PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 6 | Issue 3 Article 10

5-15-1979

Beyond Kent and Gault: Consensual Searches and Juveniles

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I. INTRODUCTION

The evolution of juvenile justice in the United States began to surge in the late 1960's when the United States Supreme Court recognized that juvenile courts provided neither the due process we were accustomed to as a free nation, nor the paternal guidance we had bargained for in return.[1] There was no *quid* for the *quo. Kent v. United States*[2] and *In re Gault*[3] were the landmark cases which called for a return of due process rights to children. Through the measured process which marks the wisdom of constitutional adjudication, children now enjoy nearly all the protections accorded adults.[4] Procedural due process is an everyday reality as to most aspects of modern juvenile courts.

If procedural rights in the adjudicative phase of the juvenile justice system have experienced almost a complete reversal since *In re Gault*, what of the constitutional protections during the preadjudicatory phase of the process? The answer is sim-

1. Kent v. United States, 383 U.S. 541, 556 (1966).

2. 383 U.S. 541 (1966). The *Kent* Court considered the requirements for a valid waiver by a juvenile court and first articulated that due process could apply to juvenile proceedings.

3. 387 U.S. 1 (1967). *In re* Gault, the watershed case, granted juveniles faced with the possibility of commitment to a state institution the right to adequate notice in advance of charges against them, *id.* at 33-34; the right to counsel, *id.* at 41; the privilege against self incrimination, *id.* at 55; and the right to cross-examine and confront witnesses, *id.* at 57.

4. The list of "non-criminal" constitutional rights has come to include matters of fundamental import: protection against racial discrimination, Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954); freedom of speech, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1968); right to a hearing prior to suspension from school, Goss v. Lopez, 419 U.S. 569, 579 (1975); right to have an abortion during the first trimester of pregnancy, Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 61 (1975); right of children under sixteen years of age to purchase contraceptives, Carey v. Population Servs. Int'l., 431 U.S. 678, 691-92 (1977); and right to a hearing, before parents may have minor child fourteen years of age or older put into a state mental hospital, *In re* Roger S., 19 Cal. 3d 921, 927, 569 P.2d 1286, 1289, 141 Cal. Rptr. 298, 301 (1977). *See* note 17 *infra* for a list of "criminal" constitutional rights. Strictly speaking, however, these are not "criminal" rights since the juvenile justice system has been conceptualized as a "civil" process. Kent v. United States, 383 U.S. 541, 555 (1966). But in actuality, the jurisprudence grants juveniles the protections afforded criminal defendants.

ple—*Gault* and its progeny have left unresolved the question as to what extent their mandate logically extends to the preadjudicatory stages, particularly the police investigatory process. In a case of such profound import the tendency is to extend the rule to its logical conclusion.[5] *Gault* has proved to be no exception. Just as its applicability has been extended to cover police interrogation of juveniles[6] and lineups,[7] it has also been construed to require application of the Fourth Amendment[8] and the exclusionary rule to the juvenile justice system.[9]

5. Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908); W. SCHAEFER, THE SUSPECT AND SOCIETY 27 (1967); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

6. In *Gault*, it was specifically held that the Fifth Amendment privilege against self-incrimination applies to juvenile proceedings. 387 U.S. at 55. This, in turn, has been interpreted to mean that Miranda v. Arizona, 384 U.S. 436 (1966), applies to juveniles as well. *See, e.g., In re* Dennis M., 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969); *In re* Creek, 243 A.2d 49 (D.C. Ct. App. 1968); and *In re* Rust, 53 Misc. 2d. 51, 278 N.Y.S.2d 333 (Fam. Ct. 1967). *See also* Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195 (1976); Note, *The Confessions of Juveniles*, 5 WILLAMETTE L. J. 66 (1968).

7. Although the Supreme Court has not ruled on the issue, lower courts have assumed that the United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stoval v. Denno, 388 U.S. 293 (1967), trilogy apply to juvenile lineup cases. *See, e.g., In re* Holley, 197 R.I. 615, 268 A.2d 723 (1970); *In re* Carl T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 665 (1969), *see also* Cannon, *Lineups In Detention Are Constitutionally Impermissible*, 5 CLEARINGHOUSE REV. 441 (1970) (suggesting that a juvenile should never be subjected to a lineup).

8. None of the cases decided by the Supreme Court thus far have held that the Fourth Amendment is applicable to juveniles within a juvenile court context. However, virtually all lower courts that have considered the issue have held or assumed that it is. *See, e.g.*, State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975); *In re* Jean M., 16 Cal. App. 3d 96, 93 Cal. Rptr. 679 (1971); *In re* Robert T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970); *In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (1967). For excellent commentary on the applicability of the Fourth Amendment to the pretrial stage in the criminal justice process, *see* INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS (tent. ed. 1977) [hereinafter cited as JUSTICE STANDARDS]; S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 54-59 (1974) [hereinafter cited as RIGHTS OF JUVENILES]; Comment, *Juvenile Rights Under the Fourth Amendment*, 11 J. FAM. L. 753 (1972).

9. Though the United States Supreme Court has not yet considered the question whether the Fourth Amendment exclusionary rule should be or will be held applicable to juvenile court proceedings, there are courts and commentators who have answered in the affirmative. *See, e.g., In re* J.M.A., 542 P.2d 170 (Alaska 1975); *In re* Roderick P., 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972); *In re* Carl T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 665 (1969); State v. Baccino, 282 A.2d 869 (Del. Super. 1971); Brown v. Fauntleroy, 442 F. 2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Nelson v. State and Newman v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975); *In re* Marsh, 40 Ill. 2d 53, 237 N.E. 2d 529 (1968); People v. Hughes, 123 Ill. App. 2d 115, 260 N.E.2d 34 (1970); State v. Gordon, 219 Kan. 643, 549 P.2d 886 (1976); Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (Ct. Spec. App. 1974); State v. Lowry, and *In re* B., 95 N.J.

The matter of searches and seizures, however, and particularly consensual searches, has been given little judicial attention in connection with juvenile court proceedings. Nevertheless, it seems likely, in view of the pressure of increasing lawlessness and social ferment, that consent problems will arise with increasing frequency in juvenile court cases in the next decade. Accordingly, this comment will assess whether juveniles should be afforded the same, greater, or lesser constitutional protections in the area of consensual searches as is currently afforded their adult counterparts. It will first, however, be necessary to examine the development of juvenile rights in order to provide a conceptual perspective from which to view consent searches. Next, the concept of "voluntary consent" and its functional validity in the context of a search will be analyzed. Finally, the area of parental consent to search a juvenile's room and personal effects will be explored.

II. DEVELOPMENT OF JUVENILE RIGHTS

In 1899, Illinois passed the Juvenile Court Act, creating the first statewide court especially for children.[10] The idea of the juvenile court spread with amazing speed. Within twelve years, twenty-two states had enacted similar statues, and by 1925 all but two states had followed Illinois' example.[11]

The juvenile court was a reaction to criticism of the then common practice of combining juvenile delinquents and adult criminals in the same judicial and penal system. The separate court, it was thought, would promote rehabilitation. The child would receive special treatment in surroundings and from per-

Super. 307, 230 A.2d 907 (1967); *In re* P., 40 App. Div. 2d 638, 336 N.Y.S.2d 212 (1972); *In re* Ronny, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Fam. Ct. 1963); *In re* Baker, 18 Ohio App. 2d 276, 248 N.E.2d 620 (1969); *In re* Morris, 29 Ohio Misc. 71, 278 N.E.2d 701 (C.P. 1971); *In re* Harvey, 222 Pa. Super. Ct. 222, 295 A.2d 93 (1972); Cuilla v. State, 434 S.W.2d 948 (Tex. Ct. App. 1968). *See generally* Comment, *The Applicability of the Fourth Amendment Exclusionary Rule to Juveniles in Delinquency Proceedings*, 4 COLUM. HUMAN RIGHTS L. REV. 417 (1972).

10. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

11. These states are Maine and Wyoming. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TASK REPORT], Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190 (1970) [hereinafter cited as Fox]. The latter reference presents a detailed examination of juvenile judicial history. *See also generally* W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 5-39 (1972); Note, *Juvenile Delinquency—The History and Development of Juvenile Courts*, 12 N.Y.L.F. 644 (1966).

sons devoted to rehabilitation instead of punishment.[12] The juvenile court's role was not to ascertain guilt or innocence but to determine what should be done in the "best interest" of the child.[13] This unique court was based upon the theory of *parens patriae*, which permits the state to act *in loco parentis* over wayward children. The state's duty as "parent" is to direct the child along the proper path to a productive and lawful adulthood.[14]

Unfortunately, the *parens patriae* doctrine of the juvenile system, in its effort to provide the child with guidance and rehabilitation, frequently operated at the expense of his basic constitutional rights. However, it was not until the late 1960's that the lack of procedural due process in juvenile proceedings began to be challenged in the courts. It was in reaction to the abuses in the juvenile justice system that Mr. Justice Fortas, speaking for the court in *Kent v. United States*,[15] stated:

> There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children [in the juvenile courts].[16]

In four major decisions the United States Supreme Court changed the contours of juvenile justice in the United States by making applicable to juveniles some of the constitutional guarantees associated with traditional criminal prosecutions.[17] Basic to

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12. Comment, *Children's Liberation—Reforming Juvenile Justice* , 21 KAN. L. REV. 177 (1973) [hereinafter cited as *Children's Liberation*].

13. *In re* Gault, 387 U.S. 1 (1967). *See* TASK FORCE REPORT, *supra* note 11, at 3; Comment, *Alternative Preadjudicatory Handling of Juveniles in South Dakota: Time for Reform*, 19 S. DAK. L. REV. 207, 208 (1974) [hereinafter cited as *S. Dak. Juveniles*].

14. *See generally In re* Gault, 387 U.S. 1, 16 (1967). *See also* Fox, *supra* note 11 at 1192; *S. Dak. Juveniles, supra* note 13, at 208; Comment, *In re Gault: Understanding the Attorney's New Role*, 12 VILL. L. REV. 803 (1967); Comment, *Juvenile Justice and Pre-Adjudication Detention*, 1 U.C.L.A.-ALASKA L. REV. 154 (1971).

15. 383 U.S. 541, 556 (1966).

16. *Id.* at 556.

17. *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966). In other contexts, the courts have found additional, though not all, guarantees of the criminal process applicable to the juvenile process. *See* Breed v. Jones, 421 U.S. 519, 541 (1975) (the double jeopardy clause of the fifth amendment protects the juvenile just as it does an adult). *See also* People v. Olivas, 17 Cal. 3d 236, 257, 551 P.2d 375, 389, 131 Cal. Rptr. 55, 69 (1976) (juvenile may not be held by the Youth Authority for a term exceeding that which might be imposed upon an adult misdemeanant commiting the same offense); *In re* Dana J. v. Superior Court, 4 Cal. 3d 836, 841, 484 P.2d 595, 598, 94 Cal. Rptr. 619, 622 (1971) (minor entitled to a free transcript of trial for use on appeal if he is personally unable to afford counsel without regard to his parents' financial status); *In re* Jean M., 16 Cal. App. 3d 96, 105, 93 Cal. Rptr. 679, 684 (1971) (sufficiency of evidence for determination that a minor had knowingly been about a place in which narcotics were unlawfully used); *In re* Michael M., 11 Cal. App. 3d 297, 301, 89 Cal. Rptr. 718, 720 (1970) (plea of guilty in a juvenile proceeding may not be accepted unless the defendant affirmatively waives his privilege against self-incrimination and confrontation on the record).

the acquisition of these protections was the imposition of the procedural due process standard of fundamental fairness in juvenile proceedings.

The United States Supreme Court first confronted the issue of fundamental fairness in *Kent v. United States*.[18] Speaking to the waiver of jurisdiction by juvenile courts, Mr. Justice Fortas recognized the statutory right to the benefits of juvenile jurisdiction and the grievious effect of the loss of that right. Thus it was concluded that the District of Columbia statute allowing waiver, read in light of the due process clause and the right to assistance of counsel, required: an informal hearing, assistance of counsel, access to records considered by the Court, and a statement of the reasons for the decision.[19] By requiring procedural due process at juvenile hearings the Court began to restore to the juvenile some of the rights he had lost under the protection of the *parens patriae* doctrine.

The next case to reach the United States Supreme Court was the landmark case of *In re Gault*,[20] which dealt with the adjudication of delinquency. Once again Mr. Justice Fortas expressed the Court's dissatisfaction with the realities of the juvenile system. Noting that lack of procedural due process was an invitation to arbitrariness and that the term *delinquent* had "come to involve only slightly less stigma than the term 'criminal' applied to adults,"[21] the Court extended to juvenile proceedings four basic constitutional protections generally associated with criminal trials. These protections were: the right to counsel,[22] the privilege against self-incrimination,[23] adequate notice of the charges,[24] and the right to confront and cross-examine witnesses.[25]

In 1970 the Court again expanded the protection accorded to juvenile offenders when, in the case of *In re Winship*,[26] it extended the criminal standard of proof beyond a reasonable doubt to delinquency hearings.[27] Mr. Justice Brennan, speaking for the ma-

18. 383 U.S. 541 (1966).
19. *Id.* at 557.
20. 387 U.S. 1 (1967).
21. *Id.* at 24.
22. *Id.* at 34.
23. *Id.* at 55.
24. *Id.* at 31.
25. *Id.* at 57.
26. 397 U.S. 358 (1970).
27. *Id.* at 368.

jority, found no sufficient basis on which to allow a lesser standard in juvenile proceedings, and rationalized the standard would not adversely affect state policies precluding criminal conviction and deprivation of civil rights, or the confidentiality, informality, flexibility, and speed of the hearings.[28]

However, in the 1971 case of *McKeiver v. Pennsylvania*,[29] this expanding application of the constitutional guarantees associated with traditional criminal prosecutions to juvenile proceedings came to a halt when the Court refused to extend to juveniles the right to trial by jury. The applicable due process in juvenile proceedings was stated as fundamental fairness for accurate fact finding.[30] The plurality of four Justices found the impanelling of a jury would not sufficiently aid in fact finding and would cause the proceedings to become adversary, protracted, public, and less protective.[31] The Court could identify no failures of the juvenile justice system which would be remedied by the presence of a jury.[32] Mr. Justice Brennan concluded that juries were not required as long as some other protection against oppression by the state or improper discharge of judicial duties could be found in the adjudicative process. He found these protections in the ability of any party so aggrieved to "appeal to the community at large . . . for executive redress through the medium of public indignation."[33] Mr. Justice Harlan concurred, based on his belief that neither the sixth amendment nor the due process clause requires states to provide criminal jury trials.[34]

The Supreme Court's approach to requests for due process in juvenile proceedings reveals an attempt to maximize the efficiency of the fact finding process without upsetting the rehabilitative ideals of the juvenile justice system.[35] *Parens patriae*, while not a byword for arbitrariness, is allowed to limit due process when a rehabilitative goal will be furthered.

III. Consensual Searches Under the Fourth Amendment

The Fourth Amendment's prohibition of unreasonable searches

28. *Id.* at 366-67.
29. 403 U.S. 528 (1971).
30. *Id.* at 543-51.
31. *Id.* at 545-51.
32. *Id.* at 547.
33. *Id.* at 555.
34. *Id.* at 557. Presently, however, the Supreme Court regards the *McKeiver* decision as a retreat from the goal of full implementation of fundamental fairness in the juvenile context. Breed v. Jones, 421 U.S. 519, 528 (1975).
35. *See generally* Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 Calif. L. Rev. 984 (1976), questioning the propriety of this approach.

and seizures[36] safeguards the privacy and security of individuals from arbitrary invasions by governmental officials.[37] Through the due process clause of the Fourteenth Amendment, the states are subject to Fourth Amendment limitations equally with the federal government.[38]

36. The United States Constitution provides in part:

> The right of the people to be secure in their persons, house, 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.

U.S. CONST. amend. IV. *See generally* Young, *Searches and Seizures in Juvenile Court Proceedings*, 25 JUV. JUST. 26 (1974) [hereinafter cited as *Searches & Seizures*]; Comment, *Application of the Rules Against Search and Seizures to Juvenile Delinquency Proceedings*, 16 BUFF. L. REV. 462 (1967); RIGHTS OF JUVENILES, *supra* note 8, at 54-71. The framers of the Constitution, mindful of the use of general warrants and writs of assistance in England and the American colonies prior to the American Revolution realized that an "unrestricted power of search and seizure could be an instrument for stifling liberty of expression," Mancus v. Search Warrant, 367 U.S. 717, 729 (1961). For excellent and informative discussions of the historical background of the Fourth Amendment, *see generally* W. TUDOR, LIFE OF JAMES OTIS (1923); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1970); Boyd v. United States, 116 U.S. 616 (1886) (discussing at length the movement of 18th-century England to abolish general warrants authorizing searches in, among other places, private houses. *Id.* at 625-26.

37. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

38. Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule provides that evidence seized in violation of the fourth amendment is inadmissible in a criminal trial. First alluded to in Boyd v. United States, 116 U.S. 616 (1886), applied in federal criminal cases in Weeks v. United States, 232 U.S. 383 (1914), and ultimately imposed on the states in Mapp v. Ohio, 367 U.S. 643 (1961). The decision in *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949), and held that the Fourteenth Amendment incorporates full Fourth Amendment protections for state citizens and that the exclusionary rule is a requisite element of this constitutional protection.

Confusion and controversy abound in commentary on the exclusionary rule. At issue are the purposes of the rule, whether the exclusion of illegally seized evidence at trial is or is not constitutionally required, whether the exclusionary rule operates to deter Fourth Amendment violations, and ultimately whether the exclusionary rule should be retained, expanded, or totally abandoned. For a contrast in the rationale and constitutional status of the rule *see* Burns, *Mapp v. Ohio, An All American Mistake*, 19 DE PAUL L. REV. 80, 100 (1969) (application of the exclusionary rule to states is an attempt to create federal common law of search and seizure and is unauthorized by the Constitution); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 372 (1974) (defendant has a personal constitutional right to exclusion of illegally seized evidence under both the Fourth Amendment and the due process clause). There is a conflict of opinions as to whether the exclusionary rule has effectively deterred illegal police conduct. *Compare* Carron, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 K.Y.L.J. 681, 725-26 (1974) (empirical evidence does not warrant conclusion that exclusionary rule fails to deter), *with* Oaks, *Studying the Exclusionary Rule in*

The United States Supreme Court's decisions on the Fourth Amendment stress that the primary source of governmental authority to conduct searches is a validly issued warrant.[39] This policy is so strong that a search conducted without a warrant issued upon probable cause is presumptively unreasonable.[40] Despite the mandate that all searches are subject to prior judicial review through application for a warrant, a myriad of exceptions to the warrant requirement exist, including searches incident to a lawful arrest,[41] searches conducted while in hot pursuit of an offender,[42] searches undertaken in an emergency situation,[43] and searches

Search and Seizure, 37 U. CHI. L. REV. 665, 755-56 (1970) (exclusionary rule fails to deter and should be abolished on condition that viable substitute is adopted). *See also* Wilkes, *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 900-01 (1975) (exclusionary rule is necessary today to inhibit "widespread police corruption and abuse of power"); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1163-64 (1973) (apart from deterrence, judicial integrity mandates expansion of exclusionary rule beyond trial setting).

For a concise analysis of the current status of the exclusionary rule and alternative remedies for Fourth Amendment violations including the Federal Tort Claims Act. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L. Q. 621, Gilligan, *The Federal Tort Claims Act: An Alternative to the Exclusionary Rule?*, 66 CRIM. L. & CRIMINOLOGY 1 (1975). *See also* Comment, *The California Constitutional Right of Privacy and the Exclusionary Rule in Civil Proceedings*, 6 PEPPERDINE U. L. REV. 231 (1978) (arguing for the extension of the exclusionary rule in civil proceedings based on the fourth amendment and the California Constitutional right of privacy).

39. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Jetters, 342 U.S. 48, 51 (1951); Agnello v. United States, 269 U.S. 20, 33 (1925).

40. As noted in Katz v. United States, 389 U.S. 347 (1967), searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable subject only to a few specifically established and well-delineated exceptions. *Id.* at 351. *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

41. United States v. Robinson, 414 U.S. 218 (1973) (in the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the fourth amendment, but is also a "reasonable" search under that amendment); Chimel v. California, 395 U.S. 752 (1968) (search incident to a lawful arrest is limited to the area in which the arrestee can "reach" for a weapon or destroy evidence); United States v. Rabinowitz, 339 U.S. 56 (1950) (search permitted both of the arrestee's person and the premises where the arrest occurred).

42. Warden v. Hayden, 387 U.S. 294 (1967) (police in hot pursuit of an offender may enter a premises without a warrant and look anywhere within the premises where the offender might be hiding); *see also* Annot., 89 A.L.R.2d 746 (1963) (cases involving search of suspect's house as part of, and immediately prior to arrest therein).

43. Chambers v. Maroney, 399 U.S. 42 (1970) (with probable cause an automobile, due to its mobility may be searched without a warrant in circumstances that would not justify a warrantless search of a house or office). Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of a vehicle upon probable cause that it contains contraband is allowable due to vehicle's mobility).

In vehicular searches incident to a traffic arrest, the state courts vary in their approaches. *See* Note, *The Scope of Searches Incident to Traffic Arrests in California: Rejecting the Federal Rule*, 9 U.S.F. L. REV. 317 (1974). The Supreme Court

conducted pursuant to the consent of the subject of the search[44] or an appropriate third party.[45]

Warrantless searches are not favored by the courts. The law prefers the intervention of a detached and disinterested magistrate as provided by the warrant procedure, to limit the scope and duration of the search and to assure that the search proceeds upon adequate probable cause, rendering the intrusion of police officers reasonable.[46] Nonetheless, the law recognizes valid consent searches as a legitimate exception to the warrant requirement and permits such searches because of their inherent reasonableness.[47]

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expanded the scope of the *person* incident to a traffic arrest in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973).

44. United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Vale v. Louisiana, 399 U.S. 30 (1970); Bumper v. North Carolina, 391 U.S. 543 (1968); Katz v. United States, 389 U.S. 347 (1967). *See also* notes 48-90 *infra*, and accompanying text.

45. United States v. Matlock, 415 U.S. 164 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Frazier v. Cupp, 394 U.S. 731 (1969); Stoner v. California, 376 U.S. 483 (1964). *See also* Wefin & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211 (1974) [hereinafter cited as Wefin & Miles], *see also* note 9 *supra*, and accompanying text.

46. Johnston v. United States, 333 U.S. 10, 13-14 (1948) (Jackson, J.): "[T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of those usual inferences which reasonable men draw from evidence. Its protection consists in requiring that the inferences be drawn by a neutral and detached magistrate instead of being, judged by the officer engaged in the often competitive enterprise of ferreting out crime." *But see* United States v. Chadwick, 433 U.S. 1 (1977): "Once a lawful search has begun, it is far more likely that [the search] will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* at 9.

In Shadwick v. City of Tampa, 407 U.S. 345 (1972), the Court held that the "issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the required arrest or search." *Id.* at 350. The Court went on to hold that the requisite detachment would be met so long as the magistrate "is removed from the prosecutor or police and works within the judicial branch subject to supervision of the judge." *Id.* at 351. In a subsequent case, the Court invalidated a warrant process that paid a justice of the peace five dollars for each warrant issued, finding such a system to be at odds with the requirement that warrants be issued by a "neutral judicial officer." Connally v. Georgia, 429 U.S. 245 (1977).

47. Wefin & Miles, *supra* note 45, at 217-27.

A. *Voluntary Consent*

1. Supreme Court Perspective

As with most rights, the right to be free from unreasonable searches and seizures can be relinquished by voluntary consent.[48] The standard for determining whether a consent is constitutionally valid and, therefore, an exception to the Fourth Amendment warrant requirement[49] was established in the landmark case of *Schneckloth v. Bustamonte*.[50] Mr. Justice Stewart, writing for a six-to-three majority,[51] first reaffirmed that the prosecution bears the onus of showing the existence of consent "freely and voluntarily given."[52] Then he observed that:

> [V]oluntariness 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 establish a voluntary consent.[53]

Mr. Justice Stewart felt an appropriate standard of voluntariness must accommodate both the public need for consensual searches as a law enforcement tool and the interest of the individual to be free from official coercion.[54] The Court observed that a balancing of similar competing concerns had been reflected in pre-*Miranda* confession cases in which a "totality of the circumstances" approach had been adopted for determining the voluntariness of admissions of guilt.[55] The Court in *Miranda* ultimately ruled that

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48. *Id.*

49. *See* notes 44-47 *supra*, and accompanying text.

50. 412 U.S. 218 (1973).

51. *Id.* In *Bustamonte*, Justices Douglas, Brennan and Marshall each dissented separately, *see* note 76 *infra*, and accompanying text.

52. 412 U.S. at 222. The Supreme Court first articulated this burden in Bumper v. North Carolina, 391 U.S. 543, 548 (1968). *Bumper* was a third party consent case, but the decision squarely rested on the issue of voluntariness. In that case, the grandmother of a rape suspect permitted four law enforcement officers to search her home, in which the suspect also resided. The purported consent was granted after the officers claimed they possessed a search warrant, which they neither read nor showed to the suspect's grandmother. *Id.* at 546-47. The Court held that consent obtained by subterfuge is invalid, and cannot be voluntary. *Id.* at 548.

53. 412 U.S. at 248-49. Justice Traynor's analysis in People v. Michael, 45 Cal. 2d 751, 290 P.2d 852 (1955), became the cornerstone of the Supreme Court's formal adoption of the "totality of the circumstances" test. 412 U.S. at 221, 230-31. It was held in *Michael* that: "[w]hether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances." 45 Cal. 2d at 753, 290 P.2d at 854. In People v. Tremayne, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971), the California text was further refined: "Consent to search confers authority to search; established the reasonable nature of a search premised thereon; is not a waiver of a constitutional right; and is effective without warning the person given the consent he might refuse to consent." *Id.* at 1015, 20 Cal. Rptr. at 198.

54. 412 U.S. at 225.

55. *Id.* at 226-27. *See also* Wefin & Miles, *supra* note 45, at 241.

the state's failure to forewarn an individual in custody of his right to remain silent rendered any confession invalid,[56] without regard to any other circumstances. In *Bustamonte*, however, Mr. Justice Stewart rejected the notion that such warnings should be a prerequisite to a valid consent search.[57] Stewart contrasted the informal atmosphere of the individual's home or the highway, where consent searches are likely to be rejected, with the inherently coercive atmosphere in which custodial interrogations commonly occur, and concluded that with regard to consent searches, warnings "would be thoroughly impractical."[58]

Mr. Justice Stewart also rejected the constitutional waiver approach of *Johnson v. Zerbst*,[59] that consent to search was "a relinquishment or abandonment of a known right or privilege,"[60] which would have required that the consenting party know of his right to refuse.[61] This requirement has been applied to previous fifth and sixth amendment cases.[62] The *Bustamonte* Court identified the purpose of the Fifth and Sixth Amendments as ensuring the right to a fair trial.[63] Fourth amendment rights, on the other hand, protect individual privacy from unreasonable state intrusion.[64] Therefore, Mr. Justice Stewart, saw no reason to extend the *Zerbst* standard to consensual searches and seizures.[65]

Consequently, the Court determined that a prophylactic warning of the right to withhold consent was not required[66] and for-

56. 384 U.S. 436, 444, 467 (1966).

57. 412 U.S. at 231.

58. *Id.* at 231-32. Recognizing that an officer's request to search might be based on rapidly developing circumstances or as a consequence of an investigation, Mr. Justice Stewart noted that the *Miranda* decision was not intended to hinder police investigations.

59. 304 U.S. 458 (1938). In *Zerbst*, two defendants who had "stated that they were ready for trial," were tried and convicted without the aid of counsel. *Id.* at 460. The Court in reversing, held that a waiver of one's Sixth Amendment right to counsel must be knowingly and intelligently made. *Id.* at 468-69.

60. *Id.* at 464.

61. 412 U.S. at 235, 246.

62. *See, e.g.*, Barker v. Page, 390 U.S. 719, 725 (1968) (right of confrontation); Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (right against self-incrimination, right to counsel); Green v. United States, 355 U.S. 184, 191-92 (1957) (double jeopardy); Adams v. United States, 317 U.S. 269, 275 (1942) (jury trial).

63. 412 U.S. at 236-37.

64. *Id.* at 228, 242. *See also* notes 36-47 *supra*, and accompanying text.

65. 412 U.S. at 242.

66. *Id.* at 213-33. Various commentators have criticized Justice Stewart's reasoning in *Bustamonte, see, e.g.*, Comment, *Valid Consent to Search Determined by Standard of "Voluntariness"*, 12 AM. CRIM. L. REV. 231, 249 (1974) (Court's decision that voluntariness is to be determined in light of the surrounding circumstances,

mally adopted and applied the "totality of the circumstances" standard to noncustodial consent searches.[67] Soon thereafter, the Court extended this test to a custodial situation in *United States v. Watson*.[68]

2. Juvenile Court Perspective

Most courts that have considered consensual searches in a juvenile context have held that juveniles, like adults, can consent to a search made without probable cause or a warrant.[69] Even though the United States Supreme Court appears to be espousing the goal of full implementation of fundamental fairness in the juvenile context,[70] it seems likely, given the judicial philosophy of the Court's *Bustamonte* decision to support law enforcement activities, with its concomitant decrease of emphasis on individual rights, that it will also extend the "totality of the circumstances" test to juvenile cases.[71]

This author, however, takes the position that due to their tender age and comparative immaturity, juveniles should be afforded even more rigorous safeguards than those applied to adults, when it is claimed that a juvenile has voluntarily consented to a search.

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absent any specific guidelines, might create more ambiguity and disparity in the resolution of factually similar cases and "unintentionally" expand police power "at the expense of the individual"); Note, *Schneckloth v. Bustamonte: A New Era in Consent Searches*, 35 U. PITT. L. REV. 655, 669-70 (1974) ("the result [in *Bustamonte*] is an unfortunate weighing process which admits of no logical standard, and undermines the *Miranda* rationale which requires "explicit knowledge of [a constitutional] right" prior to effectuating a valid waiver); Note, *The Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME LAW, 891, 906 (1974) (the decision has rendered the waiver concept "an overinflated word of art"). For an opinion contrary to *Bustamonte* on the issue of whether consent requires a showing of knowledge of the right waived, *see* State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975). The court in *Johnson* held that whenever the state has the burden of showing that the alleged waiver was voluntary, an essential element is the knowledge of the right waived. *Id.* at 354-55, 346 A.2d at 68. *See also* note 82 *supra*, for further discussion of the knowledge of the right to refuse consent.

67. *Id.* at 227, for limiting language. *See also id.* at 421 n.29, 247 n.36.

68. 423 U.S. 411 (1976). For a thorough discussion of *Watson see* Note, *Warrantless Felony Arrests Made in Public are Valid Despite the Existence of Sufficient Time to Obtain a Warrant: The "Totality of the Circumstances" Test Applies to Consent Searches When Consent Was Given Subsequent to Arrest*, 7 SETON HALL L. REV. 891 (1976).

69. *See, e.g.*, State v. Evans, 533 P.2d 1392 (Ore. App. 1975) (following the *Bustamonte* rule); *In re* Robert T., 8 Cal. App. 3d 990, 88 Cal.'Rptr. 37 (1970) (where consent was held involuntary because entry into the juvenile's apartment was gained through trickery); *In re Ronny*, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Fam. Ct. 1963) (spontaneous confession of juvenile after street detention as indicia of voluntariness of consent to search). *See also* RIGHTS OF JUVENILES, *supra* note 8, at 67-69; S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL 124-25 (1971) [hereinafter cited as NUTSHELL].

70. *See* note 17-34 *supra*, and accompanying text.

71. JUSTICE STANDARDS, *supra* note 8, at 66.

The case of *In re Williams*,[72] illustrates an awareness of the special problems involved in obtaining a juvenile's consent to a search. Williams, a fifteen year old boy, was turned over to a state trooper by a security guard who found him lurking between two cottages at a resort. Williams took the trooper to his cottage and showed him jewelry he had stolen. In holding the consent invalid, the court stated:

> [T]he consent of this 15 year old boy given at 2 o'clock in the morning while in police custody under a charge of third degree burglary and after he had been questioned for several hours without the presence of his parents or any other adult friend cannot be held to be a consent that was given freely and intelligently without any duress or coercion, express or implied. Unless we are prepared to say that because this boy is charged with juvenile delinquency and not a crime, he has no right to be secure in his person, papers, house and effects against unreasonable searches and seizure, the jewelry discovered in his bungalow is inadmissible against him and must be suppressed.[73]

In the more common non-custodial street situation, however, most juvenile courts have not been as attentive to the "voluntariness" requirement. For example, in *In re Ronny*,[74] a police officer observed a fifteen year old boy pass an unseen object to another youth in exchange for money. When the officer approached the boy and questioned him, the boy emptied his pockets, which contained illegal drugs and the money he had received from the other youth. As he produced these items, the youth confessed to the sale of illegal drugs. Only then did the officer take him into custody. The court found that there had been no resistance or objection to the search. The boy's consent was, therefore, held to be voluntary.[75]

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72. 49 Misc. 2d 154, 267 N.Y.S.2d 91 (Fam. Ct. 1966).

73. *Id.* at 169-70, 267 N.Y.S.2d at 110. *See also* Haley v. Ohio, 332 U.S. 596 (1948), where the Court stated that a child "cannot be judged by more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* at 599. Plus, a youth may not know how to protect his interests. As the Court in Gallegos v. Colorado, 270 U.S. 49 (1962), pointed out, where a fourteen year old was held incommunicado and questioned for five days regarding a robbery, a child, in comparison with an adult, cannot sense as fully the substantial consequences of a confession. Thus, the Court has taken note of the inherent differences between adults and juveniles in the past and has demanded that special care and scrutiny be taken in juvenile cases.

74. 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Fam. Ct. 1963).

75. In order to distinguish *Ronny*, one need only demonstrate the slightest hesitation or resistance on the part of the juvenile; the only evidence of consent in *Ronny* was the boy's spontaneous confession. Another example, of the courts failure to take into consideration the susceptibility of juveniles to intimidation in the presence of police is *In re* Michael V., 10 Cal. 3d 676, 680, 517 P.2d 1145, 1147, 111

The major distinction between *Williams* and *Ronny* lies not in the custodial/non-custodial difference, but rather, that the former case recognized that there is a certain element of intimidation inherent in the very presence of an authority figure dressed in uniform, badge and weaponry. Because of this greater susceptibility to such intimidation, juveniles require extra protection before their consent to a search will be deemed voluntary.

In recognition of this, the American Law Institute's Model Code of Pre-Arraignment Procedures requires that if the person searched is under the age of sixteen, the consent must be given by his parent or guardian.[76] However, since juveniles not in custody may only be detained for brief periods, there will not always be sufficient time to locate parents or guardians.[77] Thus, to impose such a requirement in this situation would effectively eliminate non-custodial consent searches involving juveniles.[78]

However, in *In re Gault*[79] the Supreme Court, in an adjudicatory context, recognized that children are generally more impressionable and more easily intimidated by authority than adults, and remarked that the voluntariness of a juvenile waiver made in the absence of parents, counsel, or other adult is highly suspect.[80] Undoubtedly, there are some situations in which the decision to consent is the free and reasoned act of the juvenile himself. Yet the presumption against the voluntariness of a consent made by a juvenile in response to a police officer's request for consent to search seems very strong, particularly in the case of children who have not reached adolescence. In view of this, the courts might better, on public policy alone, abolish juvenile consents entirely, rather than risk the possibility of denying juveniles vital rights for

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Cal. Rptr. 681, 683 (1974) ("Okay boys, why don't you empty your pockets on the car?" taken to be request for permission to search).

76. *See* AMERICAN LAW INSTITUTE, MODEL CODE OF PREARRAIGNMENT § 240.2(1)(a) (1975) [hereinafter cited as CODE OF PRE-ARRAIGNMENT], which provides:

> (1) *Persons from Whom Effective Consent May be Obtained.* The consent of justifying a search and seizure . . . must be given, in the case of:
> (2) search of an individual's person, by the individual in question or, if the person be under the age of 16, by such individual's parent or guardian . . . .

77. In discussing the constitutional bounds of a "stop and frisk," Mr. Justice White has stated that "given the proper circumstances the person may be *briefly* detained against his will while pertinent questions are directed to him." Terry v. Ohio, 392 U.S. 1, 34 (1968) (concurring opinion) (emphasis added).

78. Prohibiting consent searches in the case of juveniles would contradict the Supreme Court's stated conclusion that consent searches are a necessary police practice. Schneckloth v. Bustamonte, 412 U.S. 218, 227-28, 231-32 (1973).

79. 387 U.S. 1 (1967).

80. *Id.* at 55.

failure to estimate the effect of intimidation or greater susceptibility to apparent or real coercion on an impressionable mind.

But even if the courts fail to abolish juvenile non-custodial consent searches, they can provide greater protection than those accorded in *Schneckloth v. Bustamonte*.[81] This may be accomplished by providing juveniles with the additional support necessary to make police encounters less intimidating. Such support may be derived, first, from extending to juveniles the right to be informed of their right to refuse consent[82] and, second, from giving to a juvenile who has been taken into custody notice of his right to counsel before consent is obtained.[83]

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81. 412 U.S. 218 (1973).

82. *See* CODE OF PRE-ARRAIGNMENT, note 76, *supra*, at § 240.2(a), providing in part:

> (2) *Required Warning to Persons in Custody or Under Arrest.* Before undertaking a search, . . . an officer present shall inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.

See generally JUSTICE STANDARDS, note 8, *supra*, at 67-68; Note, *Preadjudicating Confessions and Consent Searches: Placing the Juvenile on the Same Constitutional Footing as an Adult*, 57 B.U.L. REV. 778, 790-91 (1977) [hereinafter cited as *Consent Searches*]. *See also* the separate dissenting opinions of Justices Douglas, Brennan, and Marshall, in Schneckloth v. Bustamonte, 412 U.S. 218, 275, 276, 277 (1973). Mr. Justice Douglas stated that mere "verbal assent" was insignificant, inferring that an indication of knowledge of a right to refuse consent was necessary. *Id.* at 275. Mr. Justice Brennan also inferred that knowledge of a right to refuse consent was necessary, arguing that the majority's holding would permit a person to waive a constitutional right despite the fact that he might be unaware of its existence. *Id.* at 277. Mr. Justice Marshall felt that knowledge of a right to refuse consent was an indispensable element in a valid consent search. *Id.* at 285. He noted that such knowledge could be demonstrated by the defendant's responses at the time of the search such as a prior refusal of consent or by a showing of "prior experience of training" of the defendant indicating the awareness of this right. *Id.* at 286. Although he recognized these methods of demonstrating knowledge of the defendant, he stated that the prosecution's burden of showing knowledge would disappear if the police informed defendant of his rights at the time of the search. *Id.*

It did not take New Jersey long to see the reason of these dissents, for in State v. Johnson, 68 N.J. 349, 346 A. 2d 66 (1975), its court concluded that: "[u]nless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request [for consent], his assenting . . . is not meaningful." *Id.* at 354-55, 346 A.2d at 68. *See also* note 66 *supra*.

83. *See* CODE OF PRE-ARRAIGNMENT, note 76 *supra*, at § 240.2(3), providing in pertinent part:

> (3) *Required Warning to Persons in Custody or Under Arrest.* If the individual whose consent is sought . . . is in custody or under arrest at the time such consent is offered or invited, such consent shall not justify a search and seizure . . . unless in addition to the warning required by subsection (2) [*id* note 55], such individual has been informed that he has a right to consult an attorney, either retained or

With regard to the latter, frequently the atmosphere of a police station is more intimidating than that of a public street;[84] thus providing for the assistance of counsel in making the consent decision at a police station is mandated. The former recommendation, of informing juveniles of their right to refuse consent, alleviates the compulsion to cooperate, which was part of the reasoning applied in *Miranda v. Arizona*.[85] The Court stated in *Miranda* that the warning of the right to remain silent "is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[86] The recommendation to provide for counsel serves a similar function in connection with consent searches.

Moreover, these recommendations serve to eliminate the arbitrariness and subjective inquiries inherent in determining the voluntariness of a consent from the "totality of the circumstances." By utilizing these recommendations, an objective determination of voluntariness is more easily made, resulting in clearer guidelines for police and less arbitrary decision making. Additionally, according to the hypothesis of *In re Gault*[87] that procedural fairness increases the prospects of rehabilitation, adoption of these requirements should help decrease the number of repeating offenders. Consequently, the effectiveness of police in combatting juvenile crime should be enhanced.

But even if these recommendations are not given constitutional status in the federal courts, they should be adopted legislatively[88] or constitutionally in state courts as a matter of public policy.[89]

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appointed, and to communicate with relatives or friends, before deciding whether to grant or withhold consent.

See generally, JUSTICE STANDARDS, note 8 *supra*, at 67-68; *Consent Searches, supra* note 82, at 791-92; Note, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149 (1968); Note, *Waiver of Constitutional Rights of Minors: A Question of Law or Fact*, 19 HASTINGS L.J. 223 (1967).

84. Schneckloth v. Bustamonte, 412 U.S. 218, 247 (1973).

85. 384 U.S. 436 (1966).

86. *Id.* at 468.

87. 387 U.S. 1, 26 (1967).

88. *Consent Searches*, note 82, *supra* at 779, advocates that legislatures enact these requirements now rather than waiting for judicial action so as to insure that juveniles receive full protection immediately.

89. If the state court can base its ruling on the State constitution, Supreme Court review will be effectively precluded because the Supreme Court will not review a decision resting on adequate state grounds. At the close of his opinion for the Court in Cooper v. California, 386 U.S. 58 (1967), Mr. Justice Black indicated that a state may impose higher standards on searches and seizures than the federal constitution requires. *Id.* at 62; *accord*, Oregon v. Hass, 420 U.S. 714, 719 (1975). Recently, a few state courts have reconsidered their own constitutions in order to afford greater protection of individual rights, and impose stricter restraints on law enforcement officers. *See, e.g.*, State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975), holding that an essential element of a voluntary consent is the knowledge of the right to refuse consent. *Id.* at 354-55, 346 A.2d at 68.

Furthermore, it should be noted that even if there is a resulting hinderance in law enforcement, the recommendations are not unreasonable. The Fourth Amendment itself was designed to hinder unfettered invasions of privacy by the state.[90] Juvenile consent searches conducted without a warrant and without adequate safeguards provide the kind of invasion most intrusive and most subject to abuse. When the result of permitting such an invasion is to forfeit effectively the juvenile's constitutional rights, the possible hinderance to police investigation by the safeguards proposed here are not only justified, but mandated.

B. Parental Consent

1. Parental Waiver of Juvenile Rights

The recognition of parental authority is as old as reported history. Both law and society have continued to recognize parental authority over the activities of a child living in the family home. Most courts have extrapolated on the parent-child relationship to conclude that a parent may waive the rights of a child to allow a warrantless search of the "child's room, closet, bureau or other area of the family home used by him."[91] This, of course, would partially nullify the personal protection of the Fourth Amend-

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Hawaii, California, and Pennsylvania have all circumvented the Supreme Court's interpretation of the Fifth Amendment which permits use of *Miranda* violations for impeachment purposes, by interpreting similar worded clauses in their respective state constitutions. State v. Santiago, 53 Haw. 254, 292 P.2d 657 (1971); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975). Hawaii and California have both circumvented Supreme Court interpretations of the Fourth Amendment which permits a full custodial search after arrest for a minor traffic violation, by using similarly worded clauses in their state constitutions. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 19 Cal. Rptr. 315 (1975). Michigan has circumvented Supreme Court interpretation of the Fourth Amendment which permits warrantless consensual electronic surveillance by basing its decision on similar language in the state constitution. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), *cert. denied*, 423 U.S. 878 (1975).

For discussion and commentary on the recent use of state constitutions to accord greater protection of individual rights see Falk, *The State Constitution: A More Than "Adequate" Non-Federal Ground*, 61 CALIF. L. REV. 273 (1973); Comment, *Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window*, 8 LOYOLA U.L.J. 186 (1976); Note, *Commonwealth v. Richman: A State's Requirements*, 13 DUO. L. REV. 577 (1975); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

90. United States v. Matlock, 415 U.S. 164, 180 n.1 (1974) (Douglas, J., dissenting).

91. NUTSHELL, note 11 *supra*, at 102-03. *See also Searches and Seizures*, note 36

ment. It is, therefore, necessary to examine the bases which justify the limitations of this constitutional guarantee.

The majority of parental consent cases[92] have held that, despite the fact that the juvenile did not personally consent to the search of his room in the family home, evidence against him is rendered admissible if his parent had validly[93] consented to a search of the room. His parents can literally release incriminating evidence to the police who would, except for the parental permission, be violating his constitutional rights by searching without a warrant.

In *State v. Kinderman*,[94] the court held that the father of a twenty-two year old male, who was living in the father's house, could by freely and willingly giving his consent to search the entire house, make any search of that house reasonable.[95] The court agreed that the child had a constitutional right against unlawful searches and seizures and asserted "if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house."[96] Consequently, the child's protection was to be viewed "in light of the father's right to waive it."[97]

More enlightened courts, however, have rejected the concept of

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supra, at 30-31; JUSTICE STANDARDS, note 8 *supra*, at 68; Wefin & Miles, note 45 *supra*, at 267-68.

92. *See* People v. Mortimer, 46 App. Div. 405, 361 N.Y.S.2d 955 (1974). Sorenson v. State, 478 S.W.2d 532 (Tex. Crim. App. 1972); State v. Scholt, 289 Minn. 175, 192 N.W.2d 878 (1971); People v. Daniels, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971); Vandenburg v. Superior Court, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970); Rivers v. State, 266 So. 2d 337 (S. Ct. Fla. 1969); People v. Thomas, 120 Ill. App. 2d 219, 256 N.E.2d 870 (1969); State v. Vidor, 75 Wash. 2d 607, 452 P.2d 961 (1969); Tolbert v. State, 224 Ga. 291, 161 S.E.2d 279 (1968); People v. Clark, 252 Cal. App. 2d 479, 60 Cal. Rptr. 569 (1967); Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965); State v. Kinderman, 271 Minn. 405, 136 N.W. 2d 577 (1965), *cert. denied*, 384 U.S. 909 (1965); McCray v. State, 236 Md. 9, 202 A.2d 320 (1964); Ress v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), *cert. denied*, 372 U.S. 964 (1963). *See also* Annot., 31 A.L.R.2d 1078 (1953 & Supp. 1978).

93. To be valid, consent must be freely and voluntarily given. *See* notes 48-67 *supra* and accompanying text.

94. 271 Minn. 405, 136 N.W. 2d 577 (1965), *cert. denied*, 384 U.S. 909 (1965).

95. *Id.* at 412, 136 N.W.2d at 582.

96. *Id.* at 409, 136 N.W.2d at 580.

97. *Id.* It should be noted that Justice Otis, who dissented in *Kinderman*, pointed out that the youth involved was not a juvenile and that the mere fact that a son lived with his parents should not have resulted in a loss of constitutional rights. More specifically he stated:

> I find nothing in such parent-child relationship from which implied consent to a search and seizure of the kind here may be inferred. With or without the payment of rent, I submit the Constitution requires that defendant's privacy be respected and that his clothing located in living quarters exclusively occupied by him to be insulated from intrusion without a warrant. . . .

Id. at 418, 136 N.W.2d at 585.

parental consent as an effective waiver of a juvenile's Fourth Amendment rights. In *People v. Flowers*,[98] the father of a seventeen year old boy,[99] living at home, attending school, and being supported by his parents, consented to a warrantless search of his son's room. The court specifically rejected the state's position that the combined right of control of the premises by the parent and his right of control over his son, permitted the waiver of the son's privilege against unreasonable searches and seizures.[100] The court observed:

> Michigan cases have held that an attorney cannot waive the search privilege of his client. . . . Nor can a defendant's grandmother who owned the premises where the defendant resided. . . . *To these, we now add, a parent who has no personal or punishable involvement in a crime suspected or charged.*[101]

Interestingly, the court in *Flowers* cited *Kinderman* and specifically refused to adopt the *Kinderman* holding despite the similar facts of both cases.[102]

In *Reeves v. Warden, Maryland Penitentiary*,[103] the defendant was living with his mother when police officers requested and were given permission by the mother to search her son's room. The court held the consent invalid, although the defendant's mother often entered his room to put his laundry away in a bureau, because "the room in question and the bureau in it [were] set aside exclusively for [defendant's] regular use."[104]

As *Flowers* and *Reeves* indicate, the concept of parental authority to consent should not be permitted to circumvent a juvenile's

98. 23 Mich. App. 523, 179 N.W.2d 56 (1970).

99. He was arraigned as an adult.

100. 23 Mich. App. at 526, 179 N.W.2d at 58.

101. *Id.* (emphasis added).

102. *Id.* The court enunciated that "[*Kinderman*] fail[s] to separate the constitutional rights of the son, who is the real and only defendant." *Id.* The court premised its decision on Stoner v. California, 376 U.S. 483 (1964) (a hotel clerk consented to a search of defendant's room while the latter was held in custody). In *Stoner*, the Court held, *inter alia*, that a personal waiver of one's right to privacy was imperative. The Court reasoned that one's fourth amendment rights were not to be "eroded by strained applications of agency or by unrealistic doctrines of apparent authority." *Id.* at 488. Furthermore, it reasoned that "it was the [defendant's] constitutional right which was at stake . . . not the hotel's. *It was a right, therefore, which only the [defendant] could waive* . . . ." *Id.* at 489 (emphasis added).

103. 346 F.2d 915 (4th Cir. 1965).

104. *Id.* at 924-25. *See also* Shorey v. Warden, 401 F.2d 474, 478 (4th Cir. 1968), *cert. denied*, 393 U.S. 915 (1968), where the court recognized, also, that a room or area can be set aside exclusively for an individual's use even though another person has access to that room or area for a limited purpose.

fourth amendment rights to object to unreasonable searches and seizures.

2. The Juvenile's Right of Privacy

In *People v. Nunn*,[105] a nineteen year old defendant's room had been searched with the consent of his mother. About ten days before the search, the defendant had moved out of the house, locked the door of his room, and had instructed his mother not to allow anyone to enter. Police subsequently used their own pass key to enter, after receipt of the mother's written consent.[106] The court, relying principally on *Katz v. United States*,[107] held that the defendant had a reasonable expectation of privacy and that this reasonable expectation was afforded protection by the rights granted in the Fourth Amendment.[108] The court adopted and applied the "expectation of privacy" doctrine and found that the mother did not have authority to consent to the search of her son's room.[109]

Subsequent to *Nunn*, the Supreme Court rendered its decision in *United States v. Matlock*.[110] In *Matlock*, a woman who shared a bedroom with the defendant gave police permission to search the room. Police found evidence, later introduced at defendant's trial, in a diaper bag in the only closet in the room. The court, in refusing to invalidate the search, held that authority to consent to the search of a place turns on "mutual use of the property by persons generally having joint access or control for most purposes."[111] An earlier case rejected the notion that authority to consent to a search rested on subtle distinctions developed and refined by the common law in evolving the body of property law which, more than almost any other branch of law, has been shaped by distinctions largely historical.[112]

In *People v. Stacy*,[113] the Illinois court in synthesizing *Matlock* and *Nunn*,[114] recognized that the *Nunn* requirement that "the

105. 55 Ill. 2d 344, 304 N.E.2d 81 (1973), *cert denied*, 416 U.S. 904 (1974).
106. *Id.* at 348, 304 N.E.2d at 83.
107. 389 U.S. 347 (1967).
108. *Id.* at 351.
109. 55 Ill. 2d at 351, 304 N.E.2d at 87. The court stated that the mother had set the room aside for the son's exclusive use, subject only to her housekeeping activities and her care of his personal effects. *Id.* at 348, 304 N.E.2d at 83.
110. 415 U.S. 164 (1974).
111. *Id.* at 171.
112. Jones v. United States, 372 U.S. 256, 267 (1960).
113. 58 Ill. 2d 83, 317 N.E.2d 24 (1974).
114. The court stated that:

> Although *Matlock* did not adopt the 'expectation of privacy' test of *Nunn*, the results in the two cases are not inconsistent. If one has consented to the 'mutual use of the property by persons generally having joint access

person searched must have an actual expectation of privacy, and this expectation must be reasonable,"[115] is merely the converse of the *Matlock* expression that no right of privacy exists where it is "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right."[116] Nonetheless, the *Stacy* court went on to deemphasize the subjective "expectation of privacy" test, stating that it is "irrelevant" and that "the validity of the search . . . is to be judged by the more objective 'common authority' test of *Matlock*."[117]

A further extension of the *Stacy* analysis is indicated in *In Interest of Salyer*,[118] where a fifteen year old boy's room was searched without a search warrant but with consent of his mother. The court upheld the search even though the juvenile kept his room locked and prevented his mother from entering it except on infrequent occasions.[119] The court reasoned that parental consent to search a juvenile's room is implicit in the rights and duties imposed on parents by law.[120] Furthermore, the court pointed out that it would be absurd to "say that a mother with a child of 10 or 11 or 12 or 13 or 14 or 15 has no authority over the room occupied by her child in her home."[121] The court then advocated that the standard adopted by the Illinois legislature "in declaring that a child of 18 is of age,"[122] be utilized as the line of demarcation for parental consent to search and seize personal items in a child's room.

> or control for most purposes, so that it is reasonable to recognize that any of the co-habitants 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,' these facts would indicate that the co-occupant has likewise surrendered his expectation of privacy in the property.

Id. at 88-89, 317 N.E.2d at 27 (citations omitted).

115. 55 Ill. 2d at 348, 304 N.E.2d 84.

116. 415 U.S. at 171 n.7.

117. 58 Ill. 2d at 88-89, 317 N.E.3d at 27.

118. 44 Ill. App. 854, 358 N.E.2d 1333 (1977).

119. *Id.* at 855, 857, 358 N.E.2d at 1334-35, 1337.

120. *Id.* at 856, 358 N.E.2d at 1336. The court also distinguished *Nunn* on its facts. In the instant case, the juvenile had, since he was ten years of age, been the sole occupant of the room, and some similar conduct and arrangements had been involved. Also, the court "noted as a distinctive element, that unlike the *Nunn* case, there was no showing of any instruction to the mother to let no one else come into the room." *Id. But see* note 100 *supra*, and accompanying text.

121. *Id.* at 857, 358 N.E.2d at 1337.

122. *Id.* Under ILL. REV. STAT. ch. 3 §§ 131, 132 (1975), persons under the age of eighteen are considered minors and parents generally are entitled to custody of the person of their minor children.

To accept such an approach would again provide the juvenile with the "worst of both worlds."[123] Whether or not society approves of unrestricted parental authority should not be dispositive of a juvenile's Fourth Amendment rights in objecting to unreasonable searches and seizures. Likewise, to premise such an argument on the parent's control and access over *most* portions of the premises[124] is to deflect the real issue. The fourth amendment defines a juvenile's rights and *only* he should be allowed to waive them.[125]

Moreover, to sanction parental waiver of juvenile rights engenders the deterioration and debasement of the trust and confidence on which the familial relationship is premised. The end result is the frustration of the juvenile court philosophy of creating a perception of fairness[126] and the thwarting of the juvenile's prospects for rehabilitation.

IV. CONCLUSION

The major consequence of *Kent v. United States*[127] and *In re Gault*[128] has been the judicial and social philosophy that

123. *See* note 15, *supra* and accompanying text.

124. Under *United States v. Matlock*, 415 U.S. 164 (1974), third party consents are measured by the relationship of the consenting party *to the place* searched, and not his relationship to the ultimate defendant. *See* Matthews, *Third-Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U.L. REV. 29, 32-33 (1976). While one may enjoy actual control or access over most portions of a house, he may not consent to a search of areas which are in actuality held privately by the defendant. *See* Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 344 (1968). For example, consent by a homeowner to search the room occupied by his brother-in-law, a casual guest, was held valid, but consent to search his personal effects located in that room was not since the evidence indicated no right of access *or* actual access to it. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (1973). Thus, if X and Y share an apartment, but each maintains a separate bedroom kept private from the other, X may consent to a search of his bedroom and the common living quarters, but not to Y's bedroom.

125. The Supreme Court stated in Katz v. United States, 389 U.S. 347 (1967), that ". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. Accordingly, it is unreasonable to conclude that the employee's desk in United States v. Blok, 188 F. 2d 1019 (D.C. Cir. 1951), was more exclusive to defendant than a juvenile's bedroom. The employee occupied the desk for only a limited period of time each day. A juvenile may live in his parent's home for an indefinite period of time and would consider these premises his own within the meaning of protected privacy. Therefore, the Fourth Amendment requires that a juvenile's privacy be respected and that his personal effects located in his bedroom exclusively occupied by him be insulated from intrusion without a warrant unless personally waived by him.

126. *See* text accompanying note 86 *supra*.

127. 383 U.S. 541 (1966).

128. 387 U.S. 1 (1967).

juveniles are not to be punished but rather rehabilitated through the use of special procedures.[129] The Supreme Court has indicated that a juvenile's prospects for rehabilitation are greatest when he perceives his treatment fair.[130] The recommendations herein promote such perceptions. By taking time to locate a juvenile's parent or guardian, a police officer would impress upon the juvenile the integrity of the court process. Further, in receiving notification of the right to refuse consent and the right to counsel during a custodial search, a juvenile would learn that compulsion has no role in the juvenile justice system.[131] Additionally, the touchstone of the Fourth Amendment is that it protects reasonable expectations of privacy of the individual and not simply places against unreasonable searches and seizures.[132] Such constitutional safeguards should only be waived by the juvenile himself not his parents, and then, only when guided by the safeguards suggested in this commentary. These recommendations would implement the juvenile court philosophy that rehabilitation begins with a perception of fair judicial procedures.

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129. *Id.* at 15-16.
130. *Id.* at 36.
131. *See* State v. Shaw, 93 Ariz. 40, 47, 378 P.2d 487, 491 (1963), where the court stated: "The need for special treatment begins at the instant the juvenile is contacted by peace officers. . . ."
132. Katz v. United States, 389 U.S. 347, 351 (1967).