Supplement to
A Digest of Cases
of
THE UNITED STATES SUPREME COURT
as to
JUVENILE AND FAMILY LAW

addressing the 1988 --1990 terms

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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 Due Process 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 v. 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

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[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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