those limits to the government's authority to gain access to items or information vested with this public character. The Court has noted that 'the requirements at issue in *Shapiro* were imposed in 'an essentially noncriminal and regulatory area of inquiry,' and that *Shapiro's* reach is limited where requirements are directed to a 'selective group inherently suspect of criminal activities.' . . .

"*California v. Byers*, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971), confirms that the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement. In *Byers*, the Court upheld enforcement of California's statutory requirement that drivers of cars involved in accidents stop and provide their names and addresses. A plurality found the risk of incrimination too insubstantial to implicate the Fifth Amendment, *id.*, at 427-428, 91 S.Ct. at 1537-1538, and noted that the statute 'was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities,' . . . was 'directed at the public at large,' and required disclosure of no inherently illegal activity. . . .

"When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced. In *Wilson v. United States, supra*, the Court surveyed a range of cases involving the custody of public documents and records required by law to be kept because they related to 'the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' *Id.*, 221 U.S., at 380, 31 S.Ct., at 544. The principle the Court drew from these cases is:

> "[W]here, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to incriminate him. In assuming their custody he has accepted the incident obligation to permit inspection." *Id.*, at 382, 31 S.Ct., at 545.

"These principles readily apply to this case. Once Maurice was adjudicated a child in need of assistance, his care and safety became the particular object of the state's regulatory interests. . . . Maryland first placed Maurice in shelter care, authorized placement in foster care, and then entrusted responsibility for Maurice's care to Bouknight. By accepting care

of Maurice subject to the custodial order's conditions (including requirements that she cooperate with BCDSS, follow a prescribed training regime, and be subject to further court orders), Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the state's regulatory interests and subject to inspection by BCDSS.... In assuming the obligations attending custody, Bouknight 'has accepted the incident obligation to permit inspection.' ... The state imposes and enforces that obligation as part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders....

"Persons who care for children pursuant to a custody order, and who may be subject to a request for access to the child, are hardly 'a selective group inherently suspect of criminal activities.' ... The Juvenile Court may place a child within its jurisdiction with social service officials or 'under supervision in his own home or in the custody or under the guardianship of a relative or other fit person, upon terms the court deems appropriate.' Md.Cts. & Jud.Proc.Code Ann. § 3-820(c)(1)(i) (Supp. 1989). Children may be placed, for example, in foster care, in homes of relatives, or in the care of state officials.... Even where the court allows a parent to retain control of a child within the court's jurisdiction, that parent is not one singled out for criminal conduct, but rather has been deemed to be, without the state's assistance, simply 'unable or unwilling to give proper care and attention to the child and his problems.' ... The provision that authorized the Juvenile Court's efforts to gain production of Maurice reflects this broad applicability. See Md.Cts. & Jud.Proc.Code Ann. § 3-814(c) (1984) ('If a parent guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt'). This provision 'fairly may be said to be directed at... parents, guardians, and custodians who accept placement of juveniles in custody.' ...

"Similarly, BCDSS's efforts to gain access to children, as well as judicial efforts to the same effect do not 'focu[s] almost exclusively on conduct which was criminal.' ... Many orders will arise in circumstances entirely devoid of criminal conduct even when criminal conduct may exist the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation.... This case provides an illustration: concern for the child's safety underlay the efforts to gain access to and then compel production of Maurice.... Finally, production in the vast majority of cases will embody no incriminating testimony, even if in particular cases the act of production may incriminate the custodian through an assertion of possession, the existence, or the identity of the child.... These orders to produce children cannot be characterized as efforts to gain some testimonial component of the act of production. The government demands production of the very public charge entrusted to a custodian, and makes the demand for compelling reasons unrelated to criminal law enforcement and as part of a broadly-applied regulatory regime. In these circumstances, Bouknight cannot invoke the privilege to resist the order to produce Maurice.

"We are not called upon to define the precise limitations that may exist upon the state's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.... The state's

regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution. . . . In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled. . . .

III

"The judgment of the Court of Appeals of Maryland is reversed and the cases remanded to that court for further proceedings not inconsistent with this opinion.

"So ordered."

"Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

"Although the Court assumes that respondent's act of producing her child would be testimonial and could be incriminating . . . it nonetheless concludes that she cannot invoke her privilege against self-incrimination and refuse to reveal her son's current location. Neither of the reasons the Court articulates to support its refusal to permit respondent to invoke her constitutional privilege justifies its decision. I therefore dissent.

I

"The Court correctly assumes that Bouknight's production of her son to the Maryland court would be testimonial because it would amount to an admission of Bouknight's physical control over her son. . . . The Court also assumes that Bouknight's act of production would be self-incriminating. I would not hesitate to hold explicitly that Bouknight's admission of possession or control presents 'a real and appreciable' threat of self-incrimination. . . . Bouknight's ability to produce the child would conclusively establish her actual and present physical control over him, and thus might 'prove a significant link in a chain' of evidence tending to establish [her] guilt.' . . .

"Indeed, the stakes for Bouknight are much greater than the Court suggests. Not only could she face criminal abuse and neglect charges for her alleged mistreatment of Maurice, but she could also be charged with causing his death. The state acknowledges that it suspects that Maurice is dead, and the police are investigating his case as a possible homicide. In these circumstances, the potentially incriminating aspects to Bouknight's act of production are undoubtedly significant.

II

"Notwithstanding the real threat of self-incrimination, the Court holds that 'Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.' In characterizing Bouknight as Maurice's 'custodian,' and in describing the relevant Maryland juvenile statutes as part of a noncriminal regulatory regime, the Court relies on two distinct lines of Fifth Amendment precedent, neither of which applies to this case.

A

"The Court's first line of reasoning turns on its view that Bouknight has agreed to exercise on behalf of the state certain custodial obligations with respect to her son, obligations that the Court analogizes to those of a custodian of the records of a collective entity. This characterization is baffling, both because it is contrary to the facts of this case and because this Court has never relied on such a characterization to override the privilege against self-incrimination except in the context of a claim of privilege by an agent of a collective entity.

"Jaqueline Bouknight is Maurice's mother; she is not and in fact could not be, his 'custodian' whose rights and duties are determined solely by the Maryland juvenile protection law. See Md.Cts. & Jud.Proc.Code Ann. § 3-801(j) Supp. (1989) (defining 'custodian' as 'person or agency to whom legal custody of a child has been given by order of the court other than the child's parent or legal guardian'). Although Bouknight surrendered physical custody of her child during the pendency of the proceedings to determine whether Maurice was a 'child in need of assistance' (CINA) within the meaning of the Maryland Code, § 3-801(e), Maurice's placement in shelter care was only temporary and did not extinguish her legal right to custody of her son. See § 3-801(r). When the CINA proceedings were settled, Bouknight regained physical custody of Maurice and entered into an agreement with the Baltimore City Department of Social Services (BCDSS). In that agreement, which was approved by the juvenile court, Bouknight promised, among other things, to 'cooperate with BCDSS,' but she retained legal custody of Maurice.

"A finding that a child is in need of assistance does not by itself divest a parent of legal or physical custody, nor does it transform such custody to something conferred by the state.... Thus, the parent of a CINA continues to exercise custody because she is the child's parent not because the state has delegated that responsibility to her. Although the state has obligations '[t]o provide for the care, protection, and wholesome mental and physical development of children' who are in need of assistance... these duties do not eliminate or override a parent's continuing legal obligations similarly to provide for her child.

"In light of the statutory structure governing a parent's relationship to a CINA, Bouknight is not acting as a custodian in the traditional sense of that word because she is not acting *on behalf of the state*. In reality, she continues to exercise her parental duties, constrained by an agreement between her and the state. That agreement which includes a stipulation that Maurice was a CINA, allows the state, in certain circumstances, to intercede in Bouknight's relationship with her child. It does not, however, confer custodial rights and obligations on Bouknight in the same way corporate law creates the custodial status of a corporate agent.

"Moreover, the rationale for denying a corporate custodian Fifth Amendment protection for acts done in her representative capacity does not apply to this case. The rule for a custodian of corporate records rests on the well-established principle that a collective entity, unlike a natural person, has no Fifth Amendment privilege against self-incrimination.... Because an artificial entity can act only through its agents, a custodian of such an entity's documents may not invoke her personal privilege to resist producing documents that may incriminate the entity, even if the documents may also incriminate the custodian....

"Jacqueline Bouknight is not the agent for an artificial entity that possesses no Fifth

Amendment privilege. Her role as Maurice's parent is very different from the role of a corporate custodian who is merely the instrumentality through whom the corporation acts. I am unwilling to extend the collective entity doctrine into a context where it denies individuals, acting in their personal rather than representative capacities, their Constitutional privilege against self-incrimination.

B

"The Court's decision rests as well on cases holding that 'the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable civil regulatory requirement.' . . . The cases the Court cites have two common features: they concern civil regulatory systems not primarily intended to facilitate criminal investigations, and they target the general public. . . . In contrast, regulatory regimes that are directed at a 'selective group inherently suspect of criminal activities' . . . do not result in a similar diminution of the Fifth Amendment privilege.

1

"Applying the first feature to this case, the Court describes Maryland's juvenile protection scheme as 'a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders.' The Court concludes that Bouknight cannot resist an order necessary for the functioning of that system. The Court's characterization of Maryland's system is dubious and highlights the flaws inherent in the Court's formulation of the appropriate Fifth Amendment inquiry. Virtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, solely to the avowed noncriminal purposes of the regulations. If one focuses instead on the practical effects, the same scheme could be seen as facilitating criminal investigations. The fact that the Court holds Maryland's juvenile statute to be essentially noncriminal, notwithstanding the overlapping purposes underlying that statute and Maryland's criminal child abuse statutes, proves that the Court's test will never be used to find a relationship between the civil scheme and law enforcement goals significant enough to implicate the Fifth Amendment.

"The regulations embodied in the juvenile welfare statute are intimately related to the enforcement of state criminal statutes prohibiting child abuse. . . . State criminal decisions suggest that information supporting criminal convictions is often obtained through civil proceedings and the subsequent protective oversight by BCDSS. . . . In this respect Maryland's juvenile protection system resembles the revenue system at issue in *Marchetti,* [390 U.S. 39 (1968)] which required persons engaged in the business of accepting wagers to provide certain information about their activities to the Federal Government. Focusing on the effect of the regulatory scheme, the Court held that this revenue system was not the sort of neutral civil regulatory scheme that could trump the Fifth Amendment privilege. Even though the Government's 'principal interest [was] evidently the collection of revenue,' 390 U.S. at 57, the information sought would increase the 'likelihood that any past or present gambling offenses [would] be discovered and successfully prosecuted,' *id.,* at 52.

"In contrast to *Marchetti,* the Court here disregards the practical implications of the civil scheme and holds that the juvenile protection system does not 'focu[s] almost exclusively on conduct which was criminal.' . . . I cannot agree with this approach. The state's goal of protecting children from abusive environments through its juvenile welfare system

cannot be separated from criminal provisions that serve the same goal. When the conduct at which a civil statute aims -- here, child abuse and neglect -- is frequently the same conduct subject to criminal sanction, it strikes me as deeply problematic to dismiss the Fifth Amendment concerns by characterizing the civil scheme as 'unrelated to criminal law enforcement investigation.' . . . A civil scheme that *inevitably* intersects with criminal sanctions may not be used to coerce, on pain of contempt, a potential criminal defendant to furnish evidence crucial to the success of her own prosecution.

"I would apply a different analysis, one that is more faithful to the concerns underlying the Fifth Amendment. This approach would target the respondent's particular claim of privilege, the precise nature of the testimony sought and the likelihood of self-incrimination caused by this respondent's compliance. 'To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' *Hoffman v. United States*, 341 U.S. 479, 486-487, 71 S.Ct. 814, 818-819, 95 L.Ed. 1118 (1951). . . . This analysis unambiguously indicates that Bouknight's Fifth Amendment privilege must be respected to protect her from the serious risk of self-incrimination.

"An individualized inquiry is preferable to the Court's analysis because it allows the privilege to turn on the concrete facts of a particular case, rather than on abstract characterizations concerning the nature of a regulatory scheme. Moreover, this particularized analysis would not undermine any appropriate goals of civil regulatory schemes that may intersect with criminal prohibitions. Instead, the ability of a state to provide immunity from criminal prosecution permits it to gather information necessary for civil regulation, while also preserving the integrity of the privilege against self-incrimination. The fact that the state throws a wide net in seeking information does not mean that it can demand from the few persons whose Fifth Amendment rights are implicated that they participate in their own criminal prosecutions. Rather, when the state demands testimony for its citizens, it should do so with an explicit grant of immunity.

2

"The Court's approach includes a second element; it holds that a civil regulatory scheme cannot override Fifth Amendment protection unless it is targeted at the general public. Such an analysis would not be necessary under the particularized approach I advocate. Even under the Court's test, however, Bouknight's right against self-incrimination should not be diminished because Maryland's juvenile welfare scheme clearly is *not* generally applicable. A child is considered in need of assistance because '[h]e is mentally handicapped or is not receiving ordinary and proper care and attention, and . . . [h]is parents . . . are unable or unwilling to give proper care and attention to the child and his problems.' . . . The juvenile court has jurisdiction only over children who are alleged to be in need of assistance, not over all children in the state. . . . It thus has power to compel testimony only from those parents whose children are alleged to be CINAs. In other words, the regulatory scheme that the Court describes as 'broadly directed,' is actually narrowly targeted at parents who through abuse or neglect deny their children the minimal reasonable level of care and attention. Not all such abuse or neglect rises to the level of criminal child abuse, but parents of children who have been so seriously neglected or abused as to warrant allegations that the children are in need of state assistance are clearly 'a selective group inherently suspect of criminal activities.'

III

"In the end, neither line of precedents relied on by the Court justifies riding roughshod over Bouknight's Constitutional privilege against self-incrimination. The Court cannot accurately characterize her as a 'custodian' in the same sense as the Court has used that word in the past. Nor is she the state's 'agent' whom the state may require to act on its behalf. Moreover, the regulatory scheme at issue here is closely intertwined with the criminal regime prohibiting child abuse and applies only to parents whose abuse or neglect is serious enough to warrant state intervention.

"Although I am disturbed by the Court's willingness to apply inapposite precedent to deny Bouknight her constitutional right against self-incrimination, especially in light of the serious allegations of homicide that accompany this civil proceeding, I take some comfort in the Court's recognition that the state may be prohibited from using any testimony given by Bouknight in subsequent criminal proceedings. . . . Because I am not content to deny Bouknight the constitutional protection required by the Fifth Amendment *now* in the hope that she will not be convicted *later* on the basis of her own testimony, I dissent."

Coy v. Iowa

487 U.S. 1012 (1988)

Confrontation -- ***Placing a screen between a criminal defendant and a child victim/witness violates the defendant's Sixth Amendment right to confront accusatory witnesses when the screen obstructs the child's view of the defendant, and when there is no particularized showing of necessity to dispense with face-to-face confrontation to protect the child from trauma. (See* Maryland v. Craig *in this volume, which upholds the constitutionality of one-way video testimony in child abuse litigation).***

"Justice SCALIA delivered the opinion of the Court.

"Appellant was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight. Appellant contends that this procedure, authorized by state statute, violated his Sixth Amendment right to confront the witnesses against him.

I

"In August 1985, appellant was arrested and charged with sexually assaulting two 13-year-old girls earlier that month while they were camping out in the backyard of the house next door to him. According to the girls, the assailant entered their tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him; neither was able to describe his face. In November 1985, at the beginning of appellant's trial, the state made a motion pursuant to a recently enacted statute, Act of May 23, 1985, § 6, 1985 Iowa Acts 338, now codified at Iowa Code § 910A.14 (1987),[1] to allow the complaining witnesses to testify either via closed-circuit television or behind a screen. . . . The trial court approved the use of a large screen to be placed between appellant and the witness stand during the girls' testimony. After certain lighting adjustments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all.

"Appellant objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. He argued that although the device might succeed in its apparent aim of making the complaining witnesses feel less uneasy in giving their testimony, the Confrontation Clause directly addressed this issue by giving criminal defendants a right to face-to-face confrontation. He also argued that his right to due process was violated, since the procedure would make him appear guilty and thus erode the presumption of innocence. The trial court rejected both constitutional claims, though it instructed the jury to draw no inference of guilt from the screen.

"The Iowa Supreme Court affirmed appellant's conviction, 397 N.W.2d 730 (1986). It rejected appellant's confrontation argument on the ground that, since the ability to cross-

examine the witnesses was not impaired by the screen, there was no violation of the Confrontation Clause. It also rejected the due process argument, on the ground that the screening procedure was not inherently prejudicial. . . .

II

"The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.' This language 'comes to us on faded parchment,' *California v. Green,* 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (HARLAN, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges.' Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, "The Right of Confrontation: Its History and Modern Dress," 8 *J.Pub.L* 381, 384-387 (1959).

"Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, *e.g., Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), or restrictions on the scope of cross-examination, *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cf. *Delaware v. Fensterer,* 474 U.S. 15, 18-19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) *(per curiam)* (noting these two categories and finding neither applicable). The reason for that is not, as the state suggests, that these elements are the essence of the Clause's protection -- but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, '[s]imply as a matter of English' it confers at least 'a right to meet face-to-face all those who appear and give evidence at trial.' *California v. Green, supra,* at 175, 90 S.Ct., at 1943-1944. Simply as a matter of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence -- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.' . . . *Richard II,* act 1, sc. 1.

"We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. . . .

"The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his home town of Abilene, Kansas. In Abilene, he said, it was necessary to '[meet] anyone face-to-face with

whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.... In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.' Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, *supra* at 381. The phrase still persists, 'Look me in the eye and say that.' Given these human feelings of what is necessary for fairness, the right of confrontation 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

"The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.' Z. Chafee, "The Blessings of Liberty," 35 (1956), quoted in *Jay v. Boyd*, 351 U.S. 345, 375-376, 76 S.Ct. 919, 935-936, 100 L.Ed. 1242 (1956) (DOUGLAS, J., dissenting). It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss -- the right to cross-examine the accuser; both 'ensur[e] the integrity of the fact-finding process.' *Kentucky v. Stincer, supra*, 482 U.S., at ---, 107 S.Ct., at 2662. The state can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential 'trauma' that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

III

"The remaining question is whether the right to confrontation was in fact violated in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective.... It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

"The state suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit -- namely, the right to cross-examine, see *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973); the right to exclude out-of-court statements, see *Ohio v. Roberts*, 448 U.S., at 63-65, 100 S.Ct., at 2537-2539; and the asserted right to face-to-face confrontation at some point in the proceedings other than

the trial itself, *Kentucky v. Stincer*, 482 U.S. ---, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: 'a right to *meet face-to-face* all those who appear and give evidence *at trial*.' *California v. Green*, 399 U.S., at 175, 90 S.Ct., at 1943-1944 (HARLAN, J., concurring) (emphasis added). We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. Cf. *Ohio v. Roberts*, 448 U.S., at 175, 90 S.Ct., at 2538; *Chambers v. Mississippi, supra*, at 295, 93 S.Ct., at 1045-1046. The state maintains that such necessity is established here by the statute, which creates a legislatively-imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.' *Bourjaily v. United States*, 483 U.S. ---, ---, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144 (1987) (citing *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)). The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

"The state also briefly suggests that any Confrontation Clause error was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We have recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis, see, *e.g., Delaware v. Van Arsdall*, 475 U.S., at 679, 684, 106 S.Ct., at 1436, 1437, and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. The Iowa Supreme Court had no occasion to address the harmlessness issue, since it found no Constitutional violation. In the circumstances of this case, rather than decide whether the error was harmless beyond a reasonable doubt, we leave the issue for the court below.

"We find it unnecessary to reach appellant's due process claim. Since his Constitutional right to face-to-face confrontation was violated, we reverse the judgment of the Iowa Supreme Court and remand the case.

"It is so ordered.

"Justice KENNEDY took no part in the consideration or decision of this case.

"Justice O'CONNOR, with whom Justice WHITE joins, concurring.

"I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

"Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that '[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim.' *Pennsylvania v. Ritchie,* 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many states have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures. We deal today with the Constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only state authorizing the type of screen used in this case.... A full half of the states, however, have authorized the use of one- or two-way closed circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 33 states (including 19 of the 25 authorizing closed-circuit television) permit the use of videotaped testimony, which typically is taken in the defendant's presence....

"While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant....

"Indeed, part (of the statute) involved here seems to fall into this category since in addition to authorizing a screen, Iowa Code § 910A.14 (1987) permits the use of one-way closed-circuit television with 'parties' in the same room as the child witness.

"Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. We have expressly said as much, as long ago as 1899, *Kirby v. United States,* 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899), and as recently as last Term, *Pennsylvania v. Ritchie,* 480 U.S., at 51, 107 S.Ct., at 998. But it is also not novel to recognize that a defendant's 'right physically to face those who testify against him,' *ibid.,* even if located at the 'core' of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion.... Rather, the Court has time and again stated that the Clause 'reflects a *preference* for face-to-face confrontation at trial,' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants.... That a particular procedure impacts the 'irreducible literal meaning of the clause,'... does not alter this conclusion. Indeed, virtually all of our cases approving the use of hearsay evidence have implicated the literal right to 'confront' that has always been recognized as forming 'the core of the values furthered by the Confrontation Clause,' *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970) and yet have fallen within an exception to the general requirement of face-to-face confrontation. See, e.g., *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Indeed, we expressly recognized in *Bourjaily v. United States,* --- U.S. ---, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), that 'a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable,' but we also acknowledged that 'this Court has rejected that view as 'unintended and too extreme.' *Id.,* at ---, 107 S.Ct., at

2782 (quoting *Ohio v. Roberts, supra,* at 63, 100 S.Ct., at 2537-2538). In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

"Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . The protection of child witnesses is, in my view and in the view of a substantial majority of the states, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, *e.g.,* Cal. Penal Code Ann. § 1247(d)(1) (West Supp. 1988); Fla.Stat. § 92.54(4) (1987); Mass. Gen.Laws § 278:16D(b)(1) (1986); N.J.Stat.Ann. § 2A:84A-32.4(b) (Supp. 1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it."

Notes

[1]Section 910A.14 provides in part as follows:

"The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony."

DeShaney v. Winnebago County Department of Social Services

489 U.S. 189 (1989)

Liability of Child Protective Services (CPS) Under Due Process Clause -- ***A child's rights under the Due Process Clause were not violated when CPS failed to protect him from abuse inflicted by his father. Although CPS knew of the child's danger, the child was not in state custody when his father inflicted irreparable injuries. The Due Process Clause of the Federal Constitution confers no affirmative right to government protection from violence inflicted by private persons. Thus, the state cannot be held liable under the Due Process Clause when it fails to take steps to protect a child who is not in state custody. The Court does not decide whether a child removed by the state from its parents and placed in foster care has a due process right to state protection while in foster care.***

"Chief Justice REHNQUIST delivered the opinion of the Court.

"Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. The respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

I

"The facts of this case are undeniably tragic. Petitioner Joshua DeShaney was born in 1979. In 1980, a Wyoming court granted his parents a divorce and awarded custody of Joshua to his father, Randy DeShaney. The father shortly thereafter moved to Neenah, a city located in Winnebago County, Wisconsin, taking the infant Joshua with him. There he entered into a second marriage, which also ended in divorce.

"The Winnebago County authorities first learned that Joshua DeShaney might be a victim of child abuse in January 1982, when his father's second wife complained to the police, at the time of their divorce, that he had previously 'hit the boy causing marks and [was] a prime case for child abuse.' App. 152-153. The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations, and DSS did not pursue them further. In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions. The examining physician suspected child abuse and notified DSS, which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county convened an ad hoc 'Child Protection Team' -- consisting of a pediatrician, a psychologist, a police detective, the county's lawyer,

several DSS caseworkers, and various hospital personnel -- to consider Joshua's situation. At this meeting, the Team decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counselling services, and encouraging his father's girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals.

"Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father. A month later, emergency room personnel called the DSS caseworker handling Joshua's case to report that he had once again been treated for suspicious injuries. The caseworker concluded that there was no basis for action. For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head; she also noticed that he had not been enrolled in school and that the girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action.

"In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.

"Joshua and his mother brought this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Wisconsin against respondents Winnebago County, its Department of Social Services, and various individual employees of the Department. The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. The District Court granted summary judgment for respondents.

"The Court of Appeals for the Seventh Circuit affirmed, 812 F.2d 298 (1987), holding that petitioners had not made out an actionable § 1983 claim for two alternative reasons. First, the court held that the Due Process Clause of the Fourteenth Amendment does not require a state or local governmental entity to protect its citizens from 'private violence, or other mishaps not attributable to the conduct of its employees.' *Id.*, at 301. In so holding, the court specifically rejected the position endorsed by a divided panel of the Third Circuit in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-511 (CA3 1985), and by dicta in *Jensen v. Conrad*, 747 F.2d 185, 190-194 (CA4 1984), cert. denied, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985), that once the state learns that a particular child is in danger of abuse from third parties and actually undertakes to protect him from that danger, a 'special relationship' arises between it and the child which imposes an affirmative Constitutional duty to provide adequate protection. 812 F.2d, at 303-304. Second, the court held, in reliance on

our decision in *Martinez v. California,* 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980), that the causal connection between respondents' conduct and Joshua's injuries was too attenuated to establish a deprivation of constitutional rights actionable under § 1983, 812 F.2d, at 301-303. The court therefore found it unnecessary to reach the question whether respondents' conduct evinced the 'state of mind' necessary to make out a due process claim after *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). 812 F.2d, at 302.

"Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, see *Archie v. City of Racine,* 847 F.2d 1211, 1220-1223 and n. 10 (CA7 1988) *(en banc)* (collecting cases), cert. pending, No. 88-576, and the importance of the issue to the administration of state and local governments, we granted *certiorari.* 485 U.S. ---, 108 S.Ct. 1218, 99 L.Ed.2d 419 (1988). We now affirm.

II

"The Due Process Clause of the Fourteenth Amendment provides that '[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.' Petitioners contend that the state[1] deprived Joshua of his liberty interest in 'free[dom] from . . . unjustified intrusions on personal security,' see *Ingraham v. Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977), by failing to provide him with adequate protection against his father's violence. The claim is one invoking the substantive rather than procedural component of the Due Process Clause; petitioners do not claim that the state denied Joshua protection without according him appropriate procedural safeguards, see *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) but that it was categorically obligated to protect him in these circumstances, see *Youngberg v. Romeo,* 457 U.S. 307, 309, 102 S.Ct. 2452, 2454, 73 L.Ed.2d 28 (1982).

"But nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' *Davidson v. Cannon, supra,* at 348, 106 S.Ct., at 670; see also *Daniels v. Williams, supra,* at 331, 106 S.Ct., at 665 ('to secure the individual from the arbitrary exercise of the powers of government, and to prevent governmental power from being used for purposes of oppression') (internal citations omitted); *Parratt v. Taylor,* 451 U.S. 527, 549, 101 S.Ct. 1908, 1919, 68 L.Ed.2d 420 (1981) (POWELL, J., concurring in result) (to prevent the 'affirmative abuse of power'). Its purpose was to protect the people from the state, not to ensure that the state protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

"Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317-318, 100 S.Ct. 2671, 2688-2689, 65 L.Ed.2d 784 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also *Youngberg v. Romeo, supra*, 457 U.S., at 317, 102 S.Ct., at 2458 ('As a general matter, a state is under no constitutional duty to provide substantive services for those within its border'). As we said in *Harris v. McRae*, '[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.' 448 U.S., at 317-318, 100 S.Ct., at 2688-2689 (emphasis added). If the Due Process Clause does not require the state to provide its citizens with particular protective services, it follows that the state cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.[2] As a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

"Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the state to provide the general public with adequate protective services, such a duty may arise out of certain 'special relationships' created or assumed by the state with respect to particular individuals. Brief for Petitioners 13-18. Petitioners argue that such a 'special relationship' existed here because the state knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. *Id.*, at 18-20. Having actually undertaken to protect Joshua from this danger -- which petitioners concede the state played no part in creating -- the state acquired an affirmative 'duty,' enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), as to constitute a substantive due process violation. Brief for Petitioners 20.

"We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals. In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment's Due Process Clause, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), requires the state to provide adequate medical care to incarcerated prisoners. 429 U.S., at 103-104, 97 S.Ct., at 290-291. We reasoned that because the prisoner is unable 'by reason of the deprivation of his liberty [to] care for himself,' it is only 'just' that the state be required to care for him. *Ibid.*, quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

"In *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), we extended the analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to ensure their

'reasonable safety' from themselves and others. . . . As we explained, '[if it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions.' . . .

"But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

"The *Estelle-Youngberg* analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the state's custody, but while he was in the custody of his natural father, who was in no sense a state actor.[3] While the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the state once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the state does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the state had no constitutional duty to protect Joshua.

"It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the state acquired a duty under state tort law to provide him with adequate protection against that danger. . . . But the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. . . . A state may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment. . . . Because, as explained above, the state had no constitutional duty to protect Joshua against his father's violence, its failure to do so -- though calamitous in hindsight -- simply does not constitute a violation of the Due Process Clause.

"Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the state of Wisconsin, but by Joshua's father.

The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

"The people of Wisconsin may well prefer a system of liability which would place upon the state and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the state in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

"AFFIRMED."

"Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

"'The most that can be said of the state functionaries in this case,' the Court today concludes, 'is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.' Because I believe that this description of respondents' conduct tells only part of the story and that accordingly, the Constitution itself 'dictated a more active role' for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.

"It may well be, as the Court decides that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That, however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for *certiorari,* or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.

"This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the states an affirmative duty to take basic care of their citizens, the Court foreshadows -- perhaps even preordains -- its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys' claim that, when a state has -- 'by word and by deed,' *ante,* at 1004 -- announced an intention to protect a certain class of citizens and has before it facts that would trigger that protection under the applicable state law, the Constitution imposes upon the state an affirmative duty of protection.

"The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys' claim is first and foremost about inaction (the failure, here, of respondents to take steps to

protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua). And from this perspective, holding these Wisconsin officials liable -- where the only difference between this case and one involving a general claim to protective services is Wisconsin's establishment and operation of a program to protect children -- would seem to punish an effort that we should seek to promote.

"I would begin from the opposite direction. I would focus first on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the state failed to take. Such a method is not new to this Court. Both *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), and *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), began by emphasizing that the states had confined J.W. Gamble to prison and Nicholas Romeo to a psychiatric hospital. This initial action rendered these people helpless to help themselves or to seek help from persons unconnected to the government.... Cases from the lower courts also recognize that a state's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant. See, e.g., *White v. Rochford,* 592 F.2d 381 (CA7 1979) (police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night).

"Because of the Court's initial fixation on the general principle that the Constitution does not establish positive rights, it is unable to appreciate our recognition in *Estelle* and *Youngberg* that this principle does not hold true in all circumstances. Thus, in the Court's view, *Youngberg* can be explained (and dismissed) in the following way: 'In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.' This restatement of *Youngberg's* holding should come as a surprise when one recalls our explicit observation in that case that Romeo did not challenge his commitment to the hospital, but instead 'argue[d] that he ha[d] a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights *by failing to provide* constitutionally-required conditions of confinement.' 457 U.S., at 315, 102 S.Ct., at 2457 (emphasis added). I do not mean to suggest that 'the state's affirmative act of restraining the individual's freedom to act on his own behalf was irrelevant in *Youngberg;* rather, I emphasize that this conduct would have led to no injury, and consequently no cause of action under § 1983, unless the state then had failed to take steps to protect Romeo from himself and from others. In addition, the Court's exclusive attention to state-imposed restraints of 'the individual's freedom to act on his own behalf' suggests that it was the state that rendered Romeo unable to care for himself, whereas in fact -- with an I.Q. of between 8 and 10, and the mental capacity of an 18-month-old child, 457 U.S., at 309, 102 S.Ct., at 2454 -- he had been quite incapable of taking care of himself long before the state stepped into his life. Thus, the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the state was obligated to replace. Unlike the Court, therefore, I am unable to see in *Youngberg* a neat and decisive divide between action and inaction.

"Moreover, to the Court, the only fact that seems to count as an 'affirmative act of restraining the individual's freedom to act on his own behalf' is direct physical control....

I would not, however, give *Youngberg* and *Estelle* such a stingy scope. I would recognize, as the Court apparently cannot, that 'the state's knowledge of [an] individual's predicament [and] its expressions of intent to help him' can amount to a 'limitation of his freedom to act on his own behalf' or to obtain help from others. *Ante,* at 1006. Thus, I would read *Youngberg* and *Estelle* to stand for the much more generous proposition that, if a state cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.

"*Youngberg* and *Estelle* are not alone in sounding this theme. In striking down a filing fee as applied to divorce cases brought by indigents, see *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and in deciding that a local government could not entirely foreclose the opportunity to speak in a public forum, see, e.g., *Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Hauge v. CIO,* 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); *United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), we have acknowledged that a state's actions -- such as the monopolization of a particular path of relief -- may impose upon the state certain positive duties. Similarly, *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), suggest that a state may be found complicit in an injury even if it did not create the situation that caused the harm.

"Arising as they do from constitutional contexts different from the one involved here, cases like *Boddie* and *Burton* are instructive rather than decisive in the case before us. But they set a tone equally well-established in precedent as, and contradictory to, the one the Court sets by situating the DeShaneys' complaint within the class of cases epitomized by the Court's decision in *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). The cases that I have cited tell us that *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (recognizing entitlement to welfare under state law), can stand side-by-side with *Dandridge v. Williams,* 397 U.S. 471, 484, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970) (implicitly rejecting idea that welfare is a fundamental right), and that *Goss v. Lopez,* 419 U.S. 565, 573, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975) (entitlement to public education under state law), is perfectly consistent with *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 29-39, 93 S.Ct. 1278 1294-1300, 36 L.Ed.2d 16 (1973) (no fundamental right to education). To put the point more directly, these cases signal that a state's prior actions may be decisive in analyzing the constitutional significance of its inaction. I thus would locate the DeShaneys' claims within the framework of cases like *Youngberg* and *Estelle,* and more generally, *Boddie* and *Schneider,* by considering the actions that Wisconsin took with respect to Joshua.

"Wisconsin has established a child-welfare system specifically designed to help children like Joshua. Wisconsin law places upon the local departments of social services such as respondent (DSS or Department) a duty to investigate reported instances of child abuse. See Wis.Stat.Ann. § 48.981(3) (1987 and Supp. 1988-1989). While other governmental bodies and private persons are largely responsible for the reporting of possible cases of child abuse, see § 48.981(2), Wisconsin law channels all such reports to the local departments of social services for evaluation and, if necessary, further action. § 48.981(3). Even when it is the sheriff's office or police department that receives a report of suspected child abuse, that report is referred to local social services departments for action, see § 48.981(3)(a); the only exception to this occurs when the reporter fears for the child's *immediate* safety. § 48.981(3)(b). In this way, Wisconsin law invites -- indeed, directs -- citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.

"The specific facts before us bear out this view of Wisconsin's system of protecting children. Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. When Randy DeShaney's second wife told the police that he had 'hit the boy causing marks and [was] a prime case for child abuse,' the police referred her complaint to DSS. When, on three separate occasions, emergency room personnel noticed suspicious injuries on Joshua's body, they went to DSS with this information. When neighbors informed the police that they had seen or heard Joshua's father or his father's lover beating or otherwise abusing Joshua, the police brought these reports to the attention of DSS. And when respondent Kemmeter, through these reports and through her own observations in the course of nearly 20 visits to the DeShaney home, compiled growing evidence that Joshua was being abused, that information stayed within the Department -- chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it. (As to the extent of the social worker's involvement in and knowledge of Joshua's predicament, her reaction to the news of Joshua's last and most devastating injuries is illuminating: 'I just knew the phone would ring some day and Joshua would be dead.' 812 F.2 298, 300 (CA7 1987).)

"Even more telling than these examples is the Department's control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government's Corporation Counsel) whether to disturb the family's current arrangements. When Joshua first appeared at a local hospital with injuries signaling physical abuse, for example, it was DSS that made the decision to take him into temporary custody for the purpose of studying his situation -- and it was DSS, acting in conjunction with the Corporation Counsel, that returned him to his father. Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.

"In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the state of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

"It simply belies reality, therefore, to contend that the state 'stood by and did nothing' with respect to Joshua. Through its child-protection program, the state actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like *Youngberg* and *Estelle*.

"It will be meager comfort to Joshua and his mother to know that, if the state had 'selectively den[ied] its protective services' to them because they were 'disfavored minorities,' *ante*, at 1004, n. 3, their § 1983 suit might have stood on sturdier ground. Because of the posture of this case, we do not know why respondents did not take steps to protect Joshua; the Court, however, tells us that their reason is irrelevant so long as their inaction was not the product of invidious discrimination. Presumably, then, if respondents decided not to help

Joshua because his name began with a 'j,' or because he was born in the spring, or because they did not care enough about him even to formulate an intent to discriminate against him based on an arbitrary reason, respondents would not be liable to the DeShaneys because they were not the ones who dealt the blows that destroyed Joshua's life.

"I do not suggest that such irrationality was at work in this case; I emphasize only that we do not know whether or not it was. I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment that we recognized in *Youngberg* as sufficient to preclude liability, but from the kind of arbitrariness that we have in the past condemned. . . .

"*Youngberg's* deference to a decision-maker's professional judgment ensures that once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child, or even that no special protection is required, she will not be found liable for the harm that follows. (In this way, *Youngberg's* vision of substantive due process serves a purpose similar to that served by adherence to procedural norms, namely, requiring that a state actor stop and think before she acts in a way that may lead to a loss of liberty.) Moreover, that the Due Process Clause is not violated by merely negligent conduct, see *Daniels, supra,* and *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), means that a social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under § 1983.

"As the Court today reminds us, 'the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression.' My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a state undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a state to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.

"Justice BLACKMUN, dissenting.

"Today, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. As Justice BRENNAN demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney -- intervention that triggered a fundamental duty to aid the boy once the state learned of the severe danger to which he was exposed.

"The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring clauses of the Fourteenth Amendment. Indeed, I submit that these clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled *Justice Accused* (1975).

"Like the antebellum judges who denied relief to fugitive slaves, see *id.*, at 119-121, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. Cf. A. Stone, *Law, Psychiatry, and Morality* 262 (1984) ('We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort').

"Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous perdicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, 'dutifully recorded these incidents in [their] files.' It is a sad commentary upon American life, and Constitutional principles -- so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all,' that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve -- but now are denied by this Court -- the opportunity to have the facts of their case considered in the light of the Constitutional protection that 42 U.S.C. § 1983 is meant to provide.

Notes

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[1]As used here, the term 'state' refers generically to state and local governmental entities and their agents.

[2] The state may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). But no such argument has been made here.

[3]Complaint ¶ 16, App. 6 ("At relevant times to and until March 8, 1984 [the date of the final beating], Joshua DeShaney was in the custody and control of defendant Randy DeShaney"). Had the state by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the state may be held liable under the DueProcess Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. See *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-142 (CA2 1981), after remand, 709 F.2d 782, cert. denies *sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864, 104 S.Ct 195, 78 L.Ed.2d 171 (1983); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794-797 (CA11 1987) (*en banc*), cert. pending *sub nom. Ledbetter v. Taylor*, No. 87-521. We express no view on the validity of this analogy, however, as it is not before us in the present case.

Hodgson v. Minnesota

110 S. Ct. 2926 (1990)

Abortion -- ***A state may require a minor to wait forty-eight hours after notifying a parent of her intent to get an abortion. A requirement that both parents be notified, whether or not both parents wish to be notified or have assumed responsibility for the upbringing of the child, is unconstitutional. Constitutional objection to the two-parent notification procedure was removed by providing minors an option to bypass parental notification by obtaining a court order permitting abortion without parental notification.***

"Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, IV, and VII, an opinion with respect to Part III in which Justice BRENNAN joins, an opinion with respect to Parts V and VI in which Justice O'CONNOR joins, and a dissenting opinion with respect to Part VIII.

"A Minnesota statute, Minn. Stat. §§ 144.343(2)-(7) (1988), provides, with certain exceptions, that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. In subdivisions 2-4 of the statute the notice is mandatory unless (1) the attending physician certifies that an immediate abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; (2) both of her parents have consented in writing, or (3) the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. The United States Court of Appeals for the Eighth Circuit, sitting *en banc,* unanimously held this provision unconstitutional. In No. 88-1309, we granted the state's petition to review that holding. Subdivision 6 of the same statute provides that if a court enjoins the enforcement of subdivision 2, the same notice requirement shall be effective unless the pregnant woman obtains a court order permitting the abortion to proceed. By a vote of 7-3, the Court of Appeals upheld the Constitutionality of subdivision 6. In No. 88-1125, we granted the plaintiffs' petition to review that holding.

"For reasons that follow, we now conclude that the requirement of notice to both of the pregnant minor's parents is not reasonably related to legitimate state interests and that subdivision 2 is unconstitutional. A different majority of the Court, for reasons stated in separate opinions, concludes that subdivision 6 is Constitutional. Accordingly, the judgment of the Court of Appeals in its entirety is affirmed.

I

"The parental notice statute was enacted in 1981 as an amendment to the Minor's Consent to Health Services Act. The earlier statute, which remains in effect as subdivision 1 of § 144.343 and as § 144.346, had modified the common law requirement of parental consent for any medical procedure performed on minors. It authorized 'any minor' to give effective consent without any parental involvement for the treatment of pregnancy and conditions

associated therewith, venereal disease, alcohol and other drug abuse.' The statute, unlike others of its age, applied to abortion services.

"The 1981 amendment qualified the authority of an 'unemancipated minor' to give effective consent to an abortion by requiring that either her physician or an agent notify 'the parent' personally or by certified mail at least 48 hours before the procedure is performed. The term 'parent' is defined in subdivision 3 to mean 'both parents of the pregnant woman if they are both living.' No exception is made for a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother. The statute does provide, however, that if only one parent is living, or 'if the second one cannot be located through reasonably diligent effort,' notice to one parent is sufficient. It also makes exceptions for cases in which emergency treatment prior to notice 'is necessary to prevent the woman's death,' both parents have already given their consent in writing, or the proper authorities are advised that the minor is a victim of sexual or physical abuse. The statute subjects a person performing an abortion in violation of its terms to criminal sanctions and to civil liability in an action brought by any person 'wrongfully denied notification.'

"Subdivision 6 authorizes a judicial bypass of the two-parent notice requirement if subdivision 2 is ever 'temporarily or permanently' enjoined by judicial order. If the pregnant minor can convince 'any judge of a court of competent jurisdiction' that she is mature and capable of giving informed consent to the proposed abortion,' or that an abortion without notice to both parents would be in her best interest, the court can authorize the physician to proceed without notice. The statute provides that the bypass procedure shall be confidential, that it shall be expedited, that the minor has a right to court-appointed counsel, and that she shall be afforded free access to the court '24 hours a day, seven days a week.' An order denying an abortion can be appealed on an expedited basis, but an order authorizing an abortion without notification is not subject to appeal.

"The statute contains a severability provision, but it does not include a statement of its purposes. The Minnesota Attorney General has advised us that those purposes are apparent from the statutory text and that they 'include the recognition and fostering of parent-child relationships, promoting counsel to a child in a difficult and traumatic choice, and providing for notice to those who are naturally most concerned for the child's welfare.' The district court found that the primary purpose of the legislation was to protect the well-being of minors by encouraging them to discuss with their parents the decision whether to terminate their pregnancies. It also found that the legislature was motivated by a desire to deter and dissuade minors from choosing to terminate their pregnancies. The Attorney General, however, disclaims any reliance on this purpose. . . .

III

"There is a natural difference between men and women: only women have the capacity to bear children. A woman's decision to beget or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. That Clause protects the woman's right to make such decisions independently and privately, free of unwarranted governmental intrusion.

"'Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S., at 153, is not mitigated by her minority. Indeed, considering her probable edu-

cation, employment skills, financial resoures, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.' *Bellotti v. Baird,* 443 U.S. 622, 642 (1979) (*Bellotti II*).

"As we stated in *Planned Parenthood of Central Missouri v. Danforth,* 427 U.S. 52, 74 (1976), the right to make this decision 'do[es] not mature and come into being magically only when one attains the state-defined age of majority.' Thus, the Constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.

"In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the Constitutionally-protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a state may not categorically exclude nonresidents from its borders, *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969), or deny prisoners the right to marry, *Turner v. Safley,* 482 U.S. 78, 94-99 (1987). But the regulation of Constitutionally-protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Taylor v. Safley, supra; Loving v. Virginia,* 388 U.S. 1, 12 (1967). In the abortion area, a state may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, e.g., *Maher v. Roe,* 432 U.S. 464 (1977); cf. *Webster v. Reproductive Health Services,* 492 U.S. ---, --- (1989) (plurality opinion); *id.,* at ---. (O'CONNOR, J., concurring in part and concurring in judgment). A state's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing 'obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion.' *Maher,* 432 U.S., at 474; see also *Harris v. McRae,* 448 U.S., at 315-316.

"In these cases the state of Minnesota does not rest its defense of the statute on any such value judgment. Indeed, it affirmatively disavows that state interest as a basis for upholding this law. Moreover, it is clear that the state judges who have interpreted the statute in over 3,000 decisions implementing its bypass procedures have found no legislative intent to disfavor the decision to terminate a pregnancy. On the contrary, in all but a handful of cases they have approved such decisions. Because the Minnesota statute unquestionably places obstacles in the pregnant minor's path to an abortion, the state has the burden of establishing its constitutionality. Under any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests. Cf. *Turner v. Safley,* 482 U.S., at 97; *Carey v. Population Services International,* 431 U.S., at 704 (opinion of POWELL, J.); *Doe v. Bolton,* 410 U.S. 179, 194-195, 199 (1973).

V

"Three separate but related interests -- the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit -- are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement.

"The state has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. See *Bellotti II*, 443 U.S., at 634-639 (opinion of POWELL, J.); *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).[1] That interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service . . . extends also to the minor's decision to terminate her pregnancy. Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision, *Danforth*, 428 U.S., at 74, it has never challenged a state's reasonable judgment that the decision should be made after notification to and consultation with a parent. . . . As Justice STEWART, joined by Justice POWELL, pointed out in his concurrence in *Danforth:*

> "'There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.'

"Parents have an interest in controlling the education and upbringing of their children but that interest is 'a counter-part of the responsibilities they have assumed.' The fact of biological parentage generally offers a person only 'an opportunity . . . to develop a relationship with his offspring.' . . . But the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest. . . .

"While the state has a legitimate interest in the creation and dissolution of the marriage contract . . . the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference. . . . The family may assign one parent to guide the children's education and the other to look after their health. 'The statist notion that governmental power should supersede parental authority in all cases because *some* parents abuse and neglect children is repugnant to American tradition.' We have long held that there exists a 'private realm of family life which the state cannot enter.' . . . Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the 'governmental interests advanced and the extent to which they are served by the challenged regulation.'

"A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference. . . .

VI

"We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. We have held that

when a parent or another person has assumed primary responsibility' for a minor's well-being, the state may properly enact laws designed to aid discharge of that responsibility.' To the extent that subdivision 2 of the Minnesota statute requires notification of only one parent, it does just that. The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future. . . .

"The 48-hour delay imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy. Although the District Court found that scheduling factors, weather, and the minor's school and work commitments may combine, in many cases, to create a delay of a week or longer between the initiation of notification and the abortion, . . . there is no evidence that the 48-hour period itself is unreasonable or longer than appropriate for adequate consultation between parent and child. The statute does not impose any period of delay once the parents or a court, acting *in loco parentis*, express their agreement that the minor is mature or that the procedure would be in her best interest. Indeed, as the Court of Appeals noted and the record reveals, the 48-hour waiting period may run concurrently with the time necessary to make an appointment for the procedure, thus resulting in little or no delay.

VII

"It is equally clear that the requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. The usual justification for a parental consent or notification provision is that it supports the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate. To the extent that such an interest is legitimate, it would be fully-served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision. In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases the state has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor, or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child.

"Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. In some cases, the parents were divorced and the second parent did not have custody or otherwise participate in the child's upbringing. . . . In these circumstances, the privacy of the parent and child was violated, even when they suffered no other physical or psychological harm. In other instances, however, the second parent had either deserted

or abused the child, had died under tragic circumstances, . . . or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. . . . In these circumstances, the statute was not merely ineffectual in achieving the state's goals but actually counter-productive. The focus on notifying the second parent distracted both the parent and minor from the minor's imminent abortion decision.

"The state does not rely primarily on the best interests of the minor in defending this statute. Rather, it argues that, in the ideal family, the minor should make her decision only after consultation with both parents who should naturally be concerned with the child's welfare and that the state has an interest in protecting the independent right of the parents 'to determine and strive for what they believe to be best for their children.' . . . Neither of these reasons can justify the two-parent notification requirement. The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the state. The state has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together. In *Moore v. East Cleveland,* 431 U.S. 494 (1977), we invalidated a zoning ordinance which 'slic[ed] deeply into the family itself,' *id.,* at 498, permitting the city to 'standardiz[e] its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns.' *Id.,* at 506. Although the ordinance was supported by state interests other than the state interest in substituting its conception of family life for the families own view, the ordinance's relation to those state interests was too 'tenuous' to satisfy constitutional standards. By implication, a state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all. . . .

"Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court . . . . In *Danforth,* the majority identified the only state interest in requiring parental consent as that in 'the safeguarding of the family unit and of parental authority' and held that that state interest was insufficient to support the requirement that mature minors receive parental consent. The Court summarily concluded that '[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.' *Id.,* at 75. It follows that the combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent. . . .

"Unsurprisingly, the Minnesota two-parent notification requirement is an oddity among state and federal consent provisions governing the health, welfare, and education of children. A minor desiring to enlist in the armed services or the Reserve Officers' Training Corps (ROTC) need only obtain the consent of 'his parent or guardian.' 10 U.S.C. § 505(a); 2104(b)(4); 2107(b)(4). The consent of '*a* parent or guardian' is also sufficient to obtain a passport for foreign travel from the United States Department of State, 22 CFR § 51.27 (1989), and to participate as a subject in most forms of medical research. 45 CFR §§ 46.404, 46.405 (1988). In virtually every state, the consent of one parent is enough to obtain a driver's license or operator's permit. The same may be said with respect to the decision to submit to any medical or surgical procedure other than an abortion. Indeed, the only other Minnesota statute that the state has identified which requires two-parent consent is that authorizing the minor to change his name. Tr. of Oral Arg. 30, 32; Reply Brief for Petitioner in No. 88-1309, p. 5 (citing Minn. Stat. § 259.10 (1988)). These statutes provide testimony to the unreasonableness

of the Minnesota two-parent notification requirement and to the ease with which the state can adopt less burdensome means to protect the minor's welfare. Cf. *Clark v. Jeter*, 486 U.S. 456, 464 (1988); *Turner v. Safley*, 482 U.S. 78, 98 (1987). We therefore hold that this requirement violates the Constitution.

VIII

"The Court holds that the Constitutional objection to the two-parent notice requirement is removed by the judicial bypass option provided in subdivision 6 of the Minnesota statute. I respectfully dissent from that holding.

"A majority of the Court has previously held that a statute requiring one parent's consent to a minor's abortion will be upheld if the state provides an 'alternate procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.'

* * *

"The judgment of the Court of Appeals in its entirety is affirmed.

"It is so ordered."

"Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice SCALIA join, concurring in the judgment in part and dissenting in part.

"'There can be little doubt that the state furthers a constitutionally-permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.' *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 640-641 (1979) (plurality opinion) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (STEWART, J., concurring)); see also *H. L. v. Matheson*, 450 U.S. 398, 409-411 (1981); *id.*, at 422-423 (STEVENS, J., concurring in judgment); *Danforth, supra*, at 94-95 (WHITE, J., concurring in part and dissenting in part); *id.*, at 102-103 (STEVENS, J., concurring in part and dissenting in part). Today, the Court holds that a statute requiring a minor to notify both parents that she plans to have an abortion is not a permissible means of furthering the interest described with such specificity in *Bellotti II*. This conclusion, which no doubt will come as a surprise to most parents, is incompatible with our Constitutional tradition and any acceptable notion of judicial review of legislative enactments. I dissent from the portion of the Court's judgment affirming the Court of Appeal's conclusion that Minnesota two-parent notice statute is unconstitutional.

"The Minnesota statute also provides, however, that if the two-parent notice requirement is invalidated, the same notice requirement is effective unless the pregnant minor obtains a court order permitting the abortion to proceed. Minn. Stat. § 144.343(6) (1988). The Court of Appeals sustained this portion of the statute, in effect a two-parent notice requirement with

a judicial bypass. Five Members of the Court, the four who join this opinion and Justice O'CONNOR, agree with the Court of Appeals' decision on this aspect of the statute. As announced by Justice STEVENS, who dissents from this part of the Court's decision, the Court of Appeal's judgment on this portion of the statute is therefore affirmed.

Notes

[1]'Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty, rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.' *Bellotti II,* 443 U.S., at 638-639 (opinion of POWELL, J.).

Idaho v. Wright

110 S.Ct. 3139 (1990)

Hearsay and Confrontation -- *The Confrontation Clause of the Sixth Amendment does not bar admission of all hearsay in criminal trials. When the state offers hearsay, the Sixth Amendment usually requires the prosecutor either to produce the out-of-court declarant or demonstrate the declarant's unavailability. If the declarant is unavailable, the statement is admissible only if it bears sufficient indicia of reliability. Reliability can be inferred without more where the hearsay falls within a firmly rooted hearsay exception. When the hearsay does not fall within a firmly rooted exception, the hearsay must be excluded absent a showing of particularized guarantees of trustworthiness. The residual exception (Fed. R. Evid. 803(24) and similar state rules) is not a firmly rooted exception for Confrontation Clause purposes, therefore, when hearsay statements of an unavailable declarant are offered under a residual exception, the hearsay is inadmissible absent a showing of particularized guarantees of trustworthiness.*

Hearsay statements by children regarding sexual abuse arise in a wide variety of circumstances, and the Constitution does not impose a fixed set of prerequisites to the admission of children's hearsay statements. The Court expressly declined to establish an artificial litmus test for the propriety of professional interviews of children. Thus, in Wright, *the fact that the physician who interviewed the two-and-a-half-year-old hearsay declarant did not video-tape the interview, used several leading questions, and possessed background information about the child before questioning her, did not necessarily render the child's out-of-court statements to the physician unreliable.*

Particularized guarantees of trustworthiness or reliability are established on the basis of the totality of the circumstances. The relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.

The Court identified a partial list of factors related to trustworthiness: spontaneity, consistent repetition of the same story, the child's mental state when the out-of-court statement was made, the child's use of terminology unexpected of a child of similar age, and lack of motive to fabricate. The underlying consideration is whether the child is particularly likely to be telling the truth when the statement is made.

The Court held that evidence corroborating the truth of a child's out-of-court statement (e.g., medical evidence of sexual abuse, defendant's opportunity to commit the abuse, testimony of other victims) cannot be used to support a finding of particularized guarantees of trustworthiness.

The fact that a child is unable at trial to communicate, and is thus not permitted to testify, does not necessarily render the child's out-of-court statements unreliable.

"JUSTICE O'CONNOR delivered the opinion of the Court.

"This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment.

I

"Respondent Laura Lee Wright was jointly charged with Robert L. Giles of two counts of lewd conduct with a minor under 16, in violation of Idaho Code § 18-1508 (1987). The alleged victims were respondent's two daughters, one of whom was 5½ and the other 2½ years old at the time the crimes were charged.

"Respondent and her ex-husband, Louis Wright, the father of the older daughter, had reached an informal agreement whereby each parent would have custody of the older daughter for six consecutive months. The allegations surfaced in November 1986 when the older daughter told Cynthia Goodman, Louis Wright's female companion, that Giles had had sexual intercourse with her while respondent held her down and covered her mouth, . . . and that she had seen respondent and Giles do the same thing to respondent's younger daughter. . . . The younger daughter was living with her parents -- respondent and Giles -- at the time of the alleged offenses.

"Goodman reported the older daughter's disclosures to the police the next day and took the older daughter to the hospital. A medical examination of the older daughter revealed evidence of sexual abuse. One of the examining physicians was Dr. John Jambura, a pediatrician with extensive experience in child abuse cases. . . . Police and welfare officials took the younger daughter into custody that day for protection and investigation. Dr. Jambura examined her the following day and found conditions 'strongly suggestive of sexual abuse with vaginal contact,' occurring approximately two to three days prior to the examination.

"At the joint trial of respondent and Giles, the trial court conducted a *voir dire* examination of the younger daughter, who was three years old at the time of trial, to determine whether she was capable of testifying. . . . The court concluded, and the parties agreed, that the younger daughter was 'not capable of communicating to the jury.' . . .

"At issue in this case is the admission at trial of certain statements made by the younger daughter to Dr. Jambura in response to questions he asked regarding the alleged abuse. Over objection by respondent and Giles, the trial court permitted Dr. Jambura to testify before the jury as follows:

"Q. (By the prosecutor) Now, calling your attention then to your examination of Kathy Wright on November 10th. What -- would you describe any interview dialogue that you had with Kathy at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

"A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

"I started out with basically, 'Hi, how are you,' you know, 'What did you have for breakfast this morning?' Essentially a few minutes of just sort of chit-chat.

"Q. Was there response from Kathy to that first -- those first questions?

"A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, 'Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?' And again we then established what was meant by pee-pee, it was a generic term for genital area.

"Q. Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?'

"A. Yes, we play -- I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

"Q. And 'Does daddy play with you?' Was there any response?

"A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

"Q. And then what did you say and her response?

"A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.

"Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

"A. Yes.

"Q. What did you observe?

"A. She would not -- oh, she did not talk any further about that. She would not elucidate what exactly -- what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

"Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

"A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.' . . .

"On cross-examination, Dr. Jambura acknowledged that a picture that he drew during his questioning of the younger daughter had been discarded. . . . Dr. Jambura also stated that

although he had dictated notes to summarize the conversation, his notes were not detailed and did not record any changes in the child's affect or attitude. . . .

"The trial court admitted these statements under Idaho's residual hearsay exception, which provides in relevant part:

> "Rule 803. Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> "(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.' Idaho Rule Evid. 803(24).

"Respondent and Giles were each convicted of two counts of lewd conduct with a minor under 16 and sentenced to 20-years imprisonment. Each appealed only from the conviction involving the younger daughter. Giles contended that the trial court erred in admitting Dr. Jambura's testimony under Idaho's residual hearsay exception. The Idaho Supreme Court disagreed and affirmed his conviction. *State v. Giles,* 115 Idaho 984, 772 P.2d 191 (1989). Respondent asserted that the admission of Dr. Jambura's testimony under the residual hearsay exception nevertheless violated her rights under the Confrontation Clause. The Idaho Supreme Court agreed and reversed respondent's conviction. 116 Idaho 382, 775 P.2d 1224 (1989).

"The Supreme Court of Idaho held that the admission of the inculpatory hearsay testimony violated respondent's federal constitutional right to confrontation because the testimony did not fall within a traditional hearsay exception and was based on an interview that lacked procedural safeguards. . . . The court found Dr. Jambura's interview technique inadequate because 'the questions and answers were not recorded on video-tape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation.' . . . The statements also lacked trustworthiness, according to the court, because 'this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.' Noting that expert testimony and child psychology texts indicated that children are susceptible to suggestion and are therefore likely to be misled by leading questions, the court found that '[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed.' . . . The court concluded that the younger daughter's statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause and that therefore the trial court erred in admitting them. . . . Because the court was not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred, the court reversed respondent's conviction on the count involving the younger daughter and remanded for a new trial. . . .

"We granted *certiorari,* 493 U.S. --- (1990), and now affirm."

II

"The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'

"From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause.... We reaffirmed only recently that '[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable,' this Court has rejected that view as 'unintended and too extreme.' *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)); see also *Maryland v. Craig*, [110 S.Ct. (1990)] ('[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial').

"Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. . . .

"In *Ohio v. Roberts*, we set forth 'a general approach' for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U.S., at 65. We noted that the Confrontation Clause 'operates in two separate ways to restrict the range of admissible hearsay.' *Ibid.* 'First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case, . . . the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.' *Ibid.* (citations omitted). Second, once a witness is shown to be unavailable, 'his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.' *Id.*, at 66 (footnote omitted); see also *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

"Applying this general analytical framework to the facts of *Roberts, supra*, we held that the admission of testimony given at a preliminary hearing, where the declarant failed to appear at trial despite the state's having issued five separate subpoenas to her, did not violate the Confrontation Clause.... Specifically, we found that the state had carried its burden of showing that the declarant was unavailable to testify at trial, . . . and that the testimony at the preliminary hearing bore sufficient indicia of reliability, particularly because defense counsel had had an adequate opportunity to cross-examine the declarant at the preliminary hearing.

"We have applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation Clause and hearsay issues. In *United States v. Inadi*, [475 U.S. 387 (1986)], we held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator and that therefore the

Confrontation Clause did not prohibit the admission of such statements, even though the government had not shown that the declarant was unavailable to testify at trial. . . . In *Bourjaily y. United States,* [483 U.S. 171 (1987)] we held that such statements also carried with them sufficient 'indicia of reliability' because the hearsay exception for co-conspirator statements was a firmly rooted one. 483 U.S., at 182-184.

"Applying the *Roberts* approach to this case, we first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial -- and, if so, what that showing requires. The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed. . . . The court below neither questioned this finding nor discussed the general requirement of unavailability. For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.

"The crux of the question presented is therefore whether the state, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, has carried its burden of proving that the younger daughter's incriminating statements to Dr. Jambura bore sufficient indicia of reliability to withstand scrutiny under the Clause. The court below held that although the trial court had properly admitted the statements under the state's residual hearsay exception, the statements were 'fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate.' . . . The state asserts that the court below erected too stringent a standard for admitting the statements and that the statements were, under the totality of the circumstances, sufficiently reliable for Confrontation Clause purposes.

"In *Roberts,* we suggested that the 'indicia of reliability' requirement could be met in either of two circumstances: where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.' 448 U.S., at 66; see also *Bourjaily,* 483 U.S., at 183 ('[T]he co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts,* a court need not independently inquire into the reliability of such statements'); *Lee v. Illinois,* 476 U.S. 530, 543 (1986) ('[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness') (footnote and citation omitted).

"We note at the outset that Idaho's residual hearsay exception, Idaho Rule Evid. 803(24), under which the challenged statements were admitted, . . . is not a firmly rooted hearsay exception for Confrontation Clause purposes. Admission under a firmly rooted hearsay exception satisfies the Constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. See *Mattox v. United States,* 156 U.S. 237, 243 (1895); *Roberts,* 448 U.S., at 66; *Bourjaily,* 483 U.S., at 183; see also *Lee,* 476 U.S., at 551-552 (BLACKMUN, J., dissenting) ('[S]tatements squarely within established hearsay exceptions possess 'the *imprimatur* of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for Constitutional purposes') (citation omitted). The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise

falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial, see, e.g., Senate Judiciary Committee's Note on Fed. Rule Evid. 803(24), 28 U.S. C. App., pp. 786-787; E. Cleary, McCormick on Evidence § 324.1, pp. 907-909 (3d ed. 1984). Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume Constitutional stature, a step this Court has repeatedly declined to take. See *Green,* 399 U.S., at 155-156; *Evans,* 400 U.S., at 86-87 (plurality opinion); *Inadi,* 475 U.S., at 393, n. 5; see also *Evans, supra,* at 94-95 (HARLAN, J., concurring in result).

"The state in any event does not press the matter strongly and recognizes that, because the younger daughter's hearsay statements do not fall within a firmly rooted hearsay exception, they are 'presumptively unreliable and inadmissible for Confrontation Clause purposes,' *Lee,* 476 U.S., at 543, and 'must be excluded, at least absent a showing of particularized guarantees of trustworthiness,' *Roberts,* 448 U.S., at 66. The court below concluded that the state had not made such a showing, in large measure because the statements resulted from an interview lacking certain procedural safeguards. The court below specifically noted that Dr. Jambura failed to record the interview on video-tape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing. . . .

"Although we agree with the court below that the Confrontation Clause bars the admission of the younger daughter's hearsay statements, we reject the apparently dispositive weight placed by that court on the lack of procedural safeguards at the interview. Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial. The procedural requirements identified by the court below, to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. See, e.g., *Nelson v. Farrey,* 874 F.2d 1222, 1229 (CA7 1989) (video-tape requirement not feasible, especially where defendant had not yet been criminally charged), cert. denied, 493 U.S. --- (1990); J. Myers, *Child Witness Law and Practice* § 4.6, pp. 129-134 (1987) (use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy). Although the procedural guidelines propounded by the Court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.

"The state responds that a finding of 'particularized guarantees of trustworthiness' should instead be based on a consideration of the totality of the circumstances, including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement. We agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay:

> "'The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.' 5 J. Wigmore, *Evidence* § 1420, p. 251 (J. Chadbourne rev. 1974).

"In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the 'excited utterance' exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. See, e.g., 6 Wigmore, *supra,* §§ 1745-1764; 4 J. Weinstein & M. Berger, *Weinstein's Evidence,* p. 803[2][01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U.S.C. App., p. 778. Likewise, the 'dying declaration' and 'medical treatment' exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie. See, e.g., *Mattox,* 156 U.S., at 244 ('[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath'); *Queen v. Osman,* 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L. J.) ('[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips'); Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment,* 67 N.C.L. Rev. 257 (1989). 'The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.' *Huff v. White Motor Corp.,* 609 F.2d 286, 292 (CA7 1979).

"We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents have recognized that statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability. See *Green,* 399 U.S., at 161 (examining 'whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement'); see also *Mattox,* 156 U.S., at 244; Evans, 400 U.S., at 88-89 (plurality opinion); *Roberts,* 448 U.S., at 65, 73. Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, see *Roberts, supra,* at 66, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. See *Lee v. Illinois,* 476 U.S., at 544 (determining indicia of reliability from the circumstances surrounding the making of the statement); see also *State v. Ryan,* 103 Wash. 2d 165, 174, 691 P.2d 197, 204 (1984) ('Adequate indicia of reliability [under *Roberts*] must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act'). Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

"The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. See, e.g., *State v. Robinson,* 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); *Morgan v. Foretich,* 846 F.2d 941, 948 (CA4 1988) (mental state of the declarant); *State v. Sorenson,* 143 Wis.2d 226, 246, 421 N.W.2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); *State v. Kuone,* 243 Kan. 218, 221-222, 757 P.2d 289, 292-293 (1988) (lack of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear 'particularized guarantees of trustworthiness' under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

"As our discussion above suggests, we are unpersuaded by the state's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Cf. *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986). '[T]he Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' *Roberts,* 448 U.S., at 65 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 107 (1934)). A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made may provide no basis for supposing that the declarant is particularly likely to be telling the truth -- indeed, the circumstances may even be such that the declarant is particularly unlikely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant's state-of-mind when he made the statements; the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.

"In short, the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Indeed, although a plurality of the Court in *Dutton v. Evans* looked to corroborating evidence as one of four factors in determining whether a particular hearsay statement possessed sufficient indicia of reliability, see 400 U.S., at 88, we think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless,[1] rather than that any basis exists for presuming the declarant to be trustworthy. See *id.,* at 90 (BLACKMUN, J., joined by BURGER, C.J., concurring) (finding admission of the statement at issue to be harmless error, if error at all); see also 4 D. Louisell & C. Mueller, *Federal Evidence,* § 418, p. 143 (1980) (discussing *Evans*).

"Moreover, although we considered in *Lee v. Illinois* the 'interlocking' nature of a

codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed rejected the 'interlock' theory in that case. 476 U.S., at 545-546. We cautioned that '[t]he true danger inherent in this type of hearsay is, in fact, its selective reliability.' *Id.*, at 545. This concern applies in the child hearsay context as well:

> "'Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. Furthermore, we recognized the similarity between harmless-error analysis and the corroboration inquiry when we noted in *Lee* that the harm of 'admission of the [hearsay] statement [was that it] poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.' *Ibid.*, (emphasis added).

"Finally, we reject respondent's contention that the younger daughter's out-of-court statements in this case are *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the younger daughter incompetent to testify at trial. First, respondent's contention rests upon a questionable reading of the record in this case. The trial court found only that the younger daughter was 'not capable of communicating to the jury.' . . . Although Idaho law provides that a child witness may not testify if he 'appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly,' Idaho Code § 9-202 (Supp. 1989); Idaho Rule Evid. 601(a), the trial court in this case made no such findings. Indeed, the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly. . . . In addition, we have in any event held that the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, e.g., *Mattox*, 156 U.S., at 243-244; see also 4 Louisell & Mueller, *supra*, § 486, pp. 1041-1045. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder states in their own 'enlightened development in the law of evidence,' *Evans*, 400 U.S., at 95 (HARLAN, J., concurring in result).

III

"The trial court in this case, in ruling that the Confrontation Clause did not prohibit admission of the younger daughter's hearsay statements, relied on the following factors:

> "'In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It would also seem to be the case that there is no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.

"We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the defendants. The [older daughter] has testified as to identification of [the] perpetrators. Those -- the identification of the perpetrators in this case are persons well-known to the [younger daughter]. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identity or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements.' . . .

"Of the factors the trial court found relevant, only two relate to circumstances surrounding the making of the statements: whether the child had a motive to 'make up a story of this nature,' and whether, given the child's age, the statements are of the type 'that one would expect a child to fabricate.' . . . The other factors on which the trial court relied, however, such as the presence of physical evidence of abuse, the opportunity of respondent to commit the offense, and the older daughter's corroborating identification, relate instead to whether other evidence existed to corroborate the truth of the statement. These factors, as we have discussed, are irrelevant to a showing of the 'particularized guarantees of trustworthiness' necessary for admission of hearsay statements under the Confrontation Clause.

"We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy. The younger daughter's last statement regarding the abuse of the older daughter, however, presents a closer question. According to Dr. Jambura, the younger daughter 'volunteered' that statement 'after she sort of clammed-up.' . . . Although the spontaneity of the statement and the change in demeanor suggest that the younger daughter was telling the truth when she made the statement, we note that it is possible that '[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.' *Robinson,* 153 Ariz., at 201, 735 P.2d, at 811. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, *Lee,* 476 U.S., at 543, we agree with the court below that the state has failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness' under the Confrontation Clause to overcome that presumption.

"The state does not challenge the Idaho Supreme Court's conclusion that the Confrontation Clause error in this case was not harmless beyond a reasonable doubt, and we see no reason to revisit the issue. We therefore agree with that Court that respondent's conviction involving the younger daughter must be reversed and the case remanded for further proceedings. Accordingly, the judgment of the Supreme Court of Idaho is affirmed.

"It is so ordered."

"Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice WHITE and Jus-

tice BLACKMUN join, dissenting.

"The issue is whether the Sixth Amendment right of confrontation is violated when statements from a child who is unavailable to testify at trial are admitted under a hearsay exception against a defendant who stands accused of abusing her. The Court today holds that it is not, provided that the child's statements bear 'particularized guarantees of trustworthiness.' *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). I agree. My disagreement is with the rule the Court invents to control this inquiry, and with the Court's ultimate determination that the statements in question here must be inadmissible as violative of the Confrontation Clause.

"Given the principle, for cases involving hearsay statements that do not come within one of the traditional hearsay exceptions, that admissibility depends upon finding particular guarantees of trustworthiness in each case, it is difficult to state rules of general application. I believe the Court recognizes this. The majority errs, in my view, by adopting a rule that corroboration of the statement by other evidence is an impermissible part of the trustworthiness inquiry. The Court's apparent ruling is that corroborating evidence may not be considered in whole or in part for this purpose. This limitation, at least on a facial interpretation of the Court's analytic categories, is a new creation by the Court; it likely will prove unworkable and does not even square with the examples of reliability indicators the Court itself invokes; and it is contrary to our own precedents.

"I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result; on the contrary, most federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions. See 4 D. Louisell & C. Mueller, *Federal Evidence,* § 472, p. 929 (1980) (collecting cases); 4 J. Weinstein & M. Berger, *Weinstein's Evidence,* p. 804(b)[5][01] (1988) (same). Specifically with reference to hearsay statements by children, a review of the cases has led a leading commentator on child witness law to conclude flatly: 'If the content of an out-of-court statement is supported or corroborated by other evidence, the reliability of the hearsay is strengthened.' J. Myers, *Child Witness Law and Practice* § 5.37, p. 364 (1987). The Court's apparent misgivings about the weight to be given corroborating evidence, . . . may or may not be correct, but those misgivings do not justify wholesale elimination of this evidence from consideration, in derogation of an overwhelming judicial and legislative consensus to the contrary. States are of course free, as a matter of state law, to demand corroboration of an unavailable child declarant's statements as well as other indicia of reliability before allowing the statements to be admitted into evidence. Until today, however, no similar distinction could be found in our precedents

interpreting the Confrontation Clause. If anything, the many state statutes requiring corroboration of a child declarant's statements emphasize the relevance, not the irrelevance, of corroborating evidence to the determination whether an unavailable child witness's statements bear particularized guarantees of trustworthiness, which is the ultimate inquiry under the Confrontation Clause. In sum, whatever doubt the Court has with the weight to be given the corroborating evidence found in this case there is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness.

"Far from rejecting this common-sense proposition, the very cases relied upon by the Court today embrace it. In *Lee v. Illinois*, 476 U.S. 530 (1986), we considered whether the confession of a codefendant that 'interlocked' with a defendant's own confession bore particularized guarantees of trustworthiness so that its admission into evidence against the defendant did not violate the Confrontation Clause. Although the Court's ultimate conclusion was that the confession did not bear sufficient indicia of reliability, its analysis was far different from that utilized by the Court in the present case. The Court notes that, in *Lee*, we determined the trustworthiness of the confession by looking to the circumstances surrounding its making, . . . what the Court omits from its discussion of *Lee* is the fact that we also considered the extent of the 'interlock,' that is, the extent to which the two confessions corroborated each other. The Court in *Lee* was unanimous in its recognition of corroboration as a legitimate indicator of reliability; the only disagreement was whether the corroborative nature of the confessions and the circumstances of their making were sufficient to satisfy the Confrontation Clause. See 476 U.S., at 546 (finding insufficient indicia of reliability, 'flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions,' to support admission of the codefendant's confession) (emphasis added); *id.*, at 557 (BLACKMUN, J., dissenting) (finding the codefendant's confession supported by sufficient indicia of reliability including, *inter alia*, 'extensive and convincing corroboration by petitioner's own confession' and 'further corroboration provided by the physical evidence'). See also *New Mexico v. Earnest*, 477 U.S. 648, 649, n. * (1986) (REHNQUIST, J., concurring); *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) (plurality opinion).

"The Court today suggests that the presence of corroborating evidence goes more to the issue of whether the admission of the hearsay statements was harmless error than whether the statements themselves were reliable and therefore admissible. . . . Once again, in the context of interlocking confessions, our previous cases have been unequivocal in rejecting this suggestion:

> "'Quite obviously, what the *interlocking* nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true.' *Cruz v. New York*, 481 U.S. 186, 192 (1987) (emphasis in original).

"It was precisely because the 'interlocking' nature of the confessions heightened their reliability as hearsay that we noted in *Cruz* that '[o]f course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him.' *Id.*, at 193-194 (citing *Lee, supra*, at 543-544). In short, corroboration has been an essential element in our past hearsay cases, and there is no justification for a categorical refusal to consider it here.

"Our Fourth Amendment cases are also premised upon the idea that corroboration

is a legitimate indicator of reliability. We have long held that corroboration is an essential element in determining whether police may act on the basis of an informant's tip, for the simple reason that 'because an informant is shown to be right about some things, he is probably right about other facts that he has alleged.' *Alabama v. White,* 496 U.S. ---, --- (1990). . . .

"The Court does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the 'inherent trustworthiness' of the statements. . . . But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate 'inherent trustworthiness' and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child 'use[d] . . . terminology unexpected of a child of similar age.' But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. . . . But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.

"The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way.

"In this case, the younger daughter's statements are corroborated in at least four respects: (1) physical evidence that she was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father abused the younger daughter, thus corroborating the younger daughter's statement; and (4) the testimony of the older daughter that she herself was abused by their father, thus corroborating the younger daughter's statement that her sister had also been abused. These facts, coupled with the circumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respondent's conviction and remand for it to consider in the first instance whether the child's statements bore 'particularized guarantees of trustworthiness' under the analysis set forth in this separate opinion.

"For these reasons, I respectfully dissent."

Notes

[1]The dissent suggests that the Court unequivocally rejected this view in *Cruz v. New York*, 481 U.S. 186, 192 (1987), but the quoted language on which the dissent relies . . . is taken out of context. *Cruz* involved the admission at a joint trial of a nontestifying codefendant's confession that incriminated the defendant, where the jury was instructed to consider that confession only against the codefendant, and where the defendant's own confession, corroborating that of his codefendant, was introduced against him. The court in *Cruz*, relying squarely on *Bruton v. United States*, 391 U.S. 123 (1968), held that the admission of the codefendant's confession violated the Confrontation Clause. 481 U.S., at 193. The language on which the dissent relies appears in a paragraph discussing whether the 'interlocking' nature of the confessions was relevant to the applicability of *Bruton* (the Court concluded that it was not). The Court in that case said nothing about whether the codefendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession.

Maryland v. Craig

110 S.Ct. 3157 (1990)

Confrontation; Closed-Circuit Television Testimony -- *The state's interest in the physical and psychological well-being of child abuse victims is sufficiently important in some cases to outweigh a defendant's Sixth Amendment right to confront accusatory witnesses face-to-face at a criminal trial. Where necessary to protect a child witness from trauma caused by face-to-face confrontation with the defendant, the Sixth Amendment does not prohibit use of a one-way closed-circuit television procedure in which the child testifies outside the physical presence of the defendant and cannot see the defendant.*

The Court did not decide what showing of trauma is necessary to dispense with face-to-face confrontation. The Court stated that mere nervousness or some reluctance to testify is not sufficient to dispense with face-to-face confrontation. The Court stated that the trial court must hear evidence and determine whether use of one-way closed-circuit television is needed to protect the welfare of the particular child witness. The trial court must make a case-specific finding of trauma. The Court held that a finding that face-to-face confrontation will cause serious emotional distress such that the child cannot reasonably communicate while testifying is sufficient to meet constitutional requirements.

The Court emphasized that if face-to-face confrontation is dispensed with, the other elements of confrontation should be maintained. Thus, the child should (1) testify under oath, affirmation, or other injunction to tell the truth, (2) be subject to cross-examination during which the defendant is able to communicate with cross-examining counsel, (3) be testimonially competent, and (4) be visible to the judge, the defendant, and the jury so that demeanor can be evaluated.

Although it may be appropriate to do so in some cases, the Court stated that the constitution does not require that a child witness be questioned in the physical presence of the defendant before face-to-face confrontation may be dispensed with. Similarly, the Constitution does not require the trial court to determine that a child would suffer trauma with two-way closed-circuit television, which allows the child to see the defendant on a monitor, before the court may authorize one-way televised testimony.

The trial court must find that the child witness would be traumatized not by the courtroom generally, but by the presence of the defendant. If the courtroom itself is the source of the child's trauma, steps can be taken to make testifying less traumatic without dispensing with face-to-face confrontation.

"JUSTICE O'CONNOR delivered the opinion of the Court.

"This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television.

I

"In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was Brooke Etze, a six-year-old child who, from August 1984 to June 1986, had attended a kindergarten and pre-kindergarten center owned and operated by Craig.

"In March 1987, before the case went to trial, the state sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed-circuit television, the testimony of a child witness who is alleged to be a victim of child abuse. To invoke the procedure, the trial judge must first 'determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.' Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

"In support of its motion invoking the one-way closed-circuit television procedure, the state presented expert testimony that Brooke, as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer 'serious emotional distress such that [they could not] reasonably communicate,' § 9-102(a)(1)(ii), if required to testify in the courtroom.... The Maryland Court of Appeals characterized the evidence as follows:

> "'"The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig.'
>
> "'... The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'

"Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial court rejected that contention, concluding that although the statute 'take[s] away the right of the defendant to be face-to-face with his or her accuser,' the defendant retains the 'essence of the right of confrontation,' including the right to observe, cross-examine, and have the jury view the demeanor of the witness.... The trial court further found that, 'based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' ... The trial court then found Brooke and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed-circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions....

"The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, . . . but concluded:

> "'[U]nder § 9-102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for Sixth Amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.' . . .

"Reviewing the trial court's finding and the evidence presented in support of the § 9-102 Procedure, the Court of Appeals held that, 'as [it] read *Coy v. Iowa*, 487 U.S. 1012 (1988), the showing made by the state was insufficient to reach the high threshold required by that case before § 9-102 may be invoked.' . . .

"We granted *certiorari* to resolve the important Confrontation Clause issues raised by this case. . . .

II

"The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'

"We observed in *Coy v. Iowa* that 'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.' 487 U.S., at 1016.' . . . This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots.

"We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa*, we expressly 'le[ft] for another day . . . the question whether any exceptions exist' to the 'irreducible literal meaning of the Clause: 'a right to meet face-to-face all those who appear and give evidence at trial.' 487 U.S., at 1021. . . . The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. . . . In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that any exception to the right 'would surely be allowed only when necessary to further an important public policy' i.e., only upon a showing of something more than the generalized, 'legislatively imposed presumption of trauma' underlying the statute at issue in that case. . . . We concluded that '[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception.' . . . Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "'The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *[Mattox v. United States,* 156 U.S. 237, 242-43 (1895)].

"As this description indicates, the right guaranteed by the Confrontation Clause includes not only a 'personal examination,' . . . but also '(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.' *[California v. Green,* 399 U.S. 149, 158 [(1970)].

"The combined effect of these elements of confrontation -- physical presence, oath, cross-examination, and observation of demeanor by the trier of fact -- serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. . . .

"We have recognized . . . that face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy,* 487 U.S., at 1019-1020 ('It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult'). . . . We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy, supra,* at 1017 ('[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution') (quoting *Pointer v. Texas,* 380 U.S. 400, 404 (1965)).

"Although face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' *Green, supra,* at 157, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer,* 474 U.S. 15, 22 (1985) (*per curiam*) ('[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities (such as forgetfulness, confusion, or evasion) through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony'); *[Ohio v. Roberts,* 448 U.S. 56, 69 (1980)] (oath, cross-examination, and demeanor provide 'all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation

requirement'); see also [*Kentucky v. Stincer,* 482 U.S. 730, 739-744 (1987)] (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial). . . .

"For this reason, we have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. See, e.g., *Mattox,* 156 U.S., at 243 ('[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations'); *Pointer, supra,* at 407 (noting exceptions to the confrontation right for dying declarations and 'other analogous situations'). In *Mattox,* for example, we held that the testimony of a government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240-244. We explained:

> "'There is doubtless reason for saying that . . . if notes of [the witness's] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.' *Id.,* at 243.

"We have accordingly stated that a literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.' *Roberts,* 448 U.S., at 63. Thus, in certain narrow circumstances, 'competing interests, if *closely examined,* may warrant dispensing with confrontation at trial.' *Id.,* at 64. . . . We have recently held, for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States,* 483 U.S. 171 (1987); *United States v. Inadi,* 475 U.S. 387 (1986). Given our hearsay cases, the word 'confront,' as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant -- a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial.

"In sum, our precedents establish that 'the Confrontation Clause reflects *a preference* for face-to-face confrontation at trial,' *Roberts, supra,* at 63, . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case,' *Mattox, supra,* at 243. '[W]e have attempted to harmonize the goal of the Clause -- placing limits on the kind of evidence that may be received against a defendant -- with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements.' *Bourjaily, supra,* at 182. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at

trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. Indeed, one commentator has noted that '[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation.' Graham, "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One," 8 *Crim. L. Bull.* 99, 107-108 (1972).

"This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, e.g., *Illinois v. Allen,* 397 U.S. 337, 342-343 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); [*Pennsylvania v. Ritchie,* 480 U.S. 39, 51-54 (1987)] (plurality opinion) (right to cross-examination not violated where state denied defendant access to investigative files); *Taylor v. United States,* 484 U.S. 400, 410-416 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke,* 488 U.S. 272, 280-285 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

"That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy,* our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. . . .

III

"Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation -- oath, cross-examination, and observation of the witness' demeanor -- adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition. . . . Rather, we think these elements of effective confrontation not only permit a defendant to 'confound and undo the false accuser, or reveal the child coached by a malevolent adult,' *Coy,* 487 U.S., at 1020, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out-of-court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts,* 448 U.S., at 66. We are therefore confident that use of the one-way closed-circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

"The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The state contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

"We have, of course, recognized that a state's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one. *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607 (1982); see also *New York v. Ferber,* 458 U.S. 747, 756-757 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726, 749-750 (1978); *Ginsberg v. New York,* 390 U.S. 629, 640 (1968); *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944). '[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.' *Ferber, supra,* at 757. In *Globe Newspaper,* for example, we held that a state's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. . . . This Term, in *Osborne v. Ohio,* [110 S.Ct. 1691] (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that '[i]t is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Id.,* at [1696] (quoting *Ferber, supra,* at 756-757).

"We likewise conclude today that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of states has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. Thirty-seven states, for example, permit the use of video-taped testimony of sexually abused children; 24 states have authorized the use of one-way closed-circuit television testimony in child abuse cases; and 8 states authorize the use of a two-way system in which the child-witness is permitted to see the courtroom and the defendant on a video-monitor and in which the jury and judge is permitted to view the child during the testimony.

"The statute at issue in this case, for example, was specifically intended 'to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying.' *Wildermuth v. State,* 310 Md. 496, 518, 530 A.2d 275, 286 (1987). . . .

"Given the state's traditional and 'transcendent interest in protecting the welfare of children,' *Ginsberg,* 390 U.S., at 640 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, . . . we will not second-guess the considered judgment of the Maryland legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the state makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

"The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.' . . . We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate,' § 9-102(a)(1)(ii), suffices to meet constitutional standards.

"To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. *Coy, supra*, at 1019-1020, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. . . . Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause's truth-seeking goal. See, e.g., *Coy, supra*, at 1032 (BLACKMUN, J., dissenting) (face-to-face confrontation 'may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself'). . . .

"In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

"The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity.' . . . Given this latter requirement, the Court of Appeals reasoned that '[t]he question of whether a child is unavailable to testify . . . should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much

narrower terms of the witness's inability to testify in the presence of the accused.'... '[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony.' ... The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9-102 Procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom in the presence of the defendant would result in the child suffering serious emotional distress such that the child could not reasonably communicate.... This conclusion, of course, is consistent with our holding today.

"In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that '§ 9-102 ordinarily cannot be invoked unless the child witness initially is questioned [either in or outside the courtroom] in the defendant's presence.' ... Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer 'severe emotional distress' if he or she were to testify by two-way closed-circuit television.... Reviewing the evidence presented to the trial court in support of the finding required under § 9-102(a)(1)(ii), the Court of Appeals determined that 'the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102 ... was not made here.' ... The Court of Appeals noted that the trial judge 'had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television.'... The Court of Appeals also observed that 'the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses.'... Thus, the Court of Appeals concluded:

> "'Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children in a courtroom will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find -- indeed, on the evidence before him, could not have found -- that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial.' ...

"The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the use of the one-way closed-circuit television procedure Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence 'will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate,' § 9-102(a)(1)(ii).... So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a state from using a one-way closed-circuit television procedure for the receipt of testimony by a child

witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of 'the high threshold required by [*Coy*] before § 9-102 may be invoked, . . . we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

"It is so ordered."

"Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

"Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "'We . . . conclude today that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of states has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.'

"Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the state's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, 'it is really not true, is it, that I -- your father (or mother) whom you see before you -- did these terrible things?' Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

"Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent.

I

"According to the Court, 'we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers.' . . . That is rather like saying 'we cannot say that being tried

before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial.' The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated 'face-to-face confrontation') becomes only one of many 'elements of confrontation.' . . . The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for -- 'face-to-face' confrontation -- but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for -- 'face-to-face' confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation. Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the 'right to meet face-to-face all those who appear and give evidence at trial.' *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), quoting *California v. Green*, 399 U.S. 149, 175 (1970) (HARLAN, J. concurring).

"The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), the Court says that '[i]n sum, our precedents establish that 'the Confrontation Clause reflects a preference for face-to-face confrontation at trial.'. . . But *Roberts*, and all the other 'precedents' the Court enlists to prove the implausible, dealt with the implications of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely 'reflects a preference for face-to-face confrontation at trial,' what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely 'nonpreferred' but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand* testimony from witnesses at trial -- that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial*, did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a Constitutional right unqualifiedly guaranteed.

"The Court claims that its interpretation of the Confrontation Clause 'is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process.' . . . I disagree. It is true enough that the 'necessities of trial and the adversary process' limit the manner in which Sixth Amendment rights may be exercised, and limit the scope of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen*, 397 U.S. 337 (1970). The right 'to have compulsory process for obtaining witnesses' is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. United States*, 484 U.S. 400 (1988). The scope of the right 'to have the assistance of counsel' does not include consultation with counsel at all times during the trial. *Perry v. Leeke*, 488 U.S. 272 (1989). The scope of the right to cross-examine does not include access to the state's

investigative files. *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; 'to confront' plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The 'necessities of trial and the adversary process' are irrelevant here, since they cannot alter the Constitutional text.

II

"Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront 'the witnesses against him.' As applied in the Sixth Amendment's context of a prosecution, the noun *witness* -- in 1791 as today -- could mean either (a) one who *knows or sees any thing; one personally present,* or (b) *one who gives testimony* or who *testifies,* i.e., '[i]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court.' 2 N. Webster, *An American Dictionary of the English Language* (1828) (emphasis added). See also J. Buchanan, *Linguae Britannicae Vera Pronunciatio* (1757). The former meaning (one 'who knows or sees') would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: 'witnesses against him.' The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not expressly excluded by the Confrontation Clause) 'is otherwise assured.'... The same test cannot be applied, however, to permit what is explicitly forbidden by the Constitutional text; there is simply no room for interpretation with regard to 'the irreducible literal meaning of the Clause.' *Coy, supra,* at 1020-1021.

"Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases.... That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a 'general requirement of unavailability' of the declarant.... 'In the usual case... the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.' *Ohio v. Roberts,* 448 U.S., at 65. We have permitted a few exceptions to this general rule -- e.g., for co-conspirators' statements, whose effect cannot be replicated by live testimony because they 'derive [their] significance from circumstances in which [they were] made,' *United States v. Inadi,* 475 U.S. 387, 395 (1986). 'Live' closed-circuit television testimony, however -- if it can be called hearsay at all -- is surely an example of hearsay as 'a weaker substitute for live testimony,' *id.,* at 394, which can be employed only when the genuine article is unavailable. 'When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.' *Ibid.*....

"The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of

unsworn testimony when the witness is unable to risk perjury, uncross-examined testimony when the witness is unable to undergo hostile questioning, etc., *California v. Green,* 399 U.S. 149 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green,* as in most cases of refusal, we could not know why the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. 'That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.' *Coy,* 487 U.S., at 1020. To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

III

"The Court characterizes the state's interest which 'outweigh[s]' the explicit text of the Constitution as an 'interest in the physical and psychological well-being of child abuse victims,' ... an 'interest in protecting' such victims 'from the emotional trauma of testifying.' That is not so. A child who meets the Maryland statute's requirement of suffering such 'serious emotional distress' from confrontation that he 'cannot reasonably communicate' would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the state's own fault. Protection of the child's interest -- as far as the Confrontation Clause is concerned[2] -- is entirely within Maryland's control. The state's interest here is in fact no more and no less than what the state's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one. And the interest on the other side is also what it usually is when the state seeks to get a new class of evidence admitted: fewer convictions of innocent defendants -- specifically, in the present context, innocent defendants accused of particularly heinous crimes. The 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, 'Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources,' in *Children's Eyewitness Memory,* 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, 'The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?,' 14 *Am. J. Crim. L.* 227, 230-233 (1987); Christiansen, 'The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews,' 62 *Wash. L. Rev.* 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in

foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. . . . There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota Attorney General's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, concluded that there was an 'absence of credible testimony and [a] lack of significant corroboration' to support reinstitution of sex-abuse charges, and 'no credible evidence of murders.' H. Humphrey, *Report on Scott County Investigation* 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, . . . were suggested by telling the children what other witnesses had said; . . . and children (even some who did not at first complain of abuse) were separated from their parents for months. . . . The report describes the consequences as follows:

> "'As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> "'In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide. . . .'

"The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by 'admission' of their parents' abuse. . . . Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that 'trauma would impair the child's ability to communicate' in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

"In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that, 'where face-to-face confrontation causes significant emotional distress in a child witness,' confrontation might 'in fact disserve the Confrontation Clause's truth-seeking goal.' . . . If so, that is a defect in the Constitution -- which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to 'widespread belief' and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him' (emphasis added).

* * *

"The Court today has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit Constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and

gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually Constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction."

Notes

[1]I presume that when the Court says 'trauma would impair the child's ability to communicate,' . . . it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: 'serious emotional distress such that the child cannot reasonably communicate.' Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

[2]A different situation would be presented if the defendant sought to call the child. In that event, the state's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question -- initially, at least, and perhaps exclusively -- the scope of the defendant's Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor.

Ohio v. Akron Center for Reproductive Health

110 S.Ct. 2972 (1990)

Abortion -- ***The Court rejected a facial constitutional challenge to an Ohio statute that, with certain exceptions, prohibited abortions for unmarried, unemancipated minor women absent notice to one parent or approval of the juvenile court. When parental notice is given, the state may require the physician him or herself to notify the parent. The majority noted that although the Court requires a judicial bypass procedure for statutes requiring parental consent to abortion, the Court has not decided whether a bypass procedure is required for a parental notice statute. When a minor invokes a judicial bypass procedure, the minor may be made to bear the burden of proof on the issues of her maturity and best interests. Furthermore, the state may require the minor to carry her burden by clear and convincing evidence.***

"Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, and an opinion with respect to Part V, in which THE CHIEF JUSTICE, and Justice WHITE, and Justice SCALIA join.

"The Court of Appeals held invalid an Ohio statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval. We reverse, for we determine that the statute accords with our precedents on parental notice and consent in the abortion context and does not violate the Fourteenth Amendment.

I

A

"The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (H.B. 319), which amended Ohio Rev. Code Ann. § 2919.12 (1987), and created §§ 2151.85 and 2505.073 (Supp. 1988). Section 2919.12(B), the cornerstone of this legislation, makes it a criminal offense, except in four specific circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under eighteen years of age. . . .

"The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. First, a physician may perform an abortion if he provides 'at least twenty-four hours actual notice, in person or by telephone,' to one of the woman's parents (or her guardian or custodian) of his intention to perform the abortion. § 2919.12(B)(1)(a)(i). The physician, as an alternative, may notify a minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each file an affidavit in the juvenile court stating the minor fears physical, sexual, or severe emotional abuse from one of her parents. See §§ 2919.12(B)(1)(a)(i), 2919.12(B)(1)(b), 2919.12(B)(1)(c). If the physician cannot give

the notice 'after a reasonable effort,' he may perform the abortion after 'at least forty-eight hours constructive notice' by both ordinary and certified mail. § 2919.12(B)(2). Second, a physician may perform an abortion on the minor if one of her parents (or her guardian or custodian) has consented to the abortion in writing. See § 2919.12(B)(1)(a)(ii).

"The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and consent provisions just described. The statute allows a physician to perform an abortion without notifying one of the minor's parents or receiving the parent's consent if a juvenile court issues an order authorizing the minor to consent, § 2919.12(B)(1)(a)(iii), or if a juvenile court or court of appeals, by its inaction, provides constructive authorization for the minor to consent, § 2919.12(B)(1)(a)(iv).

"The bypass procedure requires the minor to file a complaint in the juvenile court, stating (1) that she is pregnant; (2) that she is unmarried, under 18 years of age, and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; (4) that she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, *or* that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, *or t*hat notice is not in her best interests; and (5) that she has, or has not retained an attorney. §§ 2151.85(a)(1)-(5). The Ohio Supreme Court as discussed below, has prescribed pleading forms for the minor to use. See App. 6-14.

"The juvenile court must hold a hearing at the earliest possible time, but no later than the fifth business day after the minor files the complaint. § 2151.85(B)(1). The court must render its decision immediately after the conclusion of the hearing. *Ibid.* Failure to hold the hearing within this time results in constructive authorization for the minor to consent to the abortion. *Ibid.* At the hearing the court must appoint a guardian ad litem and an attorney to represent the minor if she has not retained her own counsel. § 2151.85(B)(2). The minor must prove her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence, § 2151.85(C), and the juvenile court must conduct the hearing to preserve the anonymity of the complainant, keeping all papers confidential. §§ 2151.85(D), (F).

"The minor has the right to expedited review. The statute provides that, within four days after the minor files a notice of appeal, the clerk of the juvenile court shall deliver the notice of appeal and record to the state court of appeals. § 2505.073(A). The clerk of the court of appeals dockets the appeal upon receipt of these items. *Ibid.* The minor must file her brief within four days after the docketing. *Ibid.* If she desires an oral argument, the court of appeals must hold one within five days after the docketing and must issue a decision immediately after oral argument. *Ibid.* If she waives the right to an oral argument, the court of appeals must issue a decision within five days after the docketing. *Ibid.* If the court of appeals does not comply with these time limits, a constructive order results authorizing the minor to consent to the abortion. *Ibid.*. . . .

B

"The District Court, after various proceedings, issued a preliminary injunction and later a permanent injunction preventing the state of Ohio from enforcing the statute.

"The Court of Appeals for the Sixth Circuit affirmed. . . .

II

"We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context. See *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *H. L. v. Matheson,* 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 101 S.Ct. 2517, 76 L.Ed.2d 733 (1983); *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). We do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that H.B. 319 is consistent with them.

A

"This dispute turns, to a large extent,on the adequacy of H.B. 319's judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. See *Matheson, supra,* 450 U.S. at 413, and n. 25, 101 S.Ct. at 1174, and n. 25 (upholding a notice statute without a bypass procedure as applied to immature, dependent minors). We leave the question open, because whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, H.B. 319's bypass procedure meets the requirements identified for parental consent statutes in *Danforth, Bellotti, Ashcroft,* and *Akron. Danforth* established that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a state must provide some sort of bypass procedure if it elects to require parental consent. See 428 U.S., at 74, 96 S.Ct., at 2843. As we hold today in *Hodgson v. Minnesota,* --- U.S. ---, 110 S.Ct. 2926, --- L.Ed.2d --- it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute. See also *Matheson, supra,* 450 U.S. at 411, n. 17, 101 S.Ct., at 1172, n. 17 (notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision).

"The plurality opinion in *Bellotti* stated four criteria that a bypass procedure in a consent statute must satisfy. Appellees contend that the bypass procedure does not satisfy these criteria. We disagree. First, the *Bellotti* plurality indicated that the procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. See 443 U.S., at 643, 99 S.Ct., at 3048. The Court reaffirmed this requirement in *Akron* by holding that a state cannot presume the immaturity of girls under the age of 15, 462 U.S., at 440, 103 S.Ct., at 2497. In the case now before us, we have no difficulty concluding that H.B. 319 allows a minor to show maturity in conformity with the plurality opinion in *Bellotti.* The statute permits the minor to show that she 'is sufficiently mature and well-enough informed to decide intelligently whether to have an abortion.' Ohio Rev.Code Ann. § 2151.85(C)(1) (Supp. 1988).

"Second, the *Bellotti* plurality indicated that the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, 'the desired abortion would be in her best interests.' 443 U.S., at 644, 99 S.Ct., at 3049. We believe that H.B. 319

satisfies the *Bellotti* language as quoted. The statute requires the juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual or emotional abuse. See Ohio Rev.Code Ann. § 2151.85(C)(2) (Supp. 1988).

"Third, the *Bellotti* plurality indicated that the procedure must insure the minor's anonymity. See 443 U.S., at 644, 99 S.Ct., at 3049. H.B. 319 satisfies this standard. Section 2151.85(D) provides that '[t]he [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion.' Section 2151.85(F) further states:

> "'Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records.'

"Section 2505.073(b), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The state, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records. See Ohio Rev.Code Ann. §§ 102.03(b), 102.99(b) (Supp. 1988).

"Appellees argue that the complaint forms prescribed by the Ohio Supreme Court will require the minor to disclose her identity. Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places. See App. 6-14 (pleading forms). Appellees would prefer protections similar to those included in the statutes that we reviewed in *Bellotti* and *Ashcroft*. The statute in *Bellotti* protected anonymity by permitting use of a pseudonym, see *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1025 (CA1 1981), and the statute in *Ashcroft* allowed the minor to sign the petition with her initials, see 462 U.S., at 491, n. 16, 103 S.Ct., at 2525, n. 16. Appellees also maintain that the Ohio laws requiring court employees not to disclose public documents are irrelevant because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large.

"Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the *Bellotti* plurality is taken as setting the standard, we do not find complete anonymity critical. H.B. 319, like the statutes in *Bellotti* and *Ashcroft*, takes reasonable steps to prevent the public from learning of the minor's identity. We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees. H.B. 319, like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure.

"Fourth, the *Bellotti* plurality indicated that courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion. See 443 U.S., at 644, 99 S.Ct., at 3049. H.B. 319, as noted above, requires the trial court to make its decision within five 'business day[s]' after the minor files her complaint, § 2151.88(B)(1); requires the court of appeals to docket an appeal within four 'days' after the minor files a notice of appeal, § 2505.073(A); and requires the Court of Appeals to render a decision within

five 'days' after docketing the appeal, *ibid.*

"The District Court and the Court of Appeals assumed that all of the references to days in § 2151.85(B)(1) and § 2505.073(A) meant business days as opposed to calendar days. Cf. Ohio Rule App.Proc. 14(A) (excluding nonbusiness days from computations of less than seven days). They calculated, as a result, that the procedure could take up to 22 calendar days because the minor could file at a time during the year in which the 14 business days needed for the bypass procedure would encompass three Saturdays, three Sundays, and two legal holidays. Appellees maintain, on the basis of an affidavit included in the record, that a 3-week delay could increase by a substantial measure both the costs and the medical risks of an abortion. See App. 18. They conclude, as did those courts, that H.B. 319 does not satisfy the *Bellotti* plurality's expedition requirement.

"As a preliminary matter, the 22-day calculation conflicts with two well-known rules of construction discussed in our abortion cases and elsewhere. 'Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Ashcroft*, 462 U.S., at 493, 103 S.Ct., at 2527 (opinion of POWELL, J.). Although we recognize that the other federal courts 'are better schooled in and more able to interpret the laws of their respective states' than are we, *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988), the Court of Appeals' decision strikes us as dubious. Interpreting the term 'days' in § 2505.073(A) to mean business days instead of calendar days seems inappropriate and unnecessary because of the express and contrasting use of 'business day[s]' in § 2151.85(B)(1). In addition, because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.' *Webster v. Reproductive Health Services*, 492 U.S. ---, ---, 109 S.Ct. 3040, 3060, 106 L.Ed.2d 410 (O'CONNOR, J., concurring). The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur. Cf. Ohio Rev.Code § 2505.073(A) (allowing the Court of Appeals, upon the minor's motion, to shorten or extend the time periods). Moreover, under our precedents, the mere possibility that the procedure may require up to twenty-two days in a rare case is plainly insufficient to invalidate the statute on its face. *Ashcroft*, for example, upheld a Missouri statute that contained a bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels. See 462 U.S., at 477, n. 4, 491, n. 16, 103 S.Ct., at 2519, n. 4, 2525, n. 16.

B

"Appellees ask us, in effect, to extend the criteria used by some members of the Court in *Bellotti* and the cases following it by imposing three additional requirements on bypass procedures. First, they challenge the constructive authorization provision in H.B. 319, which enable a minor to obtain an abortion without notifying one of her parents if either the juvenile court or the court of appeals fails to act within the prescribed time limits. See Ohio Rev.Code Ann. §§ 2151.85(B)(1), 2505.073(A), and § 2919.12(B)(1)(a)(iv) (1987 and Supp. 1988). They speculate that the absence of an affirmative order when a court fails to process the minor's complaint will deter the physician from acting.

"We discern no constitutional defect in the statute. Absent a demonstrated patten of abuse or defiance, a state may expect that its judges will follow mandated procedural require-

ments. There is no showing that the time limitations imposed by H.B. 319 will be ignored. With an abundance of caution, and concern for the minor's interests, Ohio added the constructive authorization provision in H.B. 319 to ensure expedition of the bypass procedures even if these time limits are not met. The state Attorney General represents that a physician can obtain certified documentation from the juvenile or appellate court that constructive authorization has occurred. Brief for Appellant 36. We did not require a similar safety net in the bypass procedures in *Ashcroft, supra,* at 479-480 n. 4, 103 S.Ct., at 2519-2520, n. 4, and find no defect in the procedures that Ohio has provided.

"Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a state seeks to deprive an individual of liberty interests, it must take upon itself the risk of error. See *Santosky v. Kramer,* 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982). House Bill 319 violates this standard, in their opinion, not only by placing the burden of proof upon the minor, but also by imposing a heightened standard of proof.

"The contention lacks merit. A state does not have to bear the burden of proof on the issues of maturity or best interests. The plurality opinion in *Bellotti* indicates that a state may require the minor to prove these facts in a bypass procedure. See 443 U.S., at 643, 99 S.Ct., at 3048. A state, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in H.B. 319 acceptable. The Ohio Supreme Court has stated:

> "'Clear and convincing evidence is that measure or degree of proof which will produce in 'the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonabledoubt as in criminal cases. It does not mean clear and unequivocal.' *Cross v. Ledford,* 161 Ohio St. 469, 477,120 N.E.2d 118, 123 (1954) (emphasis deleted).

"Our precedents do not require the state to set a lower standard. Given that the minor is assisted in the courtroom by an attorney as well as a guardian ad litem, this aspect of H.B. 319 is not infirm under the Constitution.

"Third, appellees contend that the pleading requirements in H.B. 319 create a trap for the unwary. The minor, under the statutory scheme and the requirements prescribed by the Ohio Supreme Court, must choose among three pleading forms. See Ohio Rev.Code § 2151.85(C) (Supp. 1988); App. 6-14. The first alleges only maturity and the second alleges only best interests. She may not attempt to prove both maturity and best interests unless she chooses the third form, which alleges both of these facts. Appellees contend that the complications imposed by this scheme deny a minor the opportunity, required by the plurality in *Bellotti,* to prove either maturity or best interests or both. See 443 U.S., at 643-644, 99 S.Ct., at 3048-3049.

"Even on the assumption that the pleading scheme could produce some initial confusion because few minors would have counsel when pleading, the simple and straightforward procedure does not deprive the minor of an opportunity to prove her case. It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status. In addition, we note that the minor does not make a binding election

by the initial choice of pleading form. The minor, under H.B. 319, receives appointed counsel after filing the complaint and may move for leave to amend the pleadings. See 2151.85(B)(2); Ohio Rule Juvenile Proc. 22(B); see also *Hambleton v. R. G. Barry Corp.*, 12 Ohio St.3d 179, 183-184, 465 N.E.2d 1298, 1302 (1984) (finding a liberal amendment policy in the state civil rules). Regardless of whether Ohio could have written a simpler statute, H.B. 319 survives a facial challenge.

III

"Appellees contend our inquiry does not end even if we decide that H.B. 319 conforms to *Danforth, Bellotti, Matheson, Ashcroft,* and *Akron.* They maintain that H.B. 319 gives a minor a state law substantive right 'to avoid unnecessary or hostile parental involvement' if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents. They argue that H.B. 319 deprives the minor of this right without due process because the pleading requirements, the alleged lack of expedition and anonymity, and the clear and convincing evidence standard make the bypass procedure unfair. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). We find no merit in this argument.

"The confidentiality provisions, the expedited procedures, and the pleading form requirements, on their face, satisfy the dictates of minimal due process. We see little risk of erroneous deprivation under these provisions and no need to require additional procedural safeguards. The clear and convincing evidence standard, for reasons we have described, does not place an unconstitutional burden on the types of proof to be presented. The minor is assisted by an attorney and a guardian ad litem and the proceeding is *ex parte*. The standard ensures that the judge will take special care in deciding whether the minor's consent to an abortion should proceed without parental notification. As a final matter, given that the statute provides definite and reasonable deadlines, Ohio Rev.Code Ann. § 2505.073(A), the constructive authorization provision, § 2151.85(B)(1), also comports with due process on its face.

IV

"Appellees, as a final matter, contend that we should invalidate H.B. 319 in its entirety because the statute requires the parental notice to be given by the physician who is to perform the abortion. In *Akron,* the Court found unconstitutional a requirement that the attending physician provide the information and counseling relevant to informed consent. See 462 U.S., at 446-449, 103 S.Ct., at 2501-2503. Although the Court did not disapprove of informing a woman of the health risks of an abortion, it explained that '[t]he state's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.' *Id.*, at 448, 103 S.Ct., at 2502. Appellees maintain, in a similar fashion, that Ohio has no reason for requiring the minor's physician, rather than some other qualified person, to notify one of the minor's parents.

"Appellees, however, have failed to consider our precedent on this matter. We upheld, in *Matheson,* a statute that required a physician to notify the minor's parents. See 450 U.S., at 400, 101 S.Ct., at 1166. The distinction between notifying a minor's parents and informing

a woman of the routine risks of an abortion has ample justification; although counselors may provide information about general risks as in *Akron,* appellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a state may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician. As we explained in *Matheson,*

> "'The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.' 450 U.S., at 411, 101 S.Ct., at 1172 (footnote omitted).

"The conversation with the physician, in addition, may enable a parent to provide better advice to the minor. The parent who must respond to an event with complex philosophical and emotional dimensions is given some access to an experienced and, in an ideal case, detached physician who can assist the parent in approaching the problem in a mature and balanced way. This access may benefit both the parent and child in a manner not possible through notice by less qualified persons.

"Any imposition on a physician's schedule, by requiring him to give notice when the minor does not have consent from one of her parents or court authorization, must be evaluated in light of the complete statutory scheme. The statute allows the physician to send notice by mail if he cannot reach the minor's parent 'after a reasonable effort,' Ohio Rev.Code Ann. § 2919.12(B)(2) (1987), and also allows him to forgo notice in the event of certain emergencies, see § 2919.12(C)(2). These provisions are an adequate recognition of the physician's professional status. On this facial challenge, we find the physician notification requirement unobjectionable.

V

"The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional burden on a minor seeking an abortion. We believe, in addition, that the legislature acted in a rational manner in enacting H.B. 319. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The state is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the state to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the state cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent. We uphold H.B. 319 on its face and reverse the Court of Appeals.

"It is so ordered."

Osborne v. Ohio

110 S.Ct. 1691 (1990)

Possession of Child Pornography -- ***Private possession and viewing of child pornography may be proscribed without affront to the First Amendment.***

"Justice WHITE delivered the opinion of the Court.

"In order to combat child pornography, Ohio enacted Rev.Code Ann. § 2907.323(A)(3) (Supp. 1989), which provides in pertinent part:

"'(A) No person shall do any of the following:

* * *

"'(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"'(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"'(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.'

"Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicted a nude male adolescent posed in a sexually explicit position.

"The Ohio Supreme Court affirmed Osborne's conviction, after an intermediate appellate court did the same. *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988).

I

"The threshold question in this case is whether Ohio may Constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), compels the contrary result. In *Stanley*, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive

information in the privacy of his home, and we found Georgia's justifications for its law inadequate. *Id.*, at 564-568, 89 S.Ct., at 1247-1250.

"*Stanley* should not be read too broadly. We have previously noted that *Stanley* was a narrow holding, see *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 127, 93 S.Ct. 2665, 2668, 37 L.Ed.2d 500 (1973), and, since the decision in that case, the value of permitting child pornography has been characterized as 'exceedingly modest if not *de minimis*.' *New York v. Ferber*, 458 U.S. 747, 762, 102 S.Ct. 3348, 3357, 73 L.Ed.2d 1113 (1982). But assuming, for the sake of argument that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. Every court to address the issue has so concluded. See e.g., *People v. Geever*, 122 Ill.2d 313, 327-328, 119 Ill.Dec. 341, 347-348, 522 N.E.2d 1200, 1206-1207 (1988); *Felton v. State*, 526 So.2d 635, 637 (Ala. Ct. Crim.App.), aff'd *sub nom. Ex parte Felton*, 526 So.2d 638, 641 (Ala. 1988); *State v. Davis*, Wash.App. 502, 505, 768 P.2d 499, 501 (1989); *Savery v. Texas*, 767 S.W.2d 242, 245 (Tex. App. 1989); *United States v. Boffardi*, 684 F. Supp. 1263, 1267 (SDNY 1988).

"In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. 394 U.S., at 565, 89 S.Ct, at 1248. We responded that '[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot Constitutionally premise legislation on the desirability of controlling a person's private thoughts.' *Id.*, at 566, 89 S.Ct., at 1248. The difference here is obvious: the state does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography it hopes to destroy a market for the exploitative use of children.

"It is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of minors is 'compelling.' . . . The legislative judgment as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physical, logical, emotional and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.' *Ferber*, 458 U.S., at 756-758, 102 S.Ct., at 3354-3355 (citations omitted). It is also surely reasonable for the state to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product thereby decreasing demand. In *Ferber*, where we upheld a New York statute outlawing the distribution of child pornography, we found a similar argument persuasive: '[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. 'It rarely has been suggested that the Constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' *Id.*, at 761-762, 102 S.Ct., at 761-762, 102 S.Ct., at 3356-3357 quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 688, 93 L.Ed.2d 834 (1949).

"Osborne contends that the state should use other measures, besides penalizing possession, to dry up the child pornography market. Osborne points out that in *Stanley* we rejected Georgia's argument that its prohibition of obscenity possession was a necessary incident to its proscription on obscenity distribution. 394 U.S., at 567-568, 89 S.Ct., at 1249-1250. This holding, however, must be viewed in light of the weak interests asserted by the state in that case. *Stanley*

itself emphasized that we did not 'mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.... In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.' *Id.*, at 568, n. 11, 89 S.Ct., at 1249, n. 11.

"Given the importance of the state's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the state, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 states have found it necessary to proscribe the possession of this material.

"Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. 458 U.S., at 759, 102 S.Ct., at 3355. The state's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

"Given the gravity of the state's interests in this context, we find that Ohio may Constitutionally proscribe the possession and viewing of child pornography.

II

"Osborne next argues that even if the state may constitutionally ban the possession of child pornography, his conviction is invalid because § 2907.323(A)(3) is unconstitutionally overbroad in that it criminalizes an intolerable range of Constitutionally-protected conduct. In our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the state's plainly legitimate sweep.' *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). Even where a statute at its margin infringes on protected expression, 'facial invalidation is inappropriate if the 'remainder of the statute ... covers a whole range of easily identifiable and Constitutionally proscribable ... conduct.' ... *New York v. Ferber*, 458 U.S., at 770, n. 25, 102 S.Ct., at 3362 n. 25.

"The Ohio statute, on its face, purports to prohibit the possession of 'nude' photographs of minors. We have stated that depictions of nudity, without more, constitute protected expression. See *Ferber, supra*, at 765, n. 18, 102 S.Ct., at 3359, n. 18. Relying on this observation, Osborne argues that the statute as written is substantially overbroad. We are skeptical of this claim because, in light of the statute's exemptions and 'proper purposes' provisions, the statute may not be substantially overbroad under our cases. However that may be, Osborne's overbreadth challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survives overbreadth scrutiny. Under the Ohio Supreme Court reading, the statute prohibits 'the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity consti-

tutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.' 37 Ohio St.3d, at 252, 526 N.E.2d, at 1368. By limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children. We have upheld similar language against overbreadth challenges in the past. In *Ferber*, we affirmed a conviction under a New York statute that made it a crime to promote the 'lewd exhibition of [a child's] genitals.' 458 U.S., at 751, 102 S.Ct., at 3351. We noted that '[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller [v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] as an example of a permissible regulation.' *Id.*, at 765, 102 S.Ct, at 3359.

"The Ohio Supreme Court also concluded that the state had to establish scienter in order to prove a violation of § 2907.323(A)(3) based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent specification. The statute on its face lacks a *mens rea* requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter. 458 U.S., at 765; 102 S.Ct, at 3359.

"Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him -- *i.e.*, to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed 'may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t].' *Dombrowski v. Pfister*, 380 U.S. 479, 491, n. 7, 85 S.Ct. 1116, 1123 n. 7, 14 L.Ed.2d 22 (citations omitted). In *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), for example, we reviewed the petitioners' convictions for mailing and conspiring to mail an obscene advertising brochure under 18 U.S.C. § 1461. That statute makes it a crime to mail an 'obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance.' In *Hamling*, for the first time, we construed the term 'obscenity' as used in § 1461 'to be limited to the sort of 'patently offensive representations or depictions of that specific 'hard core' sexual conduct given as examples in *Miller v. California*.' In light of this construction we rejected the petitioners' facial challenge to the statute as written, and we affirmed the petitioners' convictions under the section after finding that the petitioners had fair notice that their conduct was criminal. 418 U.S., at 114-116, 94 S.Ct., at 2906-2907.

"Like the *Hamling* petitioners, Osborne had notice that his conduct was proscribed. It is obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography. The provision criminalizes the viewing and possession of material depicting children in a state of nudity for other than 'proper purposes.' The provision appears in the 'Sex Offenses' chapter of the Ohio Code. Section 2907.323 is preceded by § 2907.322, which proscribes '[p]andering sexually oriented matter involving a minor,' and followed by § 2907.33, which proscribes '[d]eception to obtain matter harmful to juveniles.' That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration. Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn that his possession of the four photographs at issue in this case constituted a crime.

* * *

IV

"To conclude, although we find Osborne's First Amendment arguments unpersuasive, we reverse his conviction and remand for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the state had proved each of the elements of § 2907.323(A)(3).

"So ordered."

Penry v. Lynaugh

109 S.Ct. 2934 (1989)

Death Penalty -- ***The Eighth Amendment's cruel and unusual punishment clause does not prohibit capital punishment of mentally retarded persons. (See also,*** **Thompson v. Oklahoma** ***and*** **Stanford v. Kentucky,** ***this volume).***

"Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, III, IV-A and IV-B, and an opinion with respect to Part IV-C.

"In this case, we must decide whether the petitioner, Johnny Paul Penry, was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence. We must also decide whether the Eighth Amendment categorically prohibits Penry's execution because he is mentally retarded.

I

"On the morning of October 25, 1979, Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors in her home in Livingston, Texas. She died a few hours later in the course of emergency treatment. Before she died, she described her assailant. Her description led two local sheriff's deputies to suspect Penry, who had recently been released on parole after conviction on another rape charge. Penry subsequently gave two statements confessing to the crime and was charged with capital murder.

"At a competency hearing held before trial, a clinical psychologist, Dr. Jerome Brown, testified that Penry was mentally retarded. As a child, Penry was diagnosed as having organic brain damage, which was probably caused by trauma to the brain at birth. App. 34-35. Penry was tested over the years as having an IQ between 50 and 63, which indicates mild to moderate retardation. *Id.*, at 36-38, 55. Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealed that Penry, who was 22 years old at the time of the crime, had the mental age of a 6½-year-old, which means that 'he has the ability to learn and the learning or the knowledge of the average 6½-year-old kid.' *Id.*, at 41. Penry's social maturity, or ability to function in the world, was that of a 9- or 10-year-old. Dr. Brown testified that 'there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range.' *Id.*, at 47.

"The jury found Penry competent to stand trial. *Id.*, at 20-24. The guilt-innocence phase of the trial began on March 24, 1980. The trial court determined that Penry's confessions were voluntary, and they were introduced into evidence. At trial, Penry raised an insanity defense. . . .

"The jury rejected Penry's insanity defense and found him guilty of capital murder. . . .

IV

"Penry's second claim is that it would be cruel and unusual punishment, prohibited by the Eighth Amendment, to execute a mentally retarded person like himself with the reasoning capacity of a 7-year-old. He argues that because of their mental disabilities, mentally retarded people do not possess the level of moral culpability to justify imposing the death sentence. He also argues that there is an emerging national consensus against executing the mentally retarded. The state responds that there is insufficient evidence of a national consensus against executing the retarded, and that existing procedural safeguards adequately protect the interests of mentally retarded persons such as Penry. . . .

B

"The Eighth Amendment prohibits the infliction of cruel and unusual punishments. At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted. . . . The prohibitions of the Eighth Amendment are not limited, however, to those practices condemned by the common law in 1789. . . . The prohibition against cruel and unusual punishment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' . . . In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today. . . . The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. We have also looked to data concerning the actions of sentencing juries. . . . It is well-settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities. As Blackstone wrote:

> "'The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an *idiot* or a *lunatic*. . . . [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses.' . . . 4 W. Blackstone, *Commentaries* *24-*25 (emphasis in original).

"See also 1 W. Hawkins, *Pleas of the Crown* 1-2 (7th ed. 1795) ('[T]hose who are under a natural disability of distinguishing between good and evil, as . . . ideots and lunaticks are not punishable by any criminal prosecution whatsoever'). Idiocy was understood as 'a defect of understanding from the moment of birth,' in contrast to lunacy, which was 'a partial derangement of the intellectual faculties, the senses returning at uncertain intervals.' *Id.*, at 2, n. 2.

"There was no one definition of idiocy at common law, but the term 'idiot' was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil. Hale wrote that a person who is deaf and mute from birth 'is in presumption of law an ideot . . . because he hath no possibility to understand what is forbidden by law to be done, or under what penalties: but if it can appear, that he hath the use of understanding, . . . then he may be tried, and suffer judgment and execution.' 1 M. Hale,

Pleas of the Crown 34 (1736) (footnote omitted). See also *id.*, at 29 (citing A. Fitzherbert, 2 *Natural Brevium* 233 (9th ed. 1794)); *Trial of Edward Arnold,* 16 How.St.Tr. 695, 765 (Eng. 1724) ('[A] man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment'); S. Glueck, *Mental Disorder and the Criminal Law* 128-144 (1925).

"In its emphasis on a permanent, congenital mental deficiency, the old common law notion of 'idiocy' bears some similarity to the modern definition of mental retardation. . . . The common law prohibition against punishing 'idiots' generally applied, however, to persons of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil. In the 19th and early 20th centuries, the term 'idiot' was used to describe the most retarded of persons, corresponding to what is called 'profound' and 'severe' retardation today. See AAMR, *Classification in Mental Retardation* 179 (H. Grossman ed. 1983); *id.*, at 9 ('idiots" generally had IQ of 25 or below).

"The common law prohibition against punishing 'idiots' for their crimes suggests that it may indeed be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment. See *ABA Standards for Criminal Justice* 7-9.1, commentary, p. 460 (2d ed. 1980) (most retarded people who reach the point of sentencing are mildly retarded). Moreover, under *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed. *Id.*, at 422, 106 S.Ct., at 2608 (POWELL, J., concurring in part and concurring in judgment).

"Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational, as well as factual, understanding of the proceedings against him. . . . In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law. . . . Penry argues, however, that there is objective evidence today of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.' . . . The federal Anti-Drug Abuse Act of 1988, Pub.L. 100-690, § 7001*(l)*, 102 Stat. 4390, prohibits execution of a person who is mentally retarded. Only one state, however, explicitly bans execution of retarded persons who have been found guilty of a capital offense. Ga.Code Ann. § 17-7-131(j) (Supp.1988).

"In contrast, in *Ford v. Wainwright,* which held that the Eighth Amendment prohibits execution of the insane, considerably more evidence of a national consensus was available. No state permitted the execution of the insane, and 26 states had statutes explicitly requiring suspension of the execution of a capital defendant who became insane. . . . Other states had adopted the common law prohibition against executing the insane. Moreover, in examining the objective evidence of contemporary standards of decency in *Thompson v. Oklahoma,* the plurality noted that 18 states expressly established a minimum age in their death penalty statutes, and all of them required that the defendant have attained at least the age of 16 at the time of the offense. 487 U.S., at ---, and n. 30, 108 S.Ct., at 2695, and n. 30. In our view

the single state statute prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, does not provide sufficient evidence at present of a national consensus.

"Penry does not offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants nor of decisions of prosecutors. He points instead to several public opinion surveys that indicate strong public opposition to execution of the retarded. For example, a poll taker in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded. . . . A Florida poll found 71% of those surveyed were opposed to the execution of mentally retarded capital defendants, while only 12% were in favor. Brief for Petitioner 38; App. 279. A Georgia poll found 66% of those polled opposed to the death penalty for the retarded, 17% in favor, with 16% responding that it depends how retarded the person is. . . . In addition, the American Association on Mental Retardation (AAMR), the country's oldest and largest organization of professionals working with the mentally retarded, opposes the execution of persons who are mentally retarded. . . . The public sentiment expressed pressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. . . .

"Accordingly, the judgment below is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

"It is so ordered."

Stanford v. Kentucky

109 S.Ct. 2969 (1989)

Death Penalty -- ***Capital punishment for persons who commit murder at sixteen or seventeen years of age does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. (See also,* Thompson v. Oklahoma *and* Penry v. Lynaugh, *this volume).***

"Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV-A, and an opinion with respect to Parts IV-B and V, in which THE CHIEF JUSTICE, Justice WHITE and Justice KENNEDY join.

"These two consolidated cases require us to decide whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment.

I

"The first case, No. 87-5765, involves the shooting death of 20-year-old Baerbel Poore in Jefferson County, Kentucky. Petitioner Kevin Stanford committed the murder on January 7, 1981, when he was approximately 17 years and 4 months of age. Stanford and his accomplice repeatedly raped and sodomized Poore during and after their commission of a robbery at a gas station where she worked as an attendant. They then drove her to a secluded area near the station, where Stanford shot her point-blank in the face and then in the back of her head. The proceeds from the robbery were roughly 300 cartons of cigarettes, two gallons of fuel and a small amount of cash. A corrections officer testified that petitioner explained the murder as follows: '[H]e said, I had to shoot her, [she] lived next door to me and she would recognize me. . . . I guess we could have tied her up or something or beat [her up] . . . and tell her if she tells, we would kill her. . . . Then after he said that he started laughing.' 734 S.W.2d 781, 788 (Ky. 1987).

"After Stanford's arrest, a Kentucky juvenile court conducted hearings to determine whether he should be transferred for trial as an adult under Ky.Rev.Stat. § 208.170 (Michie 1982). That statute provided that juvenile court jurisdiction could be waived and an offender tried as an adult if he was either charged with a Class A felony or capital crime, or was over 16 years of age and charged with a felony. Stressing the seriousness of petitioner's offenses and the unsuccessful attempts of the juvenile system to treat him for numerous instances of past delinquency, the juvenile court found certification for trial as an adult to be in the best interest of petitioner and the community.

"Stanford was convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and was sentenced to death and 45 years in prison. The Kentucky Supreme Court affirmed the death sentence, rejecting Stanford's 'deman[d] that he has a Constitutional

right to treatment,' 734 S.W.2d, at 792. Finding that the record clearly demonstrated that 'there was no program or treatment appropriate for the appellant in the juvenile justice system,' the court held that the juvenile court did not err in certifying petitioner for trial as an adult. The court also stated that petitioner's 'age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him. *Ibid.*

"The second case before us today, No. 87-6026, involves the stabbing death of Nancy Allen, a 26-year-old mother of two who was working behind the sales counter of the convenience store she and David Allen owned and operated in Avondale, Missouri. Petitioner Heath Wilkins committed the murder on July 27, 1985, when he was approximately 16 years and 6 months of age. The record reflects that Wilkins' plan was to rob the store and murder 'whoever was behind the counter' because 'a dead person can't talk.' While Wilkins' accomplice, Patrick Stevens, held Allen, Wilkins stabbed her, causing her to fall to the floor. When Stevens had trouble operating the cash register, Allen spoke up to assist him, leading Wilkins to stab her three more times in her chest. Two of these wounds penetrated the victim's heart. When Allen began to beg for her life, Wilkins stabbed her four more times in the neck, opening her carotid artery. After helping themselves to liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Wilkins and Stevens left Allen to die on the floor.

"Because he was roughly six months short of the age of majority for purposes of criminal prosecution, Mo.Rev.Stat. § 211.021(1) (1986), Wilkins could not automatically be tried as an adult under Missouri law. Before that could happen, the juvenile court was required to terminate juvenile court jurisdiction and certify Wilkins for trial as an adult under § 211.071, which permits individuals between 14 and 17 years of age who have committed felonies to be tried as adults. Relying on the 'viciousness, force and violence' of the alleged crime, petitioner's maturity, and the failure of the juvenile justice system to rehabilitate him after previous delinquent acts, the juvenile court made the necessary certification.

"Wilkins was charged with first-degree murder, armed criminal action, and carrying a concealed weapon. After the court found him competent, petitioner entered guilty pleas to all charges. A punishment hearing was held, at which both the state and petitioner himself urged imposition of the death sentence. Evidence at the hearing revealed that petitioner had been in and out of juvenile facilities since the age of eight for various acts of burglary, theft, and arson, had attempted to kill his mother by putting insecticide into Tylenol capsules, and had killed several animals in his neighborhood. Although psychiatric testimony indicated that Wilkins had 'personality disorders,' the witnesses agreed that Wilkins was aware of his actions and could distinguish right from wrong.

"Determining that the death penalty was appropriate, the trial court entered the following order:

> "'The court finds beyond reasonable doubt that the following aggravated circumstances exist:
>
> "'1. The murder in the first degree was committed while the defendant was engaged in the perpetration of the felony and robbery, and
>
> "'2. The murder in the first degree involved depravity of mind and that as a result thereof, it was outrageously or wantonly vile, horrible or inhuman.' App. in No. 87-6026.

"On mandatory review of Wilkins' death sentence, the Supreme Court of Missouri affirmed, rejecting the argument that the punishment violated the Eighth Amendment. 736 S.W.2d 409 (1987).

"We granted *certiorari* in these cases, 488 U.S. ---, 109 S.Ct. 217, 102 L.Ed.2d 208 and 487 U.S. ---, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age.

II

"The thrust of both Wilkins' and Stanford's arguments is that imposition of the death penalty on those who were juveniles when they committed their crimes falls within the Eighth Amendment's prohibition against 'cruel and unusual punishments.' Wilkins would have us define juveniles as individuals 16 years of age and under; Stanford would draw the line at 17.

"Neither petitioner asserts that his sentence constitutes one of 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.' *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 2600, 91 L.Ed.2d 335 (1986). Nor could they support such a contention. At that time, the common law set the rebuttable table presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7.... In accordance with the standards of this common-law tradition, at least 281 offenders under the age of 18 have been executed in this country, and at least 126 under the age of 17.... Thus petitioners are left to argue that their punishment is contrary to the 'evolving standards of decency that mark the progress of a maturing society,' *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion). They are correct in asserting that this Court has 'not confined the prohibition embodied in the Eighth Amendment to barbarous methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.' *Gregg v. Georgia*, 428 U.S. 153, 171, 96 S.Ct. 2909, 2924, 49 L.Ed.2d 859 (1976). In determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole.[1] As we have said, 'Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.'... This approach is dictated both by the language of the Amendment -- which proscribes only those punishments that are both 'cruel and *unusual*' -- and by the 'deference we owe to the decisions of the state legislatures under our federal system,' *Gregg v. Georgia, supra*, 428 U.S., at 176, 96 S.Ct., at 2926.

III

"[F]irst among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives . . . of the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national

consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual. In invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the *sole* jurisdiction that authorized such a punishment. See *Coker v. Georgia,* 433 U.S., at 595-596, 97 S.Ct., at 2867-2868. In striking down capital punishment for participation in a robbery in which an accomplice takes a life, we emphasized that only eight jurisdictions authorized similar punishment. *Enmund v. Florida,* 458 U.S., at 792, 102 S.Ct., at 3374. In finding that the Eighth Amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity, we relied upon (in addition to the common-law rule) the fact that 'no state in the nation' permitted such punishment. *Ford v. Wainwright,* 477 U.S., at 408, 106 S.Ct., at 2601. And in striking down a life sentence without parole under a recidivist statute, we stressed that '[i]t appears that [petitioner] was treated more severely than he would have been in any other state.' *Solem v. Helm,* 463 U.S. 277, 300, 103 S.Ct. 3001, 3015, 77 L.Ed.2d 637 (1983).

"Since a majority of the states that permit capital punishment authorize it for crimes committed at age 16 or above, petitioners' cases are more analogous to *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) than *Coker, Enmund, Ford,* and *Solem.* In *Tison,* which upheld Arizona's imposition of the death penalty for major participation in a felony with reckless indifference to human life, we noted that only 11 of those jurisdictions imposing capital punishment rejected its use in such circumstances. *Id.,* at 154, 107 S.Ct., at 1686. As we noted earlier, here the number is 15 for offenders under 17, and 12 for offenders under 18. We think the same conclusion as in *Tison* is required in this case.

"Petitioners make much of the recently enacted federal statute providing capital punishment for certain drug-related offenses, but limiting that punishment to offenders 18 and over. The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4390, § 7001(b). That reliance is entirely misplaced. To begin with, the statute in question does not embody a judgment by the federal legislature that *no* murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not. The Congressional judgment on the broader question, if apparent at all, is to be found in the law that permits 16- and 17-year-olds (after appropriate findings) to be tried and punished as adults for *all* federal offenses, including those bearing a capital penalty that is not limited to 18-year-olds. See 18 U.S.C. § 5032 (1982 ed., Supp. V). Moreover, even if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish -- in the face of a substantial number of state statutes to the contrary -- a national consensus that such punishment is inhumane, any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful. To be sure, the absence of a federal death penalty for 16- or 17-year-olds (if it existed) might be evidence that there is no national consensus *in favor* of such punishment. It is not the burden of Kentucky and Missouri, however, to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners, *Gregg v. Georgia,* 428 U.S., at 175, 96 S.Ct., at 2926, to establish a national consensus *against* it. As far as the primary and most reliable indication of consensus is concerned -- the pattern of enacted laws -- petitioners have failed to carry that burden.

IV

A

"Wilkins and Stanford argue, however, that even if the laws themselves do not establish a settled consensus, the application of the laws does. That contemporary society views capital punishment of 16- and 17-year-old offenders as inappropriate is demonstrated, they say, by the reluctance of juries to impose, and prosecutors to seek, such sentences. Petitioners are quite correct that a far smaller number of offenders under 18 than over 18 have been sentenced to death in this country. From 1982 through 1988, for example, out of 2,106 total death sentences, only 15 were imposed on individuals who were 16 or under when they committed their crimes, and only 30 on individuals who were 17 at the time of the crime. See Streib, 'Imposition of Death Sentences For Juvenile Offenses, January 1, 1982, Through April 1, 1989,' p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989). And it appears that actual executions for crimes committed under age 18 accounted for only about two percent of the total number of executions that occurred between 1642 and 1986. See Streib, *Death Penalty for Juveniles,* at 55, 57. As Wilkins points out, the last execution of a person who committed a crime under 17 years of age occurred in 1959. These statistics, however, carry little significance. Given the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18, the discrepancy in treatment is much less than might seem. Granted, however, that a substantial discrepancy exists, that does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries. To the contrary, it is not only possible but overwhelmingly probable that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.

B

"This last point suggests why there is also no relevance to the laws cited by petitioners and their *amici* which set 18 or more as the legal age for engaging in various activities, ranging from driving to drinking alcoholic beverages to voting. It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. But even if the requisite degrees of maturity were comparable, the age-statutes in question would still not be relevant. They do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing. In the realm of capital punishment in particular, 'individualized consideration [is] a Constitutional requirement,' . . . and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age. . . . Twenty-nine states, including both Kentucky and Missouri, have codified this Constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital case. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibil-

ity of 16- and 17-year-old offenders before they are even held to stand trial as adults. The application of this particularized system to the petitioners can be declared Constitutionally inadequate only if there is a consensus, not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible. What displays society's views on this latter point are not the ages set forth in the generalized system of driving, drinking, and voting laws cited by petitioners and their *amici*, but the ages at which the states permit their particularized capital punishment systems to be applied.

V

"Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups and the positions adopted by various professional associations. We decline the invitation to rest Constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.

"We also reject petitioners' argument that we should invalidate capital punishment of 16- and 17-year-old offenders on the ground that it fails to serve the legitimate goals of penology. According to petitioners, it fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and responsible, are also less morally blameworthy. In support of these claims, petitioners and their supporting *amici* marshall an array of socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds.

"If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis. See *Dallas v. Stanglin*, 490 U.S. ---, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). But as the adjective 'socioscientific' suggests (and insofar as evaluation of moral responsibility is concerned perhaps the adjective 'ethicoscientific' would be more apt), it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred. It is rational, even if mistaken, to think the contrary. The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon. The punishment is either 'cruel *and* unusual' (*i.e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment.' Brief for Petitioner in No. 87-6026, p. 23, regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.

"We reject the dissent's contention that our approach, by 'largely return[ing] the task of defining the contours of Eighth Amendment protection to political majorities,' leaves '[C]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit,' *post,* at 2986 (citation omitted). When this Court cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the 'evolving *standards* of decency that mark the progress of a maturing *society.*' *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) (emphasis added). It has never been thought that this was a shorthand reference to the preferences of a majority of this Court. By reaching a decision supported neither by Constitutional text nor by the demonstrable current standards of our citizens, the dissent displays a failure to appreciate that 'those institutions which the Constitution is supposed to limit' include the Court itself. To say, as the dissent says, that 'it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,' *post,* at 2986 (emphasis added), quoting *Enmund v. Florida,* 458 U.S. 782, 797, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982) -- and to mean that as the dissent means it, *i.e.,* that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment' -- to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

"While the dissent is correct that several of our cases have engaged in so-called 'proportionality' analysis, examining whether 'there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,' and whether a punishment makes any 'measurable contribution to acceptable goals of punishment,' see *post,* at 2987, we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty. See *Solem v. Helm,* 463 U.S. 277, 299-300, 103 S.Ct. 3001, 3014-3015, 77 L.Ed.2d 637 (1983); *Enmund v. Florida, supra,* 458 U.S., at 789-796, 102 S.Ct., at 3372-3376; *Coker v. Georgia,* 433 U.S. 584, 593-597, 97 S.Ct. 2861, 2866-2869, 53 L.Ed.2d 982 (1977) (plurality opinion). In fact, the two methodologies blend into one another, since 'proportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.

* * *

"We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.

"The judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore

"Affirmed."

"Justice O'CONNOR, concurring in part and concurring in the judgment.

"Last Term, in *Thompson v. Oklahoma*, 487 U.S. ---, ---, 108 S.Ct. 2687, ---, 101 L.Ed.2d 702 (1988) (concurring in judgment), I expressed the view that a criminal defendant who would have been tried as a juvenile under state law, but for the granting of a petition waiving juvenile court jurisdiction, may only be executed for a capital offense if the state's capital punishment statute specifies a minimum age at which the commission of a capital crime can lead to an offender's execution and the defendant had reached that minimum age at the time the crime was committed. As a threshold matter, I indicated that such specificity is not necessary to avoid Constitutional problems if it is clear that no national consensus forbids the imposition of capital punishment for crimes committed at such an age. *Id.* at ---, 108 S.Ct., at ---. Applying this two-part standard in *Thompson*, I concluded that Oklahoma's imposition of a death sentence on an individual who was 15 years old at the time he committed a capital offense should be set aside. Applying the same standard today, I conclude that the death sentences for capital murder imposed by Missouri and Kentucky on petitioners Wilkins and Stanford respectively should not be set aside because it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers.

"In *Thompson* I noted that '[t]he most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above.' *Id.*, at ---, 108 S.Ct., at 2706. It is this difference between *Thompson* and these case, more than any other, that convinces me there is no national consensus forbidding the imposition of capital punishment for crimes committed at the age of 16 or older. See *ante*, at 2975-2976. As the Court indicates, 'a majority of the states that permit capital punishment authorize it for crimes committed at age 16 or above.' . . . *Ante*, at 2976. Three states, including Kentucky, have specifically set the minimum age for capital punishment at 16, see Ind.Code § 35-50-2-3(b) (1988); Ky.Rev.Stat.Ann. § 640.040(1) (Baldwin 1987); Nev.Rev.Stat. § 176.025 (1987); and a fourth, Florida, clearly contemplates the imposition of capital punishment on 16-year-olds in its juvenile transfer statute. See Fla.Stat. § 39.02(5)(c) (1987). Under these circumstances, unlike the 'peculiar circumstances' at work in *Thompson*, I do not think it necessary to require a state legislature to specify that the commission of a capital crime can lead to the execution of a 16- or 17-year-old offender. Because it is sufficiently clear that today no national consensus forbids the imposition of capital punishment in these circumstances, 'the implicit nature of the [Missouri] legislature's decision [is] not . . . constitutionally problematic.' 487 U.S., at ---, 108 S.Ct. at 2711. This is true, *a fortiori*, in the case of Kentucky, which has specified 16 as the minimum age for the imposition of the death penalty. The day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed. Because I do not believe that day has yet arrived, I concur in Parts I - IV-A of the plurality's opinion and I concur in its judgment.

"I am unable, however, to join the remainder of the plurality's opinion for reasons I stated in *Thompson*. Part V of the plurality's opinion 'emphatically reject[s],' *ante*, at 2979, the suggestion that, beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional. *Thompson, supra*, at ---, 108 S.Ct., at 2708, quoting *Enmund v. Florida*, 458 U.S. 782, 825, 102 S.Ct. 3368, 3391, 73 L.Ed.2d 1140 (1982) (dissenting opinion). Part IV-B of the plurality's opinion specifically rejects as irrelevant to Eighth Amendment considerations state statutes that distinguish juveniles from adults for a variety of other purposes. In my view, this Court does have a Constitutional obligation to conduct proportionality analysis. See

Penry v. Lynaugh, --- U.S. ---, ---, 109 S.Ct. 2934, ---, --- L.Ed.2d --- (1989); *Tison v. Arizona*, 481 U.S. 137, 155-158, 107 S.Ct. 1676, 1687-1688, 95 L.Ed.2d 127 (1987); *Enmund*, 458 U.S., at 797-801, 102 S.Ct., at 3376-3379; *id.*, at 825-826, 102 S.Ct., at 3391-3392 (dissenting opinion). In *Thompson* I specifically identified age-based statutory classifications as 'relevant to Eighth Amendment proportionality analysis.' 487 U.S., at ---, 108 S.Ct., at 2709. Thus, although I do not believe that these particular cases can be resolved through proportionality analysis, see *Thompson, supra*, at ---, ---, 108 S.Ct., at ---, --- (concurring in judgment), I reject the suggestion that the use of such analysis is improper as a matter of Eighth Amendment jurisprudence. Accordingly, I join all but Parts IV-B and V of the Court's opinion.

"Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

"I believe that to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence is prohibited by the Eighth Amendment.

"The method by which this Court assesses a claim that a punishment is unconstitutional because it is cruel and unusual is established by our precedents, and it bears little resemblance to the method four Members of the Court apply in this case. To be sure, we *begin* the task of deciding whether a punishment is unconstitutional by reviewing legislative enactments and the work of sentencing juries relating to the punishment in question, to determine whether our nation has set its face against a punishment to an extent that it can be concluded that the punishment offends our 'evolving standards of decency.' *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed. 2d 630 (1958) (plurality opinion). The Court undertakes such an analysis in this case. *Ante*, at 2975-2977. But Justice SCALIA, in his separate opinion on this point, *ante*, at 2972-2975, would treat the Eighth Amendment inquiry as *complete* with this investigation. I agree with Justice O'CONNOR, *ante*, at 2981, that a more searching inquiry is mandated by our precedents interpreting the Cruel and Unusual Punishment Clause. In my view, that inquiry must in this case go beyond age-based statutory classifications relating to matters other than capital punishment, cf. *ante*, at 2981 (O'CONNOR, J, concurring in part and concurring in judgment), and must also encompass what Justice SCALIA calls, with evident but misplaced disdain, 'ethicoscientific' evidence. Only then can we be in a position to judge, as our cases require, whether a punishment is unconstitutionally excessive, either because it is disproportionate given the culpability of the offender, or because it serves no legitimate penal goal. . . .

Notes

[1]We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* (accepted by the dissent, see *post*, at 2984-2986) that the sentencing practices of other countries are relevant. While 'the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among other people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,' see *Thompson v. Oklahoma*, 487 U.S. ---, ---, n. 4, 108 S.Ct. 2687, 2691-2692, n. 4, 101 L.Ed.2d 702 (1988), (SCALIA, J., dissenting), quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among other people.

Thompson v. Oklahoma

487 U.S. 815 (1988)

Death Penalty -- ***The Eighth and Fourteenth Amendments prohibit execution of a defendant who committed first degree murder when he was fifteen-years-old. (See also,*** **Stanford v. Kentucky** ***and*** **Penry v. Lynaugh,** ***this volume).***

"Justice STEVENS announced the judgment of the Court, and delivered an opinion in which Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join.

"Petitioner was convicted of first-degree murder and sentenced to death. The principal question presented is whether the execution of that sentence would violate the constitutional prohibition against the infliction of 'cruel and unusual punishments' because petitioner was only 15 years old at the time of his offense.

I

"Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary. In concert with three older persons, petitioner actively participated in the brutal murder of his former brother-in-law in the early morning hours of January 23, 1983. The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river where it remained for almost four weeks. Each of the four participants was tried separately and each was sentenced to death.

"Because petitioner was a 'child' as a matter of Oklahoma law, the district attorney filed a statutory petition, see 10 Okla. Stat.Ann. § 1112(b) (1987), seeking an order finding 'that said child is competent and had the mental capacity to know and appreciate the wrongfulness of his [conduct].' After a hearing, the trial court concluded 'that there are virtually no *reasonable* prospects for rehabilitation of William Wayne Thompson within the juvenile system and that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult.'

"At the penalty phase of the trial, the prosecutor asked the jury to find two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel; and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found the first, but not the second, and fixed petitioner's punishment at death.

"The Court of Criminal Appeals affirmed the conviction and sentence, 724 P.2d 780 (1986), citing its earlier opinion in *Eddings v. State,* 616 P.2d 1159 (1980), rev'd on other grounds, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), for the proposition that 'once

a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.' 724 P.2d, at 784. We granted *certiorari* to consider whether a sentence of death is cruel and unusual punishment for a crime committed by a 15-year-old child. . . .

II

"The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) (WARREN, C.J.). In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. Thus, in confronting the question whether the youth of the defendant -- more specifically, the fact that he was less than 16 years old at the time of his offense -- is a sufficient reason for denying the state the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.

III

"Justice Powell has repeatedly reminded us of the importance of 'the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.' *Goss v. Lopez,* 419 U.S. 565, 590-591, 95 S.Ct. 729, 744, 42 L.Ed.2d 725 (1975) (POWELL, J., dissenting). Oklahoma recognizes this basic distinction in a number of its statutes. Thus, a minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes. Like all other states, Oklahoma has developed a juvenile justice system in which most offenders under the age of 18 are not held criminally responsible. Its statutes do provide, however, that a 16- or 17-year-old charged with murder and other serious felonies shall be considered an adult. Other than the special certification procedure that was used to authorize petitioner's trial in this case 'as an adult,' apparently there are no Oklahoma statutes, either civil or criminal, that treat a person under 16 years of age as anything but a 'child.'

"The line between childhood and adulthood is drawn in different ways by various states. There is, however, complete or near unanimity among all 50 states and the District of Columbia in treating a person under 16 as a minor for several important purposes. In no state may a 15-year-old vote or serve on a jury. Further, in all but one state a 15-year-old may not drive without parental consent, and in all but four states a 15-year-old may not marry without parental consent. Additionally, in those states that have legislated on the subject, no one under age 16 may purchase pornographic materials (50 states), and in most states that

have some form of legalized gambling, minors are not permitted to participate without parental consent (42 states). Most relevant, however, is the fact that all states have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16. All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.[1]

"Most state legislatures have not expressly confronted the question of establishing a minimum age for imposition of the death penalty. In 14 states, capital punishment is not authorized at all, and in 19 others, capital punishment is authorized but no minimum age is expressly stated in the death penalty statute. One might argue on the basis of this body of legislation that there is no chronological age at which the imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children.[2] We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case. If, therefore, we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn. When we confine our attention to the 18 states that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the [capital] offense.

"The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American Bar Association[3] and the American Law Institute[4] have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the state of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

IV

"The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries. In fact, the infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying our judgment in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), that the death penalty, as then administered in unguided fashion, was unconstitutional.

"While it is not known precisely how many persons have been executed during the 20th century for crimes committed under the age of 16, a scholar has recently compiled a table revealing this number to be between 18 and 20. All of these occurred during the first half of the century, with the last such execution taking place apparently in 1948. In the following year this Court observed that this 'whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions.' . . . *Williams v. New York,* 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). The road we

have traveled during the past four decades -- in which thousands of juries have tried murder cases -- leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.

"Department of Justice statistics indicate that during the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide (murder and non-negligent manslaughter) each year. Of that group of 82,094 persons, 1,393 were sentenced to death. Only five of them, including the petitioner in this case, were less than 16 years old at the time of the offense. Statistics of this kind can, of course, be interpreted in different ways, but they do suggest that these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.' *Furman v. Georgia,* 408 U.S., at 309, 92 S.Ct., at 2762 (STEWART, J. concurring).

V

"Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty' on one such as petitioner who committed a heinous murder when he was only 15 years old. *Enmund v. Florida,* 458 U.S., at 797, 102 S.Ct., at 3376. In making that judgment, we first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty. *Id.,* at 798, 102 S.Ct., at 3377.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.' *California v. Brown,* 479 U.S. 538, ---, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases:

> "'But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.' *Bellotti v. Baird,* 443 U.S. 622, 635 [99 S.Ct. 3035, 3043, 61 L.Ed.2d 797] (1979). *Eddings v. Oklahoma,* 455 U.S., at 115-116, 102 S.Ct., at 877 (footnotes omitted).

"To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> "'Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively

the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.' *Id.*, at 115.

"Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.[5] The basis for this conclusion is too obvious to require extended explanation.[6] Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.' *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909. 2929-30, 49 L.Ed.2d 859 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.). In *Gregg,* we concluded that as 'an expression of society's moral outrage at particularly offensive conduct,' retribution was not inconsistent with our respect for the dignity of men.' *Ibid.* Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender.

"For such a young offender the deterrence rationale is equally unacceptable. The Department of Justice statistics indicate that about 98%of the arrests for willful homicide involved persons who were over 16 at the time of the offense. Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century. In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering,' *Coker v. Georgia,* 433 U.S., at 592, 97 S.Ct., at 2866, and thus an unconstitutional punishment.

VI

"Petitioner's counsel and various *amici curiae* have asked us to 'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

"The judgment of the Court of Criminal Appeals is vacated and the case is remanded with instructions to enter an appropriate order vacating petitioner's death sentence.

"It is so ordered."

"Justice KENNEDY took no part in the consideration or decision of this case.

"Justice O'CONNOR, concurring in the judgment.

"The plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be Constitutionally punished by death, and that our precedents require us to locate this age in light of the 'evolving standards of decency that mark the progress of a maturing society.' ... I accept both principles. The disagreements between the plurality and the dissent rest on their different evaluations of the evidence available to us about the relevant social consensus. Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of Constitutional law without better evidence than we now possess. Because I conclude that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality, and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court.

I

"Both the plurality and the dissent look initially to the decisions of American legislatures for signs of a national consensus about the minimum age at which a juvenile's crimes may lead to capital punishment. Although I agree with the dissent's contention that these decisions should provide the most reliable signs of a society-wide consensus on this issue, I cannot agree with the dissent's interpretation of the evidence.

"The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above. When one adds these 18 states to the 14 that have rejected capital punishment completely, it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution. Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this county has affirmatively and unequivocally endorsed such a practice, strong counter-evidence would be required to persuade me that a national consensus against this practice does not exist.

"The dissent argues that it has found such counter-evidence in the laws of the 19 states that authorize capital punishment without setting any statutory minimum age. If we could be sure that each of these 19 state legislatures had deliberately chosen to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice. In fact, however, the statistics relied on by the dissent may be quite misleading. When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. This is how petitioner was rendered death-eligible, and the same possibility appears to exist in 18 other states. As the plurality points out, however, it does not

necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds (or on even younger defendants who may be tried as adults in some jurisdictions).

"There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders. Such reasons would suggest nothing about the appropriateness of capital punishment for 15-year-olds. . . .

"There is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense. It nonetheless is true, although I think the dissent has overstated its significance, that the federal government and 19 states have adopted statutes that appear to have the legal effect of rendering some of these juveniles death-eligible. That fact is a real obstacle in the way of concluding that a national consensus forbids this practice. It is appropriate, therefore, to examine other evidence that might indicate whether or not these statutes are inconsistent with settled notions of decency in our society.

"In previous cases, we have examined execution statistics, as well as data about jury determinations, in an effort to discern whether the application of capital punishment to certain classes of defendants has been so aberrational that it can be considered unacceptable in our society. . . . In this case, the plurality emphasizes that four decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense, and that only 5 out of 1,393 death sentences during a recent 5-year period involved such defendants. Like the statistics about the behavior of legislatures, these execution and sentencing statistics support the inference of a national consensus opposing the death penalty for 15-year-olds, but they are not dispositive.

"A variety of factors, having little or nothing to do with any individual's blameworthiness, may cause some groups in our population to commit capital crimes at a much lower rate than other groups. The statistics relied on by the plurality, moreover, do not indicate how many juries have been asked to impose the death penalty for crimes committed below the age of 16, or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved. Without such data, raw execution and sentencing statistics cannot allow us reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants.

"Nor, finally, do I believe that this case can be resolved through the kind of disproportionality analysis employed in Part V of the plurality opinion. I agree that 'proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness.' Granting the plurality's premise -- that adolescents are generally less blameworthy than adults who commit similar crimes -- it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor has the plurality deduced evidence demonstrating that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty.

"Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults. . . . The special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to Eighth Amendment proportionality analysis. These characteristics, however, vary widely among different individuals of the same age, and I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the nation's legislatures. . . .

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. . . .

"The step that the plurality would take today is much narrower in scope, but it could conceivably reflect an error similar to the one we were urged to make in *Furman*. The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing capital punishment for crimes committed at the age of 15. In that event, we shall have to decide the Eighth Amendment issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time. In my view, however, we need not and should not decide the question today.

II

"Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. . . . Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

"The restrictions that we have required under the Eighth Amendment affect both legislatures and the sentencing authorities responsible for decisions in individual cases. . . .

"The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The state has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be Constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious Constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty.

In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

"The conclusion I reached in this unusual case is itself unusual. I believe, however, it is in keeping with the principles that have guided us in other Eighth Amendment cases. It is also supported by the familiar principle -- applied in different ways in different contexts -- according to which we should avoid unnecessary, or unnecessarily broad, Constitutional adjudication. . . . The narrow conclusion I reached in this case is consistent with the underlying rationale for that principle, . . . articulated many years ago by Justice Jackson: 'We are not final because we are infallible, but we are infallible only because we are final.' . . . By leaving open for now the broader Eighth Amendment question that both the plurality and the dissent would resolve, the approach I take allows the ultimate moral issue at stake in the Constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.

"For the reasons stated in this opinion, I agree that petitioner's death sentence should be vacated, and I therefore concur in the judgment of the Court."

"Justice SCALIA, with whom Chief Justice REHNQUIST and Justice WHITE join, dissenting.

"If the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long-standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment. We have already decided as much, and more, in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult. The question posed here, however, is radically different from both of these. It is whether there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime. Because there seems to me no plausible basis for answering this last question in the affirmative, I respectfully dissent.

Notes

[1]The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. See Garvey, "Freedom and Choice in Constitutional Law," 94 *Harv.L.Rev.* 1756 (1981). It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent

making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life. The assemblage of statutes in the text above, from both Oklahoma and other states, reflects this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class -- about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment. Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance. As we have observed, 'Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as *parens patriae.*' *Schall v. Martin,* 467 U.S. 253, 265, 104 S.Ct. 2403, 2410, 81 L.Ed.2d 207 (1984); see also *May v. Anderson,* 345 U.S. 528, 536, 73 S.Ct. 840, 844, 97 L.Ed. 1221 (1953) (FRANKFURTER, J., concurring) ('Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children'); *Ginsberg v. New York,* 390 U.S. 629, 649-650, 88 S.Ct. 1274, 1285-1286, 20 L.Ed.2d 195 (1968) (STEWART, J., concurring) ('[A]t least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a state may deprive children of other rights -- the right to marry, for example, or the right to vote -- deprivations that would be Constitutionally intolerable for adults'); *Parham v. J.R.,* 442 U.S. 584, 603, 99 S.Ct. 2493, 2505, 61 L.Ed.2d 101 (1979) ('Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions').

[2]It is reported that a 10-year-old black child was hanged in Louisiana in 1855 and a Cherokee Indian child of the same age was hanged in Arkansas in 1885. See Streib, "Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen," 36 *Okla.L.Rev.* 613, 619-620 (1983).

[3]"*Be It Resolved,* That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." American Bar Association, Summary of Action of the House of Delegates 17 (1983 Annual Meeting).

[4]"Civilized societies will not tolerate the spectacle of execution of children." . . . American Law Institute, Model Penal Code § 210.6 commentary at 133 (Official Draft and Revised Comments 1980).

[5]"The conception of criminal responsibility with which the juvenile court operates also provides supporting rationale for its role in crime prevention. The basic philosophy concerning this is that criminal responsibility is absent in the case of misbehaving children. . . . But, what does it mean to say that a child has no criminal responsibility? . . . One thing about this does seem clearly implied, . . . and that is an absence of the basis for adult criminal accountability -- the exercise of an unfettered freewill." S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-12 (1967) (publication of the President's Commission on Law Enforcement and Administration of Justice).

[6]A report on a professional evaluation of 14 juveniles condemned to death in the United States, which was accepted for presentation to the American Academy of Child and Adolescent Psychiatry, concluded:

"Adolescence is well-recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive. These findings raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death." Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Pyschoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States* 11 (1987).

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