COMMENTS

"Who's Been Searching in My Room?" Parental Waiver of Children's Fourth Amendment Rights

The Supreme Court should require a warrant to search a minor's belongings in her home. A warrant requirement creates new difficulties for police and parents, but these difficulties are outweighed by the importance of fourth amendment protection for minors. No judicial approach allowing parental or third party consent provides the minor with adequate fourth amendment protection. In the absence of a justifiable exception to the fourth amendment, the Court must apply the rule: no searches without warrants supported by probable cause.

INTRODUCTION

Juveniles lack the full constitutional protection afforded adults. This is particularly true in fourth amendment jurisprudence, as the protection given adults from unreasonable government intrusion[1] may be

[1] *See infra* notes 2-10 and accompanying text. Historically, fourth amendment controversies have involved a two-sided inquiry, centering on conflicts between the state and an individual. For example, in Katz v. United States, 389 U.S. 347 (1967) (challenge to warrantless government placement of bug and recorder on outside wall of phone booth), the majority stated the fourth amendment trigger as follows: "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. The widely quoted Harlan concurrence in *Katz* restated the test as "whether a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). *See also* Terry v. Ohio, 392 U.S. 1, 9 (1968) (stop and frisk by police requires articulable reasonable suspicion); Boyd v. United States, 116 U.S. 616 (1886) (district attorney illegally coerced defendant into producing evidence against himself). *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-69 (1974) (discussing the origins of the fourth amendment as protection for the individual and suggesting, as an alternative approach, treating the amendment as regulatory in nature and shifting its focus to the behavior of the government's agents rather than whether *this* defendant's rights have been violated); Cann & Egbert, *The Exclusionary Rule: Its Necessity in*

withheld in large part from juveniles. This vulnerability is apparent when a minor is the target of a police search in her home. If she tries to assert her fourth amendment rights, she often finds them waived by her parents. The ability of parents to waive their child's rights complicates the standard fourth amendment balancing of the interests of the state with the rights of the individual. At present a court determining the validity of parental waiver must balance three conflicting interests: (1) the state's law enforcement objectives; (2) the parents' interest in the control and well-being of their child; and (3) the child's right to freedom from unreasonable government intrusion.

This Comment examines the situation in which a parent consents to a search directed against a minor child, and identifies three judicial approaches allowing parental consent. First, courts have held parental authority superior to the child's fourth amendment rights and allowed parents to waive those rights. Second, courts have allowed parental consent based on the third party consent doctrine, but have presumed that the parent-child relationship furnishes the requirements for third party consent. Third, courts have allowed parents to exercise third party consent only after determining that the facts actually justify the consent. This Comment argues that none of these approaches gives minors sufficient fourth amendment protection.

Although the Supreme Court has never ruled on minors' fourth amendment rights, it has increasingly afforded minors safeguards ensuring procedural fairness. Following the logic of this trend, this Comment advocates that the Court should require a warrant supported by probable cause for any search directed against a minor in her home. The Court would thereby explicitly recognize minors' fourth amendment rights. After discussing the problems inherent in forbidding parental consent, this Comment concludes that the fundamental nature of

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Constitutional Democracy, 23 How. L.J. 299, 317-20 (1980) (defending the exclusionary rule as necessary to carry out the original goals of the fourth amendment: protecting the individual from unreasonable government intrusion into her life). Courts must balance governmental interests in health and safety with individual rights to dignity and privacy. *See, e.g.*, Payton v. New York, 445 U.S. 573, 587-602 (1980) (absent exigent circumstances, warrant required for arrest within residence); Almeida-Sanchez v. United States, 413 U.S. 266, 269-75 (1973) (roving immigration patrols could not stop and search automobiles at a distance from the border without probable cause); Terry v. Ohio, 392 U.S. 1, 20-27 (1968) ("stop-and-frisk" requires articulable reasonable suspicion); Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (administrative inspections require general, not particular, warrants); Schmerber v. California, 384 U.S. 757, 766-72 (1966) (blood alcohol test in hospital was reasonable search without warrant).

fourth amendment protection outweighs those problems. The failure of other approaches to provide sufficient fourth amendment protection to minors requires the prohibition of parental waiver.

I. The Fourth Amendment Extends to Minors

A. The Purpose and Scope of the Fourth Amendment

The purpose of the fourth amendment to the United States Constitution is to protect personal privacy and dignity against the state's unwarranted intrusion.[2] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[3]

In general, the fourth amendment prohibits warrantless searches[4] and

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[2] "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." Jones v. United States, 357 U.S. 493, 498 (1958) (invalidating night search of home without warrant). *Accord* Payton v. New York, 445 U.S. 573, 589-90 (1980) (absent exigent circumstances, warrant required for arrest within the home); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (border patrol questioning allowed at fixed checkpoints); Terry v. Ohio, 392 U.S. 1, 16-19 (1968) (reasonable suspicion required to stop and frisk individual); Katz v. United States, 389 U.S. 347, 350-53 (1967) (no warrantless electronic surveillance of public phone booths allowed); Schmerber v. California, 384 U.S. 757, 767-70 (1966) (blood alcohol test not unreasonable search if done painlessly in hospital).

The fourth amendment guarantees a minimum level of protection from government intrusion. The due process clause of the fourteenth amendment, U.S. Const. amend. XIV, applies the fourth amendment to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961). States themselves are free to provide greater protection than the federal standard, based on their own constitutions. *Compare* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (when an individual is not to be booked, proximity to police justifies only a pat down search) *with* United States v. Robinson, 414 U.S. 218 (1973) (full search allowed whenever defendant is in proximity to police).

[3] U.S. Const. amend. IV.

[4] "The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." Franks v. Delaware, 438 U.S. 154, 164 (1978) (false statement in affidavit may invalidate warrant and search); Alderman v. United States, 394 U.S. 165, 176-77 (1969) (electronic eavesdropping on defendant's property inadmissable against him although he was not a party to the conversations overheard); Jones v. United States, 357 U.S. 493, 497-99 (1958) (night search of home without warrant invalid despite probable cause); Johnson v. United States, 333 U.S. 10, 13-15 (1948) (search of hotel room with probable cause but with-

arrests without probable cause.[5]

The Court has traditionally looked to the fourth amendment's language and its historical context to determine its meaning,[6] but has not limited the scope of the amendment by either criterion.[7] The Court has recognized that the amendment embraces a philosophy about the relationship between individual and state, and was "intended to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[8] The amendment's protection is triggered by state action[9]

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out warrant violated fourth amendment).

[5] Wong Sun v. United States, 371 U.S. 471, 479 (1963) (arrest without probable cause invalid and evidence procured thereby inadmissable); Henry v. United States, 361 U.S. 98, 101-02 (1959) (arrest without probable cause invalid). For fourth amendment purposes, seizure of a person includes not only formal arrest but other types of custodial detention. Dunaway v. New York, 442 U.S. 200, 205-16 (1979) (defendant's transportation to police station and subsequent questioning was custodial detention, despite fact that defendant was not told he was arrested or booked); Terry v. Ohio, 392 U.S. 1, 20-27 (1968) (police must have reasonable suspicion of criminal activity to stop and frisk an individual; full probable cause not required).

[6] *See, e.g.*, Payton v. New York, 445 U.S. 573, 583-84 (1980) (warrant required for arrest within home); United States v. Chadwick, 433 U.S. 1, 6-11 (1977) (invalidating warrantless search of locked footlocker seized in public parking lot); Chimel v. California, 395 U.S. 752, 760-61 (1969) (limiting searches incident to arrest); Boyd v. United States, 116 U.S. 616, 625-32 (1866) (district attorney illegally coerced defendant into producing incriminating documents).

[7] For example, in United States v. Chadwick, 433 U.S. 1 (1977), the Court noted that the fourth amendment was a response to the intrusive searches of colonial homes under writs of assistance and general warrants. *Id.* at 7-8. The Court then rejected the government's contention that fourth amendment protection extends only to searches of a private residence. Silence in the historical record does not, in the Court's opinion, preclude the application of the fourth amendment to other situations. Accordingly, the Court invalidated a warrantless search of the defendant's footlocker, which was seized from the trunk of an automobile in a public parking lot. *Id.* at 11-16.

[8] United States v. Chadwick, 433 U.S. 1, 9 (1977). The specific abuses referred to were the writs of assistance and general warrants which in colonial times gave the government an unfettered right to intrude into individuals' homes and privacy. *Id.* at 8.

[9] Constitutional prohibitions do not apply to private parties, but only to state action. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (forbidding *courts* to enforce private restrictive racial covenants). The Court has found state action when the actor is a government employee, Walters v. United States, 447 U.S. 649, 656 (1980) (FBI viewing of obscene films misdelivered by post office), when there is a beneficial symbiotic relationship between the state and a private party, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (private segregated restaurant leasing space in government parking structure), when a private actor performs an exclusive governmental function, Terry v. Adams, 345 U.S. 461, 469-70 (1953) (blacks unconstitutionally excluded from decisive but private pre-primary straw polls), or when the state coerces, compels, or influences a private party's decision to act, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972) (state statute compelling private club to enforce racially discriminatory policy

intruding unreasonably on an individual's dignity and privacy.[10]

Consent searches provide notable exceptions to the warrant and probable cause requirements. An individual may waive her fourth amendment rights,[11] and in some circumstances a third party may waive these rights for her.[12] For any consent or waiver to be valid, it must be tested by the specific standards the Court has established.[13] By limiting the scope of the exception, the Court has ensured that the

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held unconstitutional).

[10] *E.g.*, United States v. Chadwick, 433 U.S. 1, 7 (1977) (invalidating warrantless search of locked footlocker in public parking lot); Terry v. Ohio, 392 U.S. 1, 8-11 (1968) (reasonable suspicion required for stop and frisk); Katz v. United States, 389 U.S. 347, 350 (1967) (prohibiting electronic eavesdropping on phone booths); Schmerber v. California, 384 U.S. 757, 766-68 (1966) (warrantless blood alcohol test held reasonable if performed in hospital).

[11] *E.g.*, Washington v. Chrisman, 455 U.S. 1, 9-10 (1982) (search of dormitory room authorized by occupant's written consent); United States v. Mendenhall, 446 U.S. 544, 557-60 (1980) (totality of the circumstances determines whether defendant's consent to body search at airport was coerced or voluntary); Schneckloth v. Bustamonte, 412 U.S. 218, 247-49 (1973) (pre-arrest consent to search car held valid despite fact that defendant was not told he could refuse); People v. Rogers, 21 Cal. 3d 542, 549, 579 P.2d 1048, 1053, 146 Cal. Rptr. 732, 737 (1978) (warrantless search of defendant's van justified by written consent); People v. James, 19 Cal. 3d 99, 115-18, 561 P.2d 1135, 1144-46, 137 Cal. Rptr. 447, 456-58 (1977) (warning of right to refuse permission to search not a precondition to valid consent); People v. Michael, 45 Cal. 2d 751, 753, 290 P.2d 852, 853-54 (1955) (voluntary consent validates warrantless search).

[12] United States v. Matlock, 415 U.S. 164, 169-71 (1974) (third party living with defendant could consent to search of any areas of which she had joint access and use). For an explanation of the facts justifying third party consent, see *infra* notes 91-105 and accompanying text.

[13] The Court has distinguished consent to search from the waiver of rights constitutionally guaranteed as the safeguards of a fair criminal trial. Schneckloth v. Bustamonte, 412 U.S. 218, 235-42 (1973). The Court has required knowing and intelligent waiver of the right to counsel, to a confrontation of witnesses, to a jury trial, to a speedy trial, and to the right to be free from double jeopardy. *Id.* at 237-38. These rights constitutionally guarantee "a fair trial and the reliability of the truth-determining process." *Id.* at 236. Since the fourth amendment protects an individual's privacy against arbitrary intrusions by the state, the protections of the fourth amendment are irrelevant to the promotion of fairness and truth at trial. *Id.* at 242. The Court does not require the state to prove a knowing and intelligent waiver of the fourth amendment.

> [Rather, the state must show that] the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Id. at 248-49.

fourth amendment remains a vigorous safeguard against arbitrary state intrusion into individual privacy.[14]

B. The Fourth Amendment and Minors

This section examines the fourth amendment's application to juvenile offenders. It will briefly discuss the history and philosophy of the juvenile justice system, and trace the Supreme Court's extension of constitutional protection to minors.

The first juvenile court was established in 1899 by the Illinois legislature,[15] and today separate courts for children exist in every American jurisdiction.[16] The juvenile court movement evolved from the efforts of social reformers in the nineteenth century to develop better methods of dealing with children in trouble.[17] The early reformers believed that individualized treatment in separate tribunals, designed to rehabilitate rather than punish, would be more effective and more humane than processing children in adult criminal courts.[18] Progressive social theo-

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[14] United States v. Ross, 456 U.S. 798, 825 (1982). While affirming the validity of searches of containers within automobiles, the Court emphasized the limitations on exceptions to the fourth amendment: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357, (footnotes omitted)." United States v. Ross, 456 U.S. 798, 825 (1982) (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)).

[15] Revised Laws of Illinois, 1899, pp. 131-37.

[16] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereafter PRESIDENT'S TASK FORCE REPORT].

[17] The juvenile court's emergence can be attributed to several factors. First, it was a natural outcome of 19th century efforts to humanize the criminal law. Second, it reflected official recognition of the proposition that children were more vulnerable and salvageable than adults. Finally, prevailing urban conditions caused by industrialization and increased immigration in the early 19th century may have accelerated reform efforts, as reformers became concerned about the effects of overcrowding, disrupted families, and rising crime. They wished to rescue children from these environmental influences and restore them to a healthy, useful life. *Id.* at 2-3. *Contra*, A. PLATT, THE CHILD SAVERS, THE INVENTION OF DELINQUENCY (1969) (arguing that the juvenile justice system was established by the American middle class to cope with the perceived threat of deviant immigrant youth). For more extensive commentary on the history of the juvenile court movement, see A. PLATT, *supra*; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

[18] The rehabilitation of troubled children has been the primary justification for maintaining a separate juvenile justice system. Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984, 996 (1976). The

ries, not legal principles, provided the framework for the juvenile court system,[19] as evidenced by its goals of investigation, diagnosis, and treatment.[20] The juvenile court judge was granted discretion to carry out these goals and to formulate the best plan for each child.[21] Because the proceedings were regarded as civil in nature and nonadversarial, constitutional restrictions were considered inapplicable.[22] The theoretical justification for the denial of procedural rights was the *parens patriae* doctrine:[23] the notion that the state was acting in its parental capacity to protect the wayward child.

Recognizing that the absence of constitutional safeguards often led to arbitrary results rather than enlightened treatment,[24] the Supreme Court, in the late 1960's, began to infuse juvenile court proceedings

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rehabilitative model assumes that juvenile offenders will become adult criminals if they are not treated and that young offenders are particularly amenable to treatment. *Id.* Because reformers were concerned about the corrupting influence of mature criminals, they believed that segregating youthful offenders was necessary to prevent them from absorbing criminal values. Most importantly, they believed that, with the proper care and discipline, these juveniles could become honest and useful citizens. *Id.* at 985.

[19] PRESIDENT'S TASK FORCE REPORT, *supra* note 16, at 2. The author states: "The ascending social sciences, with their optimistic claims to diagnose and treat the problems underlying deviance, seemed to provide the ideal tool for implementing the dual goals of treating wayward children humanely and offsetting their deleterious surroundings." *Id.*

[20] The child's background was considered more important than the facts of the incident that brought her before the court. The underlying incident was viewed as symptomatic of the need for the court to exercise its helping powers rather than as a prerequisite for the exercise of its jurisdiction. *Id.* at 3.

[21] *See generally id.* at 1-40.

[22] "Lawyers were unnecessary — adversary tactics were out of place, for the mutual aim of all was not to contest or object but to determine the treatment plan best for the child." *Id.* at 3.

[23] *In re* Gault, 387 U.S. 1, 17 (1967) (juveniles granted due process rights in delinquency hearings). This Latin phrase was taken from chancery practice, where it was used to describe the power of the state to act in the place of the parent to protect the property interests of the child. There is no trace of this doctrine in the history of criminal jurisprudence. The right of the state, as *parens patriae*, to deny the child procedural rights available to adults was justified by the assertion that children have rights to custody, not liberty. If parents default in performing their custodial functions and their child becomes delinquent, the state may intervene. The state does not deprive the child of any rights; it provides the custody to which the child is entitled. The proceedings, therefore, were not considered subject to constitutional restrictions. *Id.*

[24] *In re* Gault, 387 U.S. 1, 18-19 (1967) (juveniles granted due process rights during delinquency hearings); Kent v. United States, 383 U.S. 541, 555 (1966). The Court stated in *Kent* that the absence of procedural safeguards often meant that the child received "the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitious care and regenerative treatment postulated for children." *Id.* at 566.

with due process requirements. In *Kent v. United States*,[25] juveniles were granted procedural rights during proceedings to waive juvenile court jurisdiction, and in the landmark decision, *In re Gault*,[26] the Court held that delinquency hearings must provide the essentials of due process and fair treatment.[27] Specifically, juveniles are entitled to notice of the charges,[28] the right to counsel,[29] the privilege against self-incrimination,[30] and the rights of confrontation and cross-examination.[31] In reaching its decision, the Court noted that the serious consequences of a delinquency finding — the stigma of a delinquency label and the possibility of lengthy confinement in a juvenile facility — mandated due process safeguards.[32]

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[25] 383 U.S. 541 (1966).

[26] 387 U.S. 1 (1967).

[27] *Id.* at 30.

[28] *Id.* at 33.

[29] *Id.* at 41.

[30] *Id.* at 55.

[31] *Id.* at 57.

[32] The *Gault* Court found the stigma of a delinquency label, and particularly the possibility of incarceration, compelling reasons for extending constitutional safeguards to minors during delinquency hearings. The Court stated, "[i]n view of this [possibility of lengthy confinement], it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase 'due process.' " *Id.* at 27-28. Because these same factors are present in fourth amendment claims, fourth amendment protection should be extended to minors. In his dissent to the denial of certiorari in David Levell W. v. California, 449 U.S. 1043, 1047 (1980) (Marshall, J., dissenting), Justice Marshall stated:

> [O]ur cases have exhibited particular sensitivity to minors' claims to constitutional protection against deprivations by the State. Because loss of liberty is no less a deprivation for a child than an adult, [citation omitted] we have held that a minor's right with respect to many of these claims is virtually coextensive with an adult's. . . . I believe that if the Court examined this issue, we would be hard pressed to find reasons to distinguish these rights, which clearly apply to minors, from the Fourth Amendment right invoked by petitioner.

Id. at 1047 (citations omitted). State courts have held that since delinquency proceedings can result in deprivation of a minor's liberty, due process and fair treatment require fourth amendment protection. *E.g.*, *In re* Scott K., 24 Cal. 3d 395, 402, 595 P.2d 105, 109, 155 Cal. Rptr. 671, 675 (minors are entitled to due process when state takes action to deprive them of liberty; fourth amendment protection ensures factfinding process conforms to due process), *cert. denied*, 444 U.S. 973 (1979); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907, 910-11 (1967) (fourth amendment safeguards apply to juveniles to ensure factfinding process conforms to essentials of fairness; court cannot countenance system when juveniles may be institutionalized without ability to suppress illegally obtained evidence); *In re* Harvey, 222 Pa. Super. 222, 228, 295 A.2d 93, 97 (1972) (exclusionary rule is basic right to privacy, security, and liberty; juveniles must

While the *Gault* Court extended certain constitutional protections to juvenile proceedings, it did not define the totality of the relationship between the minor and the state.[33] Subsequent cases applied the burden of proof beyond a reasonable doubt to delinquency hearings[34] and granted juveniles double jeopardy protection.[35] However, the Court decided in *McKeiver v. Pennsylvania*[36] that juveniles are not entitled to jury trials. In *McKeiver*, the Court stated that the addition of jury trials would not remedy the defects of the juvenile court process, but would bring delay, formality, and the "clamor of the adversary system" into delinquency hearings without strengthening their factfinding function.[37] *McKeiver* suggests that, in deciding whether to apply further procedural rights, the Court will not only consider the importance of the right to be applied, but will also determine whether its incorporation will harm the beneficial aspects of the juvenile court process.

The Court has not yet reached the question of fourth amendment application.[38] Under *Gault*, this right should be extended to minors because it is essential for fair treatment.[39] For example, evidence from a

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have fourth amendment protection to ensure factfinding process measures up to essentials of fair treatment); *In re* L.L., 90 Wis. 2d 585, 592, 280 N.W.2d 343, 347 (1979) (exclusionary rule applied to illegally obtained evidence in delinquency proceeding).

[33] *In re* Gault, 387 U.S. at 13.

[34] *In re* Winship, 397 U.S. 358 (1970).

[35] Breed v. Jones, 421 U.S. 519 (1974).

[36] 403 U.S. 528 (1971).

[37] *Id.* at 545-51.

[38] The Supreme Court has repeatedly denied certiorari to state court cases dealing with minors' fourth amendment rights. *See, e.g.*, David Levell W. v. California, 449 U.S. 1043 (1980) (Marshall, J., Brennan, J., and White, J. dissenting), *denying cert. to In re* David W., 163 Cal. Rptr. 87 (2d Dist. 1980) (mother's consent validates otherwise illegal arrest), *hearing denied* (May 14, 1980), *ordered depublished by the California Supreme Court* (July 18, 1980); Fare v. Scott K., 444 U.S. 973 (1979) *denying cert. to In re* Scott K., 24 Cal. 3d. 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979) (extending fourth amendment protection against warrantless searches to minors); Salyer v. Illinois, 434 U.S. 925 (1977) *denying cert. to In re* Salyer, 44 Ill. App. 3d 854, 358 N.E.2d 1333 (1977) (parental consent to search child's locked bedroom valid).

[39] *See* David Levell W. v. California, 449 U.S. 1043, 1047-48 (1980) (Marshall, J., dissenting to the denial of certiorari); II WORKING PAPERS OF THE NATIONAL TASK FORCE TO DEVELOP STANDARDS AND GOALS FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION 69 (1977); NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION: REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION 387-88 (1976) [hereafter ADVISORY TASK FORCE REPORT]; Note, *Fourth Amendment Protection for the Juvenile Offender: State, Parent, and the Best Interests of the Minor*, 49 FORDHAM L. REV. 1140, 1148-49 (1981) (arguing that a parent's right to control her child should not take precedence over the child's right to privacy

search or seizure may be used in a delinquency adjudication. If a minor lacks fourth amendment protection, she may be found delinquent based on evidence that would be excluded in an adult criminal trial.[40] Such a finding could lead to the same serious results that concerned the Court in *Gault*: the loss of liberty in a detention or correctional facility,[41] and the stigma of a delinquency label.[42]

The extension of fourth amendment rights will not threaten the juvenile court's unique features. The exclusion of illegally seized evidence would not substantially increase the formality of the delinquency proceeding, or turn it into a full-blown adversary hearing.[43] The delinquency adjudication phase of the process would remain the same, except that the judge could not consider information that had previously been suppressed.[44] The court's rehabilitative goals could still be met during the dispositional phase.[45] Further, allowing police officers to arbitrarily search and arrest has no value to the system. Fairness, impartiality, and order may be more therapeutic. A child who feels she has been treated unfairly may leave the courtroom without respect for the law's process and consequently resist the treatment efforts of the court.[46]

Because the Court has left the issue undecided, and in the absence of a federal standard, fourth amendment rights for juveniles vary from state to state. Most state courts grant minors some protection from un-

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because parental consent is not in the best interests of the minor) [hereafter Note, *Interests of the Minor*].

[40] The exclusionary rule prohibits the use of illegally obtained evidence in a criminal trial. Mapp v. Ohio, 367 U.S. 643 (1961) (suppressing evidence from a warrantless search of defendant's home). Without fourth amendment rights, juveniles in a delinquency hearing could not suppress evidence from an unreasonable search.

[41] In 1975, the national average daily population of juvenile detention and correction facilities was 75,534. UNITED STATES DEP'T OF JUSTICE, CHILDREN IN CUSTODY: A REPORT ON THE JUVENILE DETENTION AND CORRECTION FACILITY CENSUS OF 1975 15, 17 (1979).

[42] PRESIDENT'S TASK FORCE REPORT, *supra* note 16, at 92-93. The Court stated in *Gault*: "[It] is disconcerting . . . that [the term delinquent] has come to involve only slightly less stigma than the the term 'criminal' applied to adults." 387 U.S. at 23-24 (1967).

[43] Note, *The Applicability of the Fourth Amendment Exclusionary Rule to Juveniles*, 4 COLUM. HUM. RIGHTS L. REV. 417, 444 (1972) (arguing that *McKeiver* is not a barrier to applying fourth amendment protection to juveniles).

[44] *Id.*

[45] *Id.* at 446-47.

[46] *In re* Gault, 387 U.S. at 51-52; Young, *Searches and Seizures in Juvenile Court Proceedings*, 25 JUV. JUST. 26, 34 (1974); Note, *Interests of the Minor*, *supra* note 38, at 1148.

reasonable searches and seizures.[47] Many state courts have gone further and specifically extended fourth amendment rights to juveniles.[48] Some courts, on the other hand, have simply assumed that the fourth amendment applies and have then determined the reasonableness of the search.[49] In addition, a number of states have enacted statutes incorpo-

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[47] *E.g.*, *In re* J.M.A., 542 P.2d 170, 175-76 (Alaska 1975) (evidence from search by foster parent may be used in delinquency hearing: no state action); *In re* Scott K., 24 Cal. 3d 395, 400-03, 595 P.2d 105, 108-09, 155 Cal. Rptr. 671, 674-75 (parents consent to search violated minor's fourth amendment rights), *cert. denied*, 444 U.S. 973 (1979); *In re* B.M.C., 506 P.2d 409, 411 (Colo. App. 1973) (children have same fourth amendment safeguards as adults); *In re* Marsh, 40 Ill. 2d 53, 56, 237 N.E.2d 529, 531-32 (1968) (police search of minor was valid as incident to lawful arrest); People v. Hughes, 123 Ill. App. 2d 115, 120, 260 N.E.2d 34, 35 (1970) (search made incident to lawful arrest of minor was valid); *In re* Urbasek, 76 Ill. App. 2d 375, 385, 222 N.E.2d 233, 238 (1966) (evidence obtained in violation of fourth amendment is inadmissible in delinquency hearing); *In re* J.R.M., 487 S.W.2d 502, 512 (Mo. 1972) (en banc) (search of minor's car violated his fourth amendment rights); State v. Lowry, 95 N.J. Super. 307, 319, 230 A.2d 907, 913 (1967) (protection against unreasonable searches and seizures is applicable to juveniles); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (C.P. 1971) (fourth amendment applies to juveniles); *In re* Harvey, 222 Pa. Super. 222, 228, 295 A.2d 93, 96-97 (1972) (fourth amendment applies to juveniles); Ciulla v. State, 434 S.W.2d 948, 950 (Tex. Civ. App. 1968) (minors have same fourth amendment rights as adults); *In re* L.L., 90 Wis. 2d 585, 280 N.W.2d 343, 346-47 (1979) (minors cannot be deprived of liberty on basis of illegally obtained evidence); *see also* S. DAVIS, RIGHTS OF JUVENILES (2d ed. 1980); Young, *supra* note 46, at 30; ADVISORY TASK FORCE REPORT, *supra* note 39 at 387; Note, *Preadjudicatory Confessions and Consent Searches: Placing the Juvenile on the Same Constitutional Footing as an Adult*, 57 B.U.L. REV. 778, 781 (1977) (proposing that juveniles be granted preadjudicatory constitutional safeguards analogous to the adjudicatory protections which the Supreme Court has recently extended) [hereafter Note, *Consent Searches*]; Note, *Interests of the Minor*, *supra* note 39, at 1146-47; Note, *supra* note 43, at 441-43; Note, *Beyond* Kent *and* Gault: *Consensual Searches and Juveniles*, 6 PEPPERDINE LAW REV. 801, 802 n.9 (1979) (arguing that juveniles have a reasonable expectation of privacy in their parents' homes and that only the juvenile should be able to waive her fourth amendment rights).

[48] *E.g.*, *In re* Scott K., 24 Cal. 3d 395, 403, 595 P.2d 105, 109, 155 Cal. Rptr 671, 675 (minors have fourth amendment protection) *cert. denied*, 444 U.S. 973 (1979); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907, 909-13 (1967) (juveniles are protected against unreasonable searches and seizures); *In re* Williams, 49 Misc. 2d 154, 169, 267 N.Y.S.2d 91, 109-10 (Ulster Cty. Fam. Ct. 1966) (due process and fair treatment require fourth amendment protection for children); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (Columbiana City C.P. Juv. Div. 1971) (fourth amendment applies to juveniles); *In re* Harvey, 222 Pa. Super. 222, 228, 295 A.2d 93, 96-97 (1972) (juveniles have fourth amendment rights); Ciulla v. State, 434 S.W.2d 948, 950 (Tex. Civ. App. 1968) (minors have same fourth amendment rights as adults).

[49] *E.g.*, *In re* Marsh, 40 Ill. 2d 53, 56, 237 N.E.2d 529, 531-32 (1968) (search of minor was incident to lawful arrest); *In re* Ronny, 40 Misc. 2d 194, 205, 242 N.Y.S.2d

rating the exclusionary rule into their juvenile codes.[50]

II. Parental Waiver of a Minor's Protection Against Warrantless Searches

All too often a minor suspected of criminal activity finds herself in a precarious situation. The police may want to search her room or her belongings without obtaining a warrant. If the minor refuses to consent to the search, the police may nonetheless obtain parental consent and conduct the search.[51] Although the police have neither a warrant nor the consent of the minor whose privacy is violated, most courts have held that parental consent validates the search.

Courts use three different analyses to justify this consent. First, some courts find parental consent valid based on parental authority, positing that parental right to control is superior to the child's fourth amendment rights.[52] Other courts allow parental waiver based on the third party consent doctrine, but assume the requisite use and access from the parent's position as head of the household.[53] Finally, courts may inquire into the facts justifying the third party consent. These courts hold that parents may not consent to a warrantless search of property under

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844, 856 (Queens Cty. Fam. Ct. 1963) (denial of motion by minor to suppress evidence).

[50] *E.g.*, Cal. Welf. & Inst. Code § 701 (West Supp. 1983) (evidence introduced in juvenile proceeding must be legally admissible in criminal trials); Ga. Code Ann. § 24A-2002(b) (1981) (illegally seized evidence inadmissible); Ill. Ann. Stat. ch. 37 § 704-6(1) (Smith-Hurd 1983) (criminal rules of evidence apply in juvenile proceedings); Ky. Rev. Stat. Ann. § 208.196(1) (Michie 1982), *repealed* effective July 15, 1984, *superceded by* § 208A.110(2)(b) (Michie 1982) (rules of criminal procedure apply); Miss. Code Ann. §§ 43-21-203(4), 43-21-559(1) (Supp. 1972) (rules of evidence must comply with applicable constitutional standards); N.M. Stat. Ann. § 13-14-25(C)(2) (1953) (illegally seized evidence inadmissible); N.D. Cent. Code § 27-20-27(2) (1974) (illegally seized evidence inadmissible); 42 Pa. Cons. Stat. Ann. § 6338(b) (Purdon 1982); Tenn. Code Ann. § 37-227(b) (1977) (illegally seized evidence shall not be received over objection); Tex. Fam. Code Ann. § 54.03(e) (Vernon 1975) (illegally seized evidence is inadmissible); Vt. Stat. Ann. tit. 33, § 652 (1981) (illegally seized evidence shall not be received over objection); *see also* Unif. Juvenile Court Act § 27(b), 9A U.L.A. 36 (1979) (illegally seized evidence shall not be received over objection).

[51] Most minors live with their parents or guardians. In 1980, 76.6% of the people under 18 in the United States were living with both parents, 18.0% with their mothers only, 1.7% with their fathers only, and 3.7% with neither parent. United States Bureau of the Census, Statistical Abstract of the United States 1981 49 Table 73 (102d ed. 1981).

[52] *See infra* text accompanying notes 55-91.

[53] *See infra* text accompanying notes 97-101.

the minor's exclusive control.[54] This Comment will examine each of these approaches and argue that none of them provides adequate constitutional protection for minors.

A. Parental Authority Outweighs a Minor's Fourth Amendment Rights

Some jurisdictions justify parental consent to a search of the child's property based on the parents' right to control their family.[55] Under this approach, parental authority outweighs any fourth amendment protection the child may have. For example, in *In re Salyer*,[56] the Illinois Appellate Court held that a mother could consent to a search of her son's bedroom,[57] even though the minor kept his bedroom door padlocked and rarely allowed his mother to enter.[58] The court found the right to exert control over a child's surroundings implicit in the rights and duties imposed upon a parent.[59] Since parental obligations continue until a child reaches majority, the court gave parents blanket authority to waive a minor child's protection against warrantless searches.[60]

This approach is consistent with the United States Supreme Court's traditional recognition of parental authority over the care, custody, and education of their children. In the past, the Court considered only the the state's and parents' interests in decisions about government intervention in family life.[61] Because the Court assumed the parents were acting in the child's best interests, the minor's rights and wishes were

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[54] *See infra* text accompanying notes 102-115.

[55] *E.g.*, Jenkins v. State, 146 Ga. App. 458, 460, 246 S.E.2d 466, 468 (1978) (mother's consent to search of resident minor's clothing valid); State v. Williamson, 78 N.M. 751, 754, 438 P.2d 161, 164 (1968) (mother's consent to search and seizure of resident minor's belongings found valid). *But see* People v. Flowers, 23 Mich. App. 523, 526-27, 179 N.W.2d 56, 58 (1970) (parent cannot waive child's fourth amendment rights).

[56] 44 Ill. App. 3d 854, 358 N.E.2d 1333 (1977).

[57] *Id.* at 858-59, 358 N.E.2d at 1337.

[58] *Id.* at 856, 358 N.E.2d at 1333.

[59] *Id.* at 859, 358 N.E.2d at 1336.

[60] *Id.* at 859, 358 N.E.2d at 1337.

[61] *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (compulsory high school education invalid as applied to Amish children); Prince v. Massachusetts, 321 U.S. 158, 165-71 (1944) (parental rights to direct religion of child, while strong, did not outweigh child labor laws); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (compulsory *public* school education unreasonably interfered with parental right to direct child's education); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (parents' right to direct education invalidated statute forbidding teaching of German).

subsumed within those of the parents.[62]

The Supreme Court has curtailed family autonomy, however, when parental decisions have the potential for significant social burdens.[63] Allowing parental waiver of a child's fourth amendment rights can produce serious social consequences. As discussed above, parental consent to a search of the child's property could result in court proceedings and a delinquency label for the child.[64] The stigma of this label may lead to heightened police surveillance, neighborhood isolation, lowered tolerance by school officials, and rejection by prospective employers.[65] The child would suffer from the same adverse community response that an adult criminal label engenders,[66] but without adult constitutional protection.

Moreover, if the child is placed in a juvenile facility, she will have been deprived of her liberty at a lower standard than would be applied to an adult. The Court has stated that a child has the same interest in protecting her liberty as an adult.[67] If the search was unreasonable, the child may feel she has been unfairly treated and resist the rehabilitative efforts of the court.[68] She may continue to engage in delinquent activ-

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[62] *See* cases cited *supra* note 61; *see also* Foe v. Vanderhoof, 389 F. Supp. 947, 956 D. Colo. 1975) (no blanket parental veto for minor's abortion).

[63] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (state could not force Amish parents to send children to high school). For examples of significant social burdens, see, *e.g.*, Bellotti v. Baird, 443 U.S. 622, 642 (1979) (burden of unwanted pregnancy for minor); Parham v. J.R., 442 U.S. 584, 600 (1979) (adverse social consequences of unnecessary commitment of child to mental hospital); Goss v. Lopez, 419 U.S. 565, 574-75 (1975) (loss of reputation resulting from school suspension); *In re* Gault, 387 U.S. 1, 23-24 (1967) (stigma of delinquency adjudication).

[64] Of 1,383,380 juvenile arrests in the United States in 1981, 58% were referred to juvenile court jurisdiction. UNITED STATES DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 233 Table 66 (1982).

[65] PRESIDENT'S TASK FORCE REPORT, *supra* note 16.

[66] *See supra* note 42.

[67] Parham v. J.R., 442 U.S. 584, 600 (1979) (both children and adults have substantial liberty interests in not being confined to a mental institution); *In re* Winship, 397 U.S. 358, 365 (1970) (judicial intervention cannot subject child to the possibility of institutional confinement on proof insufficient to convict an adult); *In re* Gault, 387 U.S. 1, 24 (1967) (because delinquency proceedings may lead to deprivation of liberty, procedural regularity is required by constitution).

[68] *See supra* text accompanying note 46. One commentator has suggested that:

> There is little to be lost, and much to be gained, by convincing a child that he has been treated fairly. It is difficult, if not impossible, to convince a child that he has been treated fairly when his privacy has been invaded to a greater extent than an adult's could have been.

Young, *Searches and Seizures in Juvenile Court Proceedings*, 25 JUV. JUST. 26, 34 (1974).

ity,[69] and eventually enter the criminal justice system.[70] Because waiver of a child's fourth amendment protection carries such serious consequences, parents must not be permitted to make this important decision for the child.

Recent decisions in other areas have undermined the parental authority approach, and have ramifications in fourth amendment jurisprudence. In a series of cases regarding the right of privacy for minors,[71] the Court has recognized that a minor's interests regarding contraceptives and abortion may diverge from her parents'. The Court's new analysis attempts to balance the conflicting interests of parent,[72]

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[69] A California study found a 38% recidivism rate among juveniles. CALIFORNIA DEP'T OF JUSTICE, JUVENILE CAMP RECIDIVISM 1, 9 (1978). In 1982, 1,181 wards out of a total population of 13,295 were returned to Youth Authority as parole violators. CALIFORNIA DEP'T OF THE YOUTH AUTHORITY, POPULATION MOVEMENT SUMMARY (1982).

[70] Two studies have indicated that juvenile delinquency which is serious enough to bring arrests or court hearings may lead to adult criminal activity. R. CAVAN & T. FERDINAND, JUVENILE DELINQUENCY 429 (4th ed. 1981).

[71] In the last eight years, the Supreme Court has decided six cases involving minors' rights to privacy. City of Akron v. Akron Center for Reprod. Health, 103 S. Ct. 2481 (1983) (states may not impose blanket third party consent requirements for minors' abortions); Planned Parenthood Assoc., Kansas City, Mo., v. Ashcroft, 103 S. Ct. 2517 (1983) (consent requirement constitutional because judicial alternative provided); H.L. v. Matheson, 450 U.S. 398 (1981) (state may require notice of abortion to parents); Bellotti v. Baird, 443 U.S. 622 (1979) (invalidating parental consent requirement for abortion); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (forbidding state prohibition on sale of contraceptives to minors); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976) (prohibiting blanket third party veto for minors' abortions).

Despite the recent tide of anti-abortion sentiment, and speculation that Justice O'Connor's vote might change the outcome of abortion controversies, *see* 51 U.S.L.W. 3433 (1982), the *Akron* and *Kansas City* cases reaffirmed *Bellotti*'s protection for minors' rights to abortion. *Bellotti* held that a state could require parental consent for a minor's abortion if, and only if, the state provides an alternative 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. *Bellotti*, 443 U.S. at 643-44.

Akron struck down a parental consent requirement because the judicial alternative provided in the statute made no provision for case by case evaluations of the maturity and/or emancipation of pregnant minors. *Akron*, 103 S. Ct. at 2498-99. *Kansas City* upheld a consent requirement, but did so because the judicial alternative provided conformed with the *Bellotti* rule: the court would consent to the abortion if it found either that the minor was mature enough to consent for herself, or that the abortion was in her best interests. *Kansas City*, 103 S. Ct. at 2525-26.

[72] *See infra* note 80.

child,[73] and state[74] in the child's decision.[75] The fundamental nature of the minor's right to control her reproductive system limits parental involvement. States may notify parents when their immature minor child has an abortion,[76] but they may not give parents, or any third party, blanket veto power over the child's decision to abort.[77] The Court has held that parental authority, although valid, does not outweigh a child's right to privacy.

The right to privacy analysis should apply to the analogous conflict

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[73] *See infra* note 81.

[74] *See infra* note 79.

[75] *See* Bellotti v. Baird, 443 U.S. 622, 633-39 (1979) (discussing roles of parents and state in guiding minors' abortion decisions); Carey v. Population Services Int'l, 431 U.S. 678, 692-94 (1977) (holding minor's right to privacy outweighs parental right to control child and state right to deter sexual activity by prohibiting sale of contraceptives to minor); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 72-75 (1976) (balancing minors' privacy rights against state and parental interests in terminating minors' pregnancies).

[76] H.L. v. Matheson, 450 U.S. 398, 407-10 (1981) (approving parental notification requirement for abortion as applied to immature, unemancipated minor); *cf.* Leigh v. Olson, 497 F. Supp. 1340, 1348-50 (D.N.D. 1980) (requiring parental notification for abortion regardless of maturity held invalid). The Sixth Circuit has refused to grant parents a constitutional right to notification of their child's use of contraceptives. Doe v. Irwin, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980).

[77] Courts have held statutory third party veto power over minors' abortions invalid unless the statute provides: (1) an opportunity for the minor to prove that she is mature and able to consent herself; or (2) an opportunity for the minor to prove that although she is immature, the abortion is in her best interests. City of Akron v. Akron Center for Reprod. Health, 103 S. Ct. 2481, 2497-99 (1983); Planned Parenthood Ass'n, Kansas City, Mo., v. Ashcroft, 103 S. Ct. 2517, 2525-26 (1983); Bellotti v. Baird, 443 U.S. 622, 642-44 (1979); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74 (1976); Wynn v. Carey, 582 F.2d 1375, 1385-90 (7th Cir. 1978); Wolfe v. Schroering, 541 F.2d 523, 525 (6th Cir. 1976); Margaret S. v. Edwards, 488 F. Supp. 181, 202-03 (E.D. La. 1980); Scheinberg v. Smith, 482 F. Supp. 529, 533-35 (S.D. Fla. 1979), *aff'd in part, vacated in part*, 659 F.2d 476 (5th Cir. 1981); Gary-Northwest Ind. Women's Services v. Bowen, 421 F. Supp. 734, 736 (N.D. Ind. 1977), *aff'd mem.*, 451 U.S. 934 (1981); Lady Jane v. Maher, 420 F. Supp. 318, 320-21 (D. Conn. 1976), *aff'd mem. sub nom.* Maloney v. Lady Jane, 431 U.S. 926 (1977); Doe v. Zimmerman, 405 F. Supp. 534, 538 (M.D. Pa. 1975); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 566-67 (E.D. Pa. 1975), *aff'd mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976); Foe v. Vanderhoof, 389 F. Supp. 947, 951-56 (D. Colo. 1975); Ballard v. Anderson, 4 Cal. 3d 873, 880-83, 484 P.2d 1345, 1350-52, 95 Cal. Rptr. 1, 6-8 (1971); State v. Koome, 84 Wash. 2d 901, 905-09, 530 P.2d 260, 264-66 (1975). Courts have also invalidated statutes prohibiting the sale of contraceptives to minors. Carey v. Population Services Int'l, 431 U.S. 678, 691-99 (1977); Doe v. Pickett, 480 F. Supp. 1218, 1221-23 (S.D. W. Va. 1979).

between state, parent, and child in the fourth amendment context.[78] The state in each case has an interest in the health and safety of the minor.[79] The parents have an interest in the custody and care of their child, and in preserving family harmony and autonomy.[80] The minor is asserting the right to privacy. In the contraceptive and abortion cases, she has a privacy interest in controlling her reproductive system; in the fourth amendment context, she seeks to preserve her privacy from state intrusion. Her interests may conflict with both the state's and parents' concerns.[81] The Court has implied the right to privacy regarding a wo-

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[78] The Court's right to privacy cases are analogous to minors' criminal procedure rights cases. *See* Bellotti v. Baird, 443 U.S. 622, 633 (1979) (citing *In re* Gault, 387 U.S. 1, 13 (1967)); Carey v. Population Services Int'l, 431 U.S. 678, 692 (1977) (quoting *In re* Gault, 387 U.S. 1, 13 (1967)). If the rationale for granting minors criminal procedure protections also justifies granting minors rights to privacy, then logically reasons advanced to support minors' rights to privacy also support granting minors criminal procedure protections.

[79] In the privacy context, the state has an interest in the health of the minor and how the contraceptives or abortion will affect her. H.L. v. Matheson, 450 U.S. 398, 411 (1981); Bellotti v. Baird, 443 U.S. 622, 635-36 (1979); Carey v. Population Services Int'l, 431 U.S. 678, 686-96 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 72-73 (1976); Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980). In the juvenile justice context, the state has an interest in preventing further crime and in rehabilitating the juvenile. *See generally* Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984 (1976).

[80] In the privacy context, the parents' interest is in the health of their child, in bringing her up in conformity with their moral values, and in their right to at least be informed as to her actions. Bellotti v. Baird, 443 U.S. 622, 637-41, 648 (1979) (recognizing these interests, but prohibiting parental consent requirement for abortion); Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir.) (parents have no constitutional right to notice of their child's use of contraceptives), *cert. denied*, 449 U.S. 829 (1980); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978) (prohibiting requirement of parental consent for minor's abortion).

Parents also have an interest in family autonomy. Family autonomy is the long recognized right of parents to authority in their household and control over their children, independent of the state. *Bellotti*, 443 U.S. at 637-39; Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 73 (1976); *see also supra* note 61. The right includes the "inculcation of moral standards, religious beliefs, and elements of good citizenship." *Bellotti*, 443 U.S. at 638 (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)). For a general discussion of family autonomy, see Levy, *The Rights of Parents*, 1976 B.Y.U. L. REV. 693. In the fourth amendment context the parents have a similar interest in the morals of their child. They have the right to maintain their home free of unlawful activity. They may have other children whom they wish to protect, and if the child's crime is a tort, they may face liability as parents. *See infra* text accompanying notes 117-23.

[81] In the privacy context, parent and child interests conflict when the child seeks to obtain contraceptives or an abortion, which the parent would deny her. Child and state

man's reproductive system from the "penumbra" of the Bill of Rights.[82] If parental authority does not outweigh a court implied right, it must not outweigh express fourth amendment rights.

In the privacy cases, hostility between parent and child weakens the recognized parental interest.[83] An antagonistic parent-child relationship lessens the presumption that the parent will act in the child's best interests.[84] The parent's right to participate in the child's decision regarding contraceptives correspondingly decreases. The same reweighting of interests should apply in the fourth amendment context. Parental discov-

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interests conflict when the state limits the child's access to contraceptives. For example, the state may statutorily attempt to forbid the sale of contraceptives to minors. *E.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (invalidating statute forbidding sale of contraceptives to persons under 16 years, and sales of contraceptives to anyone without a prescription). The state may attempt to require some parental involvement which has the practical effect of a prohibition. *E.g.*, Bellotti v. Baird, 443 U.S. 622, 643-47 (1979) (invalidating statute requiring either parental consent or court order after parental refusal to consent for minor's abortion). In the search and seizure context, the minor's interests conflict with both the parent's right to control the child and their household in general, and with the state's interest in law enforcement.

[82] Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (right to privacy guarantees married couples access to contraceptives).

[83] H.L. v. Matheson, 450 U.S. 398, 407 n.14 (1981) (noting that statute requiring parental notice for abortion, although valid as applied to immature minors, might not be valid as applied to minors with a hostile family relationship); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 75 (1976) (dismissing enhancement of family unit or parental authority as interests served by requiring parental consent for abortion); Leigh v. Olson, 497 F. Supp. 1340, 1349-50 (D.N.D. 1980) (when parent and child have close, understanding relationship, parental notice is valuable, but statute requiring notice held invalid because many hostile relationships exist in which parental notice will be harmful).

[84] Poe v. Gerstein, 517 F.2d 787, 793-94 (5th Cir. 1975) (holding parental consent requirement for minors' abortions unconstitutional), *aff'd mem. sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976). In *Poe*, the court discussed parental authority and family autonomy as interests supporting the parental consent requirement. The court concluded that neither interest was a valid justification for allowing parental veto. The Fifth Circuit noted that "there is no reason to expect the parents to always act in the child's best interests." *Id.* at 793. The court also found that a state imposed child-parent consultation would be ineffective. When the family relationships are close, the child will likely confide voluntarily in the parent. When the family unit is already fractured, "imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit." *Id.* at 794; *see also* Leigh v. Olson, 497 F. Supp. 1340, 1349-50 (D.N.D. 1980) (statute requiring parental notice for abortion invalid because many hostile parent-child relationships exist in which parental notice will be harmful); State v. Koome, 84 Wash. 2d 901, 907-08, 530 P.2d 260, 265-66 (1975) (hostility between parent and child negates any presumption that the parent will act in child's best interest in a decision regarding abortion).

ery of the child's criminal activity will cause hostility between parent and child.[85] Parental waiver is inappropriate in an emotionally charged atmosphere full of anger and recrimination.[86]

Allowing parental consent to police searches conflicts analytically with the Court's privacy cases, and is also inconsistent with the interests advanced to support the consent. Parental right to consent may actually detract from parental authority. While the exercise of parental consent *might* increase the child's respect for the parent, and strengthen parental authority,[87] it is more likely that the knowledge that her parent is allied with the police will engender a sense of betrayal in the child.[88] Ultimately, the bitterness created may sever the parent-child bond.[89] The parental decision to consent also disrupts family autonomy, the right to freedom from state intrusion into family life.[90] When the parent consents to a police search, she relinquishes that autonomy and invites the state to intrude into the family.[91] To the child, the consent

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[85] The parents' natural first reaction upon discovery of their child's criminal activity may be anger and a desire to punish the child. Allowing parents to consent to a search may lead the parents, in the heat of that anger, to punish the child by consenting to the search by police.

[86] *Cf.* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 843 (3d Cir. 1970) (wife's third party consent granted in antagonism to her husband might be invalid) (dicta).

[87] *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their "Rights,"* 1976 B.Y.U. L. REV. 605, 651-52 (arguing that granting independant constitutional rights to minors actually deprives them of their 'right' to parental control and guidance).

[88] Note, *Interests of the Minor, supra* note 39, at 1158. Regardless of the historical philosophy that juvenile court proceedings are not adversarial, a minor who gets involved with the police will perceive the situation as adversarial. If her parents help the police, rather than protecting her, she will not see it as action taken in her best interests. She will think that her parents have sided with the enemy. Her emotions toward her parents will be correspondingly angry or bitter.

[89] *See* Parham v. J.R., 442 U.S. 584, 610 (1979). In *Parham*, the Court considered the standard of due process required when a parent commits a child to a state mental institution. The Court found that requiring adversarial hearings between parent and child would impair their relationship permanently. *Id. Cf.* Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 75 (1976) (parental power to forbid child's abortion will not strengthen parental authority).

[90] For a good discussion of the concept of family autonomy, see Levy, *The Rights of Parents*, 1976 B.Y.U. L. REV. 693.

[91] Parental consent is asserted in these cases because the police have no warrant. Without consent, there could be no entry. The parent makes the decision whether to consent and break the autonomy of the family. *See, e.g.*, State v. Clemons, 27 Ariz. App. 193, 194, 552 P.2d 1208, 1209 (1976); Jenkins v. State, 146 Ga. App. 458, 459, 246 S.E.2d 466, 468 (1978); *In re* Salyer, 434 Ill. App. 3d 854, 859, 358 N.E.2d 1333,

may signal parental abdication; the parent is no longer in control. This is an incongruous result, since the parent consents in the name of family autonomy.

B. Third Party Consent Allows Parental Waiver

The Supreme Court has based third party consent[92] to a search on an individual's assumption of the risk that another person will consent to a search of her property. The Court will imply an assumption of the risk when two or more people have joint use, access, or control over property.[93] Third party consent binds an absent, nonconsenting person.[94] If

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1337, *cert. denied*, 434 U.S. 925 (1977); State v. Wagster, 361 So. 2d 849, 855 (La. 1978); Tate v. State, 32 Md. App. 613, 618-19, 363 A.2d 622, 626 (1976); Bell v. State, 360 So. 2d 697, 700 (Miss. 1978); People v. Deborah J.A.A., 63 A.D.2d 808, 808, 405 N.Y.S.2d 333, 333-34 (1978); People v. Mortimer, 46 A.D.2d 275, 277-78, 361 N.Y.S.2d 955, 958 (1974).

For example, *In re* Scott K., 24 Cal. 3d 395, 398-99, 595 P.2d 105, 106, 155 Cal. Rptr. 671, 672 (1979), the parents may actually have initiated the government action by calling the police themselves. Scott K.'s mother found marijuana in her son's desk. She gave it to a police officer, telling him she thought her son was selling drugs. Later, the police came to seach Scott's belongings. If Scott had been 18, his mother's consent to a search of property under his exclusive control would have been invalid, despite the fact that the property was located in his mother's house. *See, e.g.*, United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (mother could not consent to search of son's locked footlocker); Reeves v. Warden, 346 F.2d 915, 924 (4th Cir. 1965) (mother could not consent to search of son's bureau when it was set aside for his exclusive use).

[92] To avoid confusion, third party consent based on common use, access and control will hereafter be referred to as third party consent. Third party consent based on parental authority will be referred to as parental consent.

[93] Third party consent is only valid in circumstances in which the third party enjoys mutual control, access or use of the area such that "it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his own right, and that the others have assumed the risk that one of their number might permit the common area to be searched." United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (living together); *e.g.*, Frazier v. Cupp, 394 U.S. 731, 740 (1969) (sharing knapsack); United States v. Harrison, 679 F.2d 942, 946-47 (D.C. Cir. 1982) (wife's consent to search of shared storage area); United States v. Buettner-Janusch, 646 F.2d 759, 764-67 (2d Cir.) (lab assistant had access to professor's chemicals), *cert. denied*, 454 U.S. 830 (1981); United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974) (friend with car keys had access to defendant's car); Maxwell v. Stephens, 348 F.2d 325, 334-37 (8th Cir.) (mother had access to 18 year old son's room in her house), *cert. denied*, 382 U.S. 944 (1965); Roberts v. United States, 332 F.2d 892, 895-97 (8th Cir. 1964) (wife and defendant husband jointly owned and occupied premises), *cert. denied*, 380 U.S. 980 (1965); Woodard v. United States, 254 F.2d 312, 313 (D.C. Cir. 1958) (homeowner had access to guest's rooms), *cert. denied*, 357 U.S. 930 (1958); United States v. Ocampo, 492 F. Supp. 1211, 1236-37 (E.D.N.Y. 1980) (wife had access to husband's bureau), *aff'd*, 650 F.2d 421 (2d Cir. 1981); United States v. Myers, 232 F. Supp. 65,

two parties with common authority[95] are present and disagree, neither may consent.[96]

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66 (E.D. Pa. 1964) (mother's consent to search of dining room); Rees v. Peyton, 225 F. Supp. 507, 513-14 (E.D. Va. 1964) (homeowners had access to attic storage area); People v. Daniels, 16 Cal. App. 3d 36, 42-45, 93 Cal. Rptr. 628, 631-32 (4th Dist. 1971) (mother had access to adult son's room in her house); Rivers v. State, 226 So. 2d 337, 338 (Fla. 1969) (shared bedroom); Morris v. Commonwealth, 306 Ky. 349, 354, 208 S.W.2d 58, 60 (1948) (father had access to own kitchen); Jones v. State, 13 Md. App. 309, 283 A.2d 184, 187-88 (1971) (mother had access to adult son's room in her home); People v. Chism, 390 Mich. 104, 128-40, 211 N.W.2d 193, 204-10 (1973) (wife of defendant had joint use and control of their house); State v. Schotl, 289 Minn. 175, 178-79, 182 N.W.2d 878, 880 (1971) (mother had access to adult son's room); State v. Williamson, 78 N.M. 751, 754, 438 P.2d 161, 164 (mother had access to adult son's bedroom), *cert. denied*, 393 U.S. 891 (1968); Commonwealth v. Hardy, 423 Pa. 208, 215-16, 223 A.2d 719, 723 (1966) (father had access to his own living room); McGee v. State, 2 Tenn. Crim. App. 100, 451 S.W.2d 709, 712 (1969) (friends of defendant had access to room he occupied in their home); Sorensen v. State, 478 S.W.2d 532, 533 (Tex. Crim. App. 1972) (mother had access to adult son's room); State v. Vidor, 75 Wash. 2d 607, 608, 452 P.2d 961, 961 (1969) (mother had access to son's bedroom).

Joint use, access or control, also termed common authority, will not be implied from the mere property interest a third party has in the premises. Stoner v. California, 376 U.S. 483 (1964) (hotel clerk's consent to search of customer's room invalid); Chapman v. United States, 365 U.S. 610 (1961) (landlord's consent to search of a rented house invalid). Nor will such authority be implied from a status relationship such as marriage, *Matlock*, 415 U.S. at 170, or master servant. United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (boss could not consent to police search of desk set aside for the exclusive use of employee despite authority to look in desk himself for job-related purposes). Even when the third party may validly consent to a search of the premises, that authority does not extend to a container on the premises to which the third party has no access. United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) (third party consent to search of defendant's suitcases left in her apartment invalid), *cert. denied*, 429 U.S. 982 (1976).

[94] United States v. Matlock, 415 U.S. 164, 170 (1974) (woman living with defendant validly consented to search of their room while defendant was absent; his subsequent protest did not affect the validity of the consent).

[95] "Common authority" denotes the joint use, access and control required for an implied assumption of the risk of third party consent. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

[96] *See* United States v. Matlock, 415 U.S. 164, 170 (1974) (woman could consent to search of bedroom shared with *absent* boyfriend); Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965) (brother's consent to search of sister's apartment held invalid since sister was there protesting); Tompkins v. Superior Court, 59 Cal. 2d 65, 68-69, 378 P.2d 113, 116, 27 Cal. Rptr. 889, 892 (1963) (consent of absent occupant of apartment did not authorize search when present co-occupant refused consent); People v. Mortimer, 46 A.D.2d 275, 276, 361 N.Y.S.2d 955, 958 (1974) (prior refusal by arrested co-occupant negates consent by co-occupant on premises).

1. Parents assumed to have common authority.

Some courts presume that the parent-child relationship provides sufficient common authority for third party consent.[97] While this theory purports to use the third party consent doctrine, it is functionally equivalent to the parental authority model. For example, in *State v. Wagster*,[98] when police searched a boy's van pursuant to his father's consent, the court held that because the parents had joint access to the van, the son assumed the risk that his parents might permit a search.[99] A factual analysis, however, might lead to a different conclusion. The boy bought the van with his own money, and his parents did not enter it without his permission.[100] Under these circumstances, the parents did not appear to have joint use of and access to the van within the meaning of the third party consent doctrine.

The court in *Wagster* purportedly based its analysis on the third party consent doctrine, but concluded that the parent's position as head of the household foreclosed any scrutiny of the facts.[101] Therefore, a third party consent inquiry can achieve the same unsatisfactory results as the parental authority analysis discussed above: parents — as parents — will always be able to waive their child's fourth amendment rights.

2. Factual examination of third party consent requirements

Occasionally courts apply the true third party consent doctrine and examine the facts to determine whether the child has exclusive control over the property to be searched.[102] For example, in *In re Scott K.*,[103]

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[97] *E.g.*, Tolbert v. State, 224 Ga. 291, 293-94, 161 S.E.2d 279, 280 (1968) (position as head of the household sufficient to validate consent to search son's car parked on the premises); People v. Thomas, 120 Ill. App. 2d 219, 222, 256 N.E.2d 870, 872 (1969) (mother's possessory interest in home sufficient to validate consent to seizure of son's weapons); Morris v. Commonwealth, 306 Ky. 349, 354, 208 S.W.2d 58, 60 (1948) (head of household can consent to search); Tate v. State, 32 Md. App. 613, 363 A.2d 622, 626 (1976) (minor's mother had common authority over premises and could consent to search of son's bedroom); People v. Deborah J.A.A., 63 A.D.2d 808, 808, 405 N.Y.S.2d 333, 334 (1978) (step-parent had sufficient authority to consent to search of minor's bedroom).

[98] 361 So. 2d 849 (La. 1978).

[99] *Id.* at 855.

[100] *Id.*

[101] "Unquestionably, except in unusual circumstances, the parent possesses at least common authority, if not principal authority, over the residence occupied by the parent and his nineteen year old son." *Id.*

[102] *E.g.*, Bell v. State, 360 So. 2d 697, 700 (Miss. 1978) (mother's access to son's

the California Supreme Court held that a father could not consent to a police search of a toolbox over which his son had exclusive control.[104] While this analysis appears to grant minors the same fourth amendment protections as adults, it has very limited application. Only under exceptional circumstances will minors be able to maintain sufficient control over their property to prevent a parental waiver.[105] Moreover, under this approach, the minor's fourth amendment rights will vary from family to family. The child whose parents grant him a great deal of privacy will be treated more favorably by the court than a child with intrusive parents.[106]

Aside from the narrow scope of the *Scott K.* court's protection of minors' rights,[107] this approach leaves unanswered two important

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room validated her consent to police search); State v. Peterson, 525 S.W.2d 599, 608 (Mo. Ct. App. 1975) (son had exclusive control of his bedroom, so father could not consent to search); People v. Mortimer, 46 A.D.2d 275, 277-78, 361 N.Y.S.2d 955, 958 (1974) (father's consent to search of gymbag under exclusive control of son was invalid).

[103] 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671, *cert. denied*, 444 U.S. 973 (1979).

[104] *Id.* at 403 n.7, 595 P.2d at 109 n.7, 155 Cal. Rptr. at 675 n.7.

[105] In cases involving adult or emancipated children living at home, rent payment is one factor the court considers when determining parental use and access for third party consent. *See, e.g.*, People v. Nunn, 55 Ill. 2d 344, 346, 304 N.E.2d 81, 85 (1973) (mother's consent to search of adult child's bedroom invalid); Jones v. State, 13 Md. App. 309, 283 A.2d 184, 188 (1971) (mother could consent to search of child's bedroom; he paid neither room nor board). Dependant minors rarely pay rent to their parents. Further, minors seldom have exclusive control over property located in their parents' home. Adult children are more likely to be able to prevent parental access to their personal property. *See, e.g.*, United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (mother could not consent to search of son's locked footlocker); Reeves v. Warden, 346 F.2d 915, 924 (4th Cir. 1965) (mother could not consent to search of son's bureau when it was set aside for his exclusive use).

[106] While the same lack of uniformity is true in adult third party consent cases, adults may choose their living companions. If adults find that their companions intrude too much on their privacy, they can live alone. Children do not have similar freedom to define their standards of privacy.

[107] For other comments on the *Scott K.* decision, see Comment, *An Analytical Model to Assure Consideration of Parental and Familial Interests when Defining the Constitutional Rights of Minors - An Examination of In Re* Scott K., 1980 B.Y.U. L. REV. 598 (analyzing *Scott K.* as 'judicial legislation' and concluding that it would not pass the strict scrutiny test which the author postulates the infringement on parental rights demands); Note, *In re* Scott K.: *The Juvenile's Right to Privacy in the Home*, 68 CALIF. L. REV. 783 (1980) (proposing that the California Supreme Court clarify *Scott K.* by allowing minors to assert fourth amendment rights despite parental opposition if the minor is able to comprehend the right, and suggesting a rebuttable presumption of such comprehension if the minor is 14 or over); Comment, *In re* David W.: *A Departure*

problems. First, the *Scott K.* rule will be difficult for the police to follow. *Scott K.* holds that a parent may not consent to a search of property over which the child has exclusive control.[108] When the police request consent, they will not know whether the parent has the use and access required to justify the consent. The police will want to assume that parents have such access, since it is in the interests of law enforcement. However, the child may later suppress the evidence by proving that the parent lacked access to the property searched.[109] The police will have violated the child's rights and wasted time and money by relying on the apparently valid parental consent.[110] Fourth amendment law must be clear in its prohibitions on government action, or it will be ineffective.[111]

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from Scott K. *is Ordered Not Published*, 4 CRIM. JUST. J. 327 (1980) (comparing *David W.*, in which the California Supreme Court let stand an appellate decision allowing a mother to consent to an otherwise invalid arrest of her 13 year old son, with *Scott K.*, and concluding that the court needs to clarify which criminal procedure rights parents may waive and why); 18 J. FAM. L. 422 (1980) (concluding that *Scott K.* did not diminish parental control over the child, but will not allow the courts to presume that the parent speaks for his child); Note, *California Supreme Court Extends the Fourth Amendment Protection to Minors - In re* Scott K., 2 WHITTIER L. REV. 351 (1980) (noting that *Scott K.* reversed the emphasis from parental authority to minors' rights versus their government, but concluding that the decision was so vague as to be difficult for lower courts and police to follow). *See also In re* David W., 163 Cal. Rptr. 87 (2d Dist. 1980) (purporting to follow *Scott K.*, but upholding mother's consent to otherwise invalid arrest of her 13 year old son), *hearing denied* (May 14, 1980), *ordered depublished by the California Supreme Court* (July 18, 1980), *cert. denied*, 449 U.S. 1043 (1980) (three Justices dissenting).

[108] *In re* Scott K., 24 Cal. 3d 395, 403, 595 P.2d 105, 109, 155 Cal. Rptr. 671, 675 (1979).

[109] Courts must exclude any evidence obtained in violation of the fourth amendment. Mapp v. Ohio. 367 U.S. 643 (1961) (applying exclusionary rule to states).

[110] Another potential problem with the *Scott K.* rule is that courts have held that a search is reasonable if based on the consent of a third party whom the police reasonably and in good faith believe to have authority to consent. People v. Carr, 8 Cal. 3d 287, 298, 502 P.2d 513, 519, 104 Cal. Rptr. 705, 711 (1972) (search of seemingly abandoned duplex reasonable pursuant to consent of landlord). This doctrine, if applied to the parent-child third party consent situation, could vitiate any fourth amendment protection *Scott K.* offers juveniles. Common sense indicates that it will be reasonable in most conceivable situations for the police to believe that parents have control over their child's room and property.

[111] United States v. Ross, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring). While disagreeing with the Court's ruling on warrantless searches of containers within automobiles, Justice Blackmun stated that "[i]t is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established." *Id.* Justice Powell concurred separately for much the same reasons. *Id.*

Second, *Scott K.* allows parents to exercise third party consent, although the assumption of the risk which justifies that consent cannot be implied in the parent-child relationship. The Supreme Court has permitted a third party to consent to a search of the premises if she possesses common authority over them.[112] The Court will find common authority if both parties enjoy mutual use, access, or control over the property.[113] If there is common authority, the Court will imply that each co-occupant or user has assumed the risk that the other might permit a search of the common property.[114] When the parties with joint access are adults, the implication is reasonable, since adults may choose where to live and with whom. If they voluntarily share access to their property, they assume the risk that the co-occupant will consent to a search. Children ordinarily lack such a choice. The nature of the parent-child relationship contradicts an implied assumption of the risk by the child, because the parents' control of the household will dictate the extent of their access to the child's room and property. Children do not *assume* the risks attendant on co-occupancy of property. The involuntary status of the parent-child relationship forces those risks upon them. Therefore, the rationale underlying third party consent between adults does not support the doctrine as applied in the parent-child context. *Scott K.* ignored this problem, limiting fourth amendment protection of minors to property over which the child has exclusive control.[115] The *Scott K.* approach unjustifiably allows parents to consent to a search if they have joint use and access. Without an assumption of the risk by the child, third party consent should not apply.

III. A Proposed Warrant Requirement

A. The Proposal

The United States Supreme Court should extend the protection of the fourth amendment to minors. Because this amendment prohibits searches without warrants, the Court should require a warrant for a search directed against a minor in her home. A minor's fourth amendment rights outweigh parental authority and family autonomy considerations, and preclude parental waiver of the warrant requirement. Fur-

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[112] *See supra* note 93.

[113] *See supra* notes 92-96 and accompanying text.

[114] *See supra* notes 92-96 and accompanying text.

[115] *In re* Scott K., 24 Cal. 3d 395, 404-06, 595 P.2d 105, 110-11, 155 Cal. Rptr. 671, 676-77 (1979).

ther, the Court should not permit parents to give third party consent to a search of their child's property. The justification for this exception to the warrant requirement is missing in the parent-child relationship. Unless a minor herself consents to the search,[116] the police must obtain a warrant to search the minor's property.

The current approaches to parental consent situations have led to unjust results. The due process rights of minors have been denied either in the name of parental authority, or by the inappropriate use of the third party consent doctrine. The warrant requirement proposal eliminates the inequities of the current approaches by providing a bright line rule for the courts and law enforcement. Constitutional protection should not depend on family norms or the jurisdiction where the child resides; the warrant requirement is necessary for fair treatment for all juveniles.

B. Objections

This section will discuss several potential objections to the warrant proposal: (1) the warrant requirement might impede parental efforts to maintain a lawful home; (2) the efficacy of its application to a younger child might be challenged; and (3) the possibility of evasion of the rule must be acknowledged. While these objections do raise valid issues, they are not insurmountable barriers to the warrant requirement.

1. Parental Right to Maintain a Lawful Home

Parents have the right, within certain limitations, to raise their children and maintain their home as they see fit.[117] Most parents desire to keep a lawful home, and welcome the opportunity to eliminate criminal activity.[118] They may wish to protect other children from a sibling's

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[116] Granting fourth amendment rights to minors also raises an issue as to when the minor, rather than the parent, may waive her rights. That question is beyond the scope of this Comment.

[117] *See* Moore v. City of East Cleveland, 431 U.S. 494, 497-507 (1977) (invalidating zoning statutes defining 'family' so as to exclude the household of appellant, her son and her two grandsons); Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (compulsory high school education statute unconstitutionally violated Amish parents' right to raise their children as they wished); Stanley v. Illinois, 405 U.S. 645, 651-55 (1972) (statute presuming father of illegitimate children an unfit parent and depriving him of custody without a hearing held unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding statute requiring public v. private school education unconstitutional); Meyer v. Nebraska, 262 U.S. 390, 400-02 (1923) (invalidating statute prohibiting teaching children foreign languages in school).

[118] Parents who do not so desire would probably not consent to a police search and a

criminal influence, or themselves from liability if the child's act is also tortious.[119] While the proposed warrant requirement might appear to impede parents' ability to maintain a lawful home, this is not the case, as parents may cooperate fully with the police to the point of actually consenting to a search. In many cases, parents themselves will provide the information necessary to meet the probable cause requirement for obtaining a search warrant.[120] The parent could seize any contraband in the child's possession and present it to the police, or they could handle the matter themselves without police involvement.[121] The parent's right to control activities in the home justifies these intrusions into the child's life. These solutions involve no state action and present no constitutional question.[122]

Once the state is involved, however, the child is entitled to fourth amendment protection and her rights outweigh the parent's interests in maintaining a lawful home. Because a search of the minor's belongings may result in delinquency adjudication and confinement in a state institution,[123] the minor's rights cannot be conditioned on parental actions. In the final analysis, if the search leads to conviction, the minor faces confinement, not the parent. It is the minor's interests which must be given primacy, not the parents'.

2. Protection Should Not Depend on the Age of the Minor

Even very young children may be subject to delinquency proceedings.[124] Since they also face the risk of confinement, they should not be

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warrant would be required.

[119] *See generally* 59 AM. JUR. 2D *Parent and Child* §§ 130-138 (1971).

[120] For example, in *Scott K.* the minor's mother gave the police marijuana found in her son's desk drawer. She also told them that Scott was probably selling the drug. 24 Cal. 3d 395, 398, 595 P.2d 105, 106, 155 Cal. Rptr. 671, 672 (1979). Most likely this information would have provided probable cause to issue a warrant had the police attempted to obtain one.

[121] When criminal activity by the child has not been established, police intervention could be inappropriate. Commentators have severely criticized the use of the court system by angry parents to punish their children. *See* Hickey, *Status Offenses and the Juvenile Court*, in STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM (R. Allinson ed. 1978); Note, *Ungovernability: the Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1394-97 (1973-74). In these situations, family counseling may be the preferred method for coping with the problem. *See generally* R. BARON & F. FEENEY, JUVENILE DIVERSION THROUGH FAMILY COUNSELING (1976).

[122] *See supra* note 9.

[123] *See supra* notes 41-42.

[124] In 1981, 2,035,748 persons under 18 were arrested. 623,018 were under 15. UNITED STATES DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 177 Table 34

granted less protection than older children.[125] The warrant requirement must apply regardless of the age of the child.[126]

Parents generally exert greater control over young children than over older children. In some situations parents must be allowed to make unhampered decisions for the immature child. For example, parental power over young children is essential in the health context.[127] In this area parental guidance prevents the potential harmful impact of a child's immature decision.[128] However, the child's decision to assert her fourth amendment rights will not harm her. It preserves her privacy from the police until they obtain a warrant. In contrast, a parental waiver may very well have long term detrimental effects on the child, stripping her of constitutional protection at the point of her entry into the justice system.[129]

(1982).

[125] In 1975, out of 771 correctional and detention facilities examined in a federal survey, 193 had male residents less than 12 years of age. UNITED STATES DEPARTMENT OF JUSTICE, CHILDREN IN CUSTODY 50 Table 1-34 (1979).

[126] The application of other procedural safeguards has not been dependent on the age of the minor. It would be incongruous and inequitable to do so with fourth amendment rights. For example, the validity of a minor's waiver of fifth amendment rights is based on the totality of the circumstances. Fare v. Michael C., 442 U.S. 707, 725 (1979) (minor's request to see his probation officer during interrogation was not the equivalent of a request to see his attorney). Justice Marshall, in his dissent to the denial of certiorari to *In re* David W., 163 Cal. Rptr. 87 (2d Dist. 1980) (officially depublished) (mother could consent to otherwise invalid arrest of 13 year old son), pointed out the incongruity in allowing a parent to waive the child's fourth amendment rights at home and then determining that the child could effectively waive his *Miranda* rights at the police station:

> I find it hard to discern the logic of the . . . court's conclusion that petitioner was capable of making a knowing and intelligent waiver of his *Miranda* rights. . . . Surely, if a minor in his home lacks the capacity to decide whether to accompany police officers to the station for questioning, there must be some question about the same minor's capacity to make a knowing and intelligent waiver of his rights at the police station.

David Levell W. v. California, 449 U.S. 1043, 1049 (1980) (Marshall J., dissenting).

[127] *See* Bellotti v. Baird, 443 U.S. 622, 637-39 (1979) (discussing parental interests in their child's decision to abort).

[128] *See generally* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their "Rights,"* 1976 B.Y.U. L.REV. 693.

[129] "[I]n situations where the interests of the child (*no matter his age*) and the parent are apt to conflict or a serious adverse impact on the child is likely to be the consequence of unilateral parental actions, it is now argued that the child's interests deserve representation by an independent advocate before a neutral decisionmaker." Wald, *Making Sense Out of the Rights of Youth*, 4 HUM. RIGHTS 13, 17 (1974) (emphasis added).

3. Potential Circumvention of the Warrant Requirement

Police officers may react to the warrant requirement by finding ways to circumvent it.[130] They might hint that parents conduct their own search and turn any evidence found over to the police. An implied suggestion is probably insufficient police involvement to taint the parental search with state action, and trigger the application of the fourth amendment.[131] Presumably, parents willing to consent to a police search would also be willing to conduct the search themselves. Circumvention of the rule would admittedly weaken its prophylactic effects. Yet the same possibility of private party searches evading the warrant requirement has not led the Court to abandon the requirement for adults.[132] The warrant requirement would provide so much more protection than the current approaches that the possibility of evasion does not lessen its validity.

CONCLUSION

The Supreme Court should extend fourth amendment protection to minors. This fundamental constitutional protection, which is basic to a free society, should not depend upon where a minor lives. In addition, the Court should prohibit parental waiver of a child's protection against warrantless searches in her home. Approaches taken by state courts have failed to provide minors with adequate protection against government intrusion in the home. Analogous right to privacy cases in-

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[130] Police have responded rapidly to circumvent other criminal procedure decisions. *See* Lewis & Allen, *"Participating Miranda": An Attempt to Subvert Certain Constitutional Safeguards*, 23 CRIME AND DELINQ. 75 (1977).

[131] *See* United States v. Jennings, 653 F.2d 107 (4th Cir. 1981) (private search by airline personnel was not state action although DEA agent gave tip and was present). *But see* United States v. Robinson, 504 F. Supp. 425 (N.D. Ga. 1980) (airline employee search manipulated by DEA agent was state action).

[132] The Court continues to uphold other criminal procedure protections capable of evasion, for example, the *Miranda* rules. *See supra* note 130. Moreover, the Court recently reaffirmed the vitality of the warrant requirement of the fourth amendment. In Payton v. New York, 445 U.S. 573 (1980), the Court held that police must have a warrant to arrest a person inside her home, saying:

> The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home. In the absence of any evidence that effective law enforcement has suffered in those states that already have such a requirement, . . . we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command we consider to be unequivocal.

Id. at 602 (citations omitted).

dicate that parental rights to control their children do not outweigh the child's fourth amendment rights. Consequences of parental waiver affect the child, not the parent. Furthermore, the third party consent doctrine does not justify parental waiver of the child's rights. The Court has based third party consent upon an assumption of the risk which cannot be implied from the involuntary status of the child-parent relationship. To say that the child assumes the risk that her parents might search anything she owns is to say the child has no privacy at all. The Court's deference to family autonomy may allow that result between parent and child. But the child's lack of privacy vis-a-vis her parents should not deprive her of privacy from the state. Allowing state intrusion offends the spirit of the fourth amendment. Third party consent, whether based on use and access or on parental authority, is not appropriate in the parent-child context.

The Supreme Court should require a warrant to search a minor's belongings in her home. A warrant requirement creates new difficulties for police and parents, but they are outweighed by the importance of fourth amendment protection for minors. No approach allowing parental or third party consent provides the minor with adequate fourth amendment protection. In the absence of a justifiable exception to the fourth amendment, the Court must apply the rule: no searches without warrants supported by probable cause.

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