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Fourth Amendment Protection for the Juvenile Offender: State, Parent, and the Best Interests of the Minor

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FOURTH AMENDMENT PROTECTION FOR THE JUVENILE OFFENDER: STATE, PARENT, AND THE BEST INTERESTS OF THE MINOR

INTRODUCTION

The fourth amendment[1] "protects people from unreasonable government intrusions into their legitimate expectations of privacy."[2] It requires that a warrant be obtained[3] before the government conducts a search.[4] Evidence obtained from an illegal search is excluded at trial.[5]

Although courts have recognized that minors have fourth amendment protection in criminal proceedings[6] and a privacy interest in general,[7] the scope of a minor's right to fourth amendment protection in a juvenile court setting is unclear. The Supreme Court has refused

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1. The fourth amendment of the United States Constitution provides that "[t]he 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." U.S. Const. amend. IV. The fourth amendment is applicable to the states through the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961).

2. United States v. Chadwick, 433 U.S. 1, 7 (1977); *accord*, Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. White, 401 U.S. 745, 752 (1971); Katz v. United States, 389 U.S. 347, 351-53 (1967). To be able to assert a fourth amendment violation, an individual must establish that he has both a subjective expectation of privacy and a privacy interest recognized by society. Rakas v. Illinois, 439 U.S. at 143 n.12.

3. *E.g.*, Arkansas v. Sanders, 442 U.S. 753, 758 (1979); Mincey v. Arizona, 437 U.S. 385, 390 (1978); United States v. Chadwick, 433 U.S. 1, 9-10 (1977); United States v. United States District Court, 407 U.S. 297, 317 (1972); Katz v. United States, 389 U.S. 347, 357 (1967); Agnello v. United States, 269 U.S. 20, 30 (1925).

4. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921). The fourth amendment does not apply to searches and seizures by private individuals unless the individual conducting the search, "in light of all the circumstances of the case, [can] be regarded as having acted as an . . . agent of the state." Coolidge v. New Hampshire, 403 U.S. at 487.

5. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Originally, the Court implied that the rule was to be applied whenever a fourth amendment violation occurred. *Id.* at 657. During the 1970's, however, growing dissatisfaction with the rule resulted in the Court's refusal to apply it retroactively, United States v. Peltier, 422 U.S. 531, 538-39 (1975), and in a grand jury proceeding. United States v. Calandra, 414 U.S. 338, 350 (1974). *See generally* Rakas v. Illinois, 439 U.S. 128, 137 (1978) ("Each time the exclusionary rule is applied . . . [r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."). For a discussion of other remedies available to redress an illegal search or seizure, see Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 25-28 (1975).

6. Davis v. Mississippi, 394 U.S. 721, 723-25 (1969).

7. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (privacy interest entitles minor to the right to use contraceptives); Planned Parenthood v. Dan-

to consider whether alleged juvenile offenders are entitled to fourth amendment protection.[8] States that have recognized fourth amendment rights have limited both the class of juvenile offender protected[9] and the scope of protection itself.[10] Furthermore, state courts have not sufficiently explained the reasons for granting alleged juvenile offenders fourth amendment protection, thereby leaving the subject open to debate.

Part I of this Note argues that minors in a juvenile court setting are entitled to full fourth amendment protection against unreasonable searches and seizures. An analysis of the Court's recent criticisms of the juvenile justice system and its grants of certain due process protections to alleged juvenile offenders reveals that the earlier reasons for denying minors fourth amendment protection are no longer valid. To grant minors fourth amendment protection, however, and also allow a parent an unfettered right to consent to the search of the child's room or belongings, as some state courts have done, is to provide the child with no more than illusory protection. Part II of this Note argues that a parent's right to control his child should not take precedence over the child's right to privacy because parental consent is not in the best interests of the minor. A parent, therefore, should be held to the same limitations that apply in normal, fourth amendment third party consent situations.

I. The Scope of the Minor's Fourth Amendment Protection

A. *The Origins of the Juvenile Justice System*

Until the turn of the century, juveniles accused of criminal acts were subject to criminal court jurisdiction and were incarcerated in

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forth, 428 U.S. 52, 75 (1976) (privacy interest entitles minor to the right to an abortion).

8. W. v. California, 101 S. Ct. 622 (1980), *denying cert. to In re* David W., 103 Cal. App. 3d 469, 163 Cal. Rptr. 87 (1980). In dissenting to the Court's denial of certiorari, Justice Marshall stated that "[t]he Court has never previously considered the scope of Fourth Amendment protections when asserted by a minor." *Id.* at 624. (Marshall, J., dissenting).

9. States have not extended fourth amendment protection to juveniles who have engaged in noncriminal misbehavior. *E.g.*, State v. Lowry, 95 N.J. Super. 307, 317, 230 A.2d 907, 912 (Super. Ct. Law Div. 1967); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (C.P. 1971); N.M. Stat. Ann. §§ 32-1-27(c)(2) (1978); N.D. Cent. Code § 27-20-27(2) (1974); Tenn. Code Ann. § 37-227(b) (1977); Vt. Stat. Ann. tit. 33, § 652 (Cum. Supp. 1980).

10. Some courts have permitted a search based on a lower standard of reasonableness than would be applied if an adult were searched. *E.g.*, L.L. v. Circuit Court, 90 Wis. 2d 585, 592, 280 N.W.2d 343, 347 (1979); *see, e.g.*, Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct. App. 1975); People v. Scott D., 34 N.Y.2d

facilities with adult offenders.[11] This practice was criticized, however, because juveniles were being schooled in crime by hardened adult prisoners.[12] In response, state legislatures created the juvenile justice system[13] to eliminate the criminalizing effect of adult prisons upon minors by providing for the separate treatment of child offenders.[14]

The system was created not to punish, but to benefit minors by helping them develop into well-adjusted, law abiding adult citizens.[15] In exercising the *parens patriae* power through the juvenile justice system, the state was permitted to intervene between the

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483, 488-89, 315 N.E.2d 466, 469-70, 358 N.Y.S.2d 403, 408 (1974). One court has held that a minor has fourth amendment protection, but may not invoke the exclusionary rule. State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975).

11. M. Hyde, Juvenile Justice And Injustice 8-12 (1977); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909).

12. *In re* Gault, 387 U.S. 1, 15 (1967); Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 198 (1905); Mack, *supra* note 11, at 107; Note, *State Responses to Extreme Cases: Jurisdictional Statutes and Status Offenders*, 1979 N.Y.U. Ann. Survey Am. L. 95, 96 [hereinafter cited as *Jurisdictional Statutes*].

13. The juvenile justice system has its origins in early English law. In the United States, the system can be traced to the New York House of Refuge. V. Streib, Juvenile Justice in America 5-6 (1978). Illinois was the first state to enact juvenile justice legislation. *Id.* The Illinois statute was the "prototype for succeeding juvenile court acts." Note, *The Juvenile Justice Standards Project: Noncriminal Juvenile Misbehavior*, 1977 N.Y.U. Ann. Survey Am. L. 737, 739 [hereinafter cited as *Juvenile Misbehavior*] (footnote omitted). By 1925, all but two states had passed juvenile justice legislation. V. Streib, *supra*, at 6. As of 1967, a juvenile justice system existed in every state of the union. *In re* Gault, 387 U.S. 1, 14 (1967). For a discussion of the history of the juvenile justice system, see L. Cole, Our Children's Keepers xvi-xxii (1972); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *supra* note 11, at 107; *Jurisdictional Statutes*, *supra* note 12, at 95-98.

14. The juvenile justice system, as it was originally intended to function, can be divided into three phases: pre-adjudicative analysis, adjudication, and post-adjudicative treatment. The first phase is initiated when a juvenile who has allegedly committed an offense is arrested and placed in a juvenile detention center. V. Streib, *supra* note 13, at 22-34. The staff at the detention center examines the minor's background to determine the child's problems and needs. This information is given to the youth's probation officer and to the juvenile court judge. K. Wooden, Weeping in the Playtime of Others 98 (1976). In the adjudicative phase, the minor goes before the juvenile court judge. A hearing is held to determine whether the child has committed the alleged offense and what treatment is in the child's best interests. V. Streib, *supra* note 13, at 34-43. Post-adjudicative treatment consists of either probation or institutionalization. *Id.* at 43-50.

15. Breed v. Jones, 421 U.S. 519, 528-29 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 & n.5 (1971); *In re* Winship, 397 U.S. 358, 365 (1970); *In re* Gault, 387 U.S. 1, 15-16 (1967); Kent v. United States, 383 U.S. 541, 554 (1966); *Ex parte* Sharp, 15 Idaho 120, 129, 96 P. 563, 564 (1908); Commonwealth v. Fisher, 213 Pa. 48, 55-56, 62 A. 198, 200-01 (1905); Mill v. Brown, 31 Utah 473, 479, 88 P. 609, 613 (1907); Mack, *supra* note 11, at 107, 117, 120; *Jurisdictional Statutes*, *supra* note 12, at 96.

parent and children to save them from future lives of crime.[16] As a result, juvenile court jurisdiction included children who were in need of supervision, as well as minors accused of criminal acts.[17]

To further the system's rehabilitative ends, juvenile court proceedings were intended to be nonadversarial[18] and civil in nature.[19] State and child were to cooperate with the judge in determining whether the minor had committed the alleged offense and in establishing the treatment that would be most effective in remedying the problem.[20] Most importantly, even though a minor faced possible incarceration, such confinement was not considered a deprivation of liberty[21] because it was supposedly in the child's best interests.[22] Accordingly,

16. *In re* Gault, 387 U.S. 1, 16-17 (1967); Kent v. United States, 383 U.S. 541, 554-55 (1966). In *Ex parte* Sharp, 15 Idaho 120, 96 P. 563 (1908), the court stated that "[i]t is the paternal and benevolent hand of the state reaching out as parens patriae to take hold of the child during its minority for the purposes of fostering, protecting, and educating the child. . . . [T]his power and duty and obligation is exercised on the part of the state only in cases where the child is destitute of that care and protection to which [he] is entitled." *Id.* at 130, 96 P. at 565; *accord*, Commonwealth v. Fisher, 213 Pa. 48, 52-53, 62 A. 198, 200 (1905); Mill v. Brown, 31 Utah 473, 479, 88 P. 609, 613 (1907); *see* K. Wooden, *supra* note 14, at 23-25; Mack, *supra* note 11, at 109.

17. *Juvenile Misbehavior*, *supra* note 13, at 739-40. Originally, the term "delinquent" referred to both children who had committed an act that would constitute a crime if committed by an adult and to children who had engaged in noncriminal misbehavior. *See* Mack, *supra* note 11, at 107; Comment, *"Delinquent Child": A Legal Term Without Meaning*, 21 Baylor L. Rev. 352, 357-60 (1969). In recent years, a majority of states have created separate statutory classifications for status offenders, juveniles who have engaged in noncriminal misbehavior. *See* note 81 *infra*. In these states, "delinquent" refers only to minors who have engaged in acts which, if committed by an adult, would constitute a crime. *Id.* Examples of "status crimes are truancy, disobedience, incorrigibility, and sexual misconduct." *Juvenile Misbehavior*, *supra* note 13, at 738 n.12.

18. *In re* Gault, 387 U.S. 1, 16 (1967); Kent v. United States, 383 U.S. 541, 555 (1966); V. Streib, *supra* note 13, at 13; *see, e.g.*, *Ex parte* Sharp, 15 Idaho 120, 124, 96 P. 563, 564-65 (1908); Commonwealth v. Fisher, 213 Pa. 48, 52-53, 62 A. 198, 200 (1905).

19. Breed v. Jones, 421 U.S. 519, 529 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 541, 550-51 (1971); *In re* Winship, 397 U.S. 358, 365 (1970); *In re* Gault, 387 U.S. 1, 17 (1967); Kent v. United States, 383 U.S. 541, 554 (1966); *Ex parte* Sharp, 15 Idaho 120, 129, 96 P. 563, 564 (1908); Commonwealth v. Fisher, 213 Pa. 48, 53-54, 62 A. 198, 200 (1905). *See generally* V. Streib, *supra* note 13, at 13; Mack, *supra* note 11, at 109-10; *Jurisdictional Statutes*, *supra* note 12, at 97-98.

20. *See* Mack, *supra* note 11, at 120.

21. *In re* Gault, 387 U.S. 1, 17 (1967). The Court stated that "a child, unlike an adult, has a right 'not to liberty but to custody.' . . . If his parents default in effectively performing their custodial functions . . . the state may intervene. In doing so, it does not deprive the child of any rights . . . ." *Id.*; *accord*, *Ex parte* Sharp, 15 Idaho 120, 129, 96 P. 563, 564 (1908); Commonwealth v. Fisher, 213 Pa. 48, 56, 62 A. 198, 201 (1905); Mill v. Brown, 31 Utah 473, 480, 88 P. 609, 613 (1907); *see* Mack, *supra* note 11, at 109-10; *Jurisdictional Statutes*, *supra* note 12, at 97.

22. *In re* Gault, 387 U.S. 1, 15-16 (1967); *Ex parte* Sharp, 15 Idaho 120, 129, 96 P. 563, 564 (1908); Commonwealth v. Fisher, 213 Pa. 48, 50-53, 62 A. 198, 200 (1905); Mill v. Brown, 31 Utah 473, 479, 88 P. 609, 613 (1907).

due process protections afforded in criminal proceedings were not available in a juvenile court setting.[23]

B. *The Minor's Right to Some Protection Within the Juvenile Justice System*

1. The Court's Expansion of Due Process Protections

After sixty years of little change,[24] the Supreme Court in *In re Gault*[25] declared that a juvenile offender who faces possible incarceration is deprived of liberty and thus entitled to some due process protection.[26] The Court extended to juvenile offenders the privilege against self-incrimination,[27] the right to counsel,[28] the right to notice,[29] and the right to confront and cross-examine witnesses.[30] In subsequent cases, the protection against double jeopardy[31] and the standard of proof beyond a reasonable doubt[32] were also applied to the juvenile court proceeding.

In granting minors many due process protections, the Court in *Gault* acknowledged that the juvenile justice system had failed to rehabilitate the children placed under its control.[33] It nevertheless

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23. *In re* Gault, 387 U.S. 1, 17 (1967); Kent v. United States, 383 U.S. 541, 554 (1966).

24. The first criticism of the juvenile justice system occurred in Kent v. United States, 383 U.S. 541 (1966). The Court stated that "studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults," *id.* at 555 (footnote omitted), and that "[t]here is evidence . . . that . . . the child receives the worst of both worlds." *Id.* at 556.

25. 387 U.S. 1 (1967).

26. *Id.* at 24-28, 41. The Court held that the minor's potential "commitment to an institution" deprives him of liberty. *Id.* at 41. It also concluded that the stigma attached to being adjudged "delinquent," coupled with the adverse effect such labeling has on future employment, infringed upon the child's liberty interests. *Id.* at 24-25. With each grant of a due process right, the Court emphasized the potential deprivation of the minor's liberty interest. *Id.* at 34, 41. The Court's definition of liberty has been reaffirmed in subsequent cases. Personal liberty encompasses both the right to be free from physical restraint and the protection of reputation. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975); Board of Regents v. Roth, 408 U.S. 564, 572-73 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *But see* Paul v. Davis, 424 U.S. 693, 701 (1976) (reputation alone is not a sufficient liberty interest).

27. 387 U.S. at 55.

28. *Id.* at 41.

29. *Id.* at 33-34.

30. *Id.* at 57.

31. Breed v. Jones, 421 U.S. 519, 531 (1975).

32. *In re* Winship, 397 U.S. 358, 363-64 (1970).

33. 387 U.S. at 6, 17-18, 29-30. The Court's criticisms of the juvenile justice system were numerous. In attacking the theory of *parens patriae*, the Court described it as "murky" and stated that "its historic credentials are of dubious rele-

reaffirmed the validity of the system's rehabilitative model of justice.[34] Believing that such a system could potentially benefit the child,[35] the Court created the "fundamental fairness" standard for determining which constitutional protections should be made available to minors in a juvenile court setting.[36] Pursuant to this standard,

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vance." *Id.* at 16. The Court questioned the juvenile system's constitutional basis and attacked its practical success. *Id.* at 17-18. Additionally, the Court stated that juvenile offenders receive neither the care promised under the rehabilitative model nor the constitutional protections available in a criminal proceeding. *Id.* at 18-19. The Court explained that, without constitutional due process protections, Gerald Gault was adjudged delinquent and committed to a state training school for a period of six years. *Id.* at 7-8. By comparison, an adult charged with the same crime would have been entitled to all due process protections and would have faced a maximum punishment of a fifty dollar fine and two months in jail. *Id.* at 29. The Court concluded that "[s]o wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide. . . . 'The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.'" *Id.* at 29-30 (quoting Juvenile Delinquency—Its Prevention and Control 35 (Russell Sage Foundation, 1966)).

34. *Id.* at 22, 27. In criticizing the system, the Court was careful not "to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile [justice] system relating to offenders which are valuable." *Id.* at 22. The Court repeatedly emphasized its belief in the continued validity of the system, stating that the "unique benefit" juveniles obtain from the juvenile courts would not be impaired by constitutional due process protections. *Id.* Nor would due process standards "compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Id.* at 21 (footnote omitted). The Court concluded that "[w]hile due process requirements will, in some instances, introduce a degree of order and regularity . . ., nothing will require that the conception of the kindly juvenile judge be replaced." *Id.* at 27. Similarly, in subsequent cases the Court criticized the system but reaffirmed its validity. *See* Breed v. Jones, 421 U.S. 519, 529, 537, 539 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 545, 547 (1971); *In re* Winship, 397 U.S. 358, 366 (1970). In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court stated that "[s]o much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young." *Id.* at 547.

35. 387 U.S. at 21, 22, 26-27; *see* Breed v. Jones, 421 U.S. 519, 529, 537, 539 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 545, 547 (1971); *In re* Winship, 397 U.S. 358, 366 (1970).

36. 387 U.S. at 30-31. Justice Fortas, in delivering the opinion of the Court, did not use the term fundamental fairness. Rather, he referred to the "'essentials of due process and fair treatment'." *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)). Justice Harlan coined the phrase "fundamental fairness." He stated that there are "three criteria by which the procedural requirements of due process should be measured . . . . [F]irst, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve . . . the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections. . . . In this way, the Court may guarantee the

minors were given only those protections that would not have an adverse effect on the system's ability to rehabilitate the child.[37] The Court's continued belief in the system's potential to benefit the child, therefore, prevented it from granting minors all the due process protections available in an adult criminal court.[38]

2. State Courts and the Minor's Fourth Amendment Rights

Since the Court's landmark decision in *Gault*, many states have extended fourth amendment rights to a minor in a juvenile court set-

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fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime." *Id.* at 72 (Harlan, J., concurring in part, dissenting in part). This "fundamental fairness" standard was adopted by the Court in later decisions. Breed v. Jones, 421 U.S. 519, 531 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); *In re* Winship, 397 U.S. 358, 359 (1970).

37. *See* 387 U.S. at 21. Each grant of a right was accompanied by an analysis aimed at ensuring that such a grant would not have an adverse effect upon the juvenile justice system's rehabilitative goals. In granting the juvenile offender the right to notice, the Court concluded that the policy of "shielding the child from the public stigma of knowledge of his having been taken into custody" is not furthered by denying him the right to notice. *Id.* at 33. The right to counsel was viewed by the Court as furthering the goals of the juvenile system. *Id.* at 36-37. The privilege against self-incrimination was necessary to foster the child's trust in both family and state, thereby furthering the prospects of rehabilitation. *Id.* at 52. Without it, "the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished." *Id.* (footnote omitted). In subsequent cases, the Court has continued to employ this analysis in determining the rights applicable to juvenile offenders. In Breed v. Jones, 421 U.S. 519 (1975), the Court stated that the fact "[t]hat the system has fallen short of the high expectations of its sponsors in no way detracts from the broad social benefits sought," *id.* at 529, and that "courts should be reluctant to impose on the juvenile-court system any additional requirements which could so strain its resources as to endanger its unique functions." *Id.* at 537. The Court held that protection against double jeopardy in a juvenile court proceeding would not adversely affect the goals of the juvenile justice system. *Id.* at 537, 539. Rather, such a grant was viewed as aiding the objectives of the system. *Id.* at 540. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the withholding of the right to a jury trial was partially based on a fear that such a grant would have a negative effect on the juvenile court's rehabilitative goals. *Id.* at 545, 547, 550. The Court believed that "the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545. In *In re* Winship, 397 U.S. 358 (1970), the Court rejected "the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process." *Id.* at 366 (footnote omitted).

38. *See* 387 U.S. at 13, 30. The Court did not attempt to define the "totality of the relationship of the juvenile and the state." *Id.* at 13. The Court was careful to note that the juvenile court hearing need not "'conform with all of the requirements of a criminal trial.'" *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)); *accord,* McKeiver v. Pennsylvania, 403 U.S. 528, 533 (1971) (not "*all* rights

ting through legislation[39] or court decisions.[40] The states, however, have placed restrictions on the fourth amendment protection that has been granted. For example, only minors that have engaged in criminal conduct have been granted fourth amendment rights.[41] The protection available to a juvenile who has engaged in noncriminal misbehavior has not been defined.[42] Furthermore, full fourth amendment protection has not been provided. State courts have permitted invasions into the minor's privacy based on a standard of reasonableness lower than that required in situations involving an adult.[43] Most importantly, state courts have not even applied the "fundamental fairness" analysis to determine whether full fourth amendment protection will adversely affect the rehabilitive goals of the juvenile justice system. The Supreme Court's silence and the states inadequate treatment of a minor's fourth amendment rights has, therefore, created a need for determining what protection should be available to the child.

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constitutionally assured to an adult accused of crime . . . are . . . available to the juvenile in his delinquency proceeding").

39. *E.g.*, N.M. Stat. Ann. § 32-1-27 (1978); N.D. Cent. Code § 27-20-27(2) (1974); Tenn. Code Ann. § 37-227(b) (1977); Vt. Stat. Ann. tit. 33, § 652 (Cum. Supp. 1980).

40. *E.g.*, *In re* J.M.A., 542 P.2d 170, 173-76 (Alaska 1975); *In re* Scott K., 24 Cal. 3d 395, 402-03, 595 P.2d 105, 110, 155 Cal. Rptr. 671, 675, *cert. denied*, 444 U.S. 973 (1979); *In re* Marsh, 40 Ill. 2d 53, 57-58, 237 N.E.2d 529, 532 (1968); *In re* J.R.M., 487 S.W.2d 502, 511-12 (Mo. 1972) (en banc); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (C.P. 1971); *In re* Harvey, 222 Pa. Super. Ct. 222, 224, 295 A.2d 93, 95 (1972); Ciulla v. State, 434 S.W.2d 948, 950 (Tex. Civ. App. 1968); L.L. v. Circuit Court, 90 Wis. 2d 585, 592, 280 N.W.2d 343, 347 (1979); *see* State v. Lowry, 95 N.J. Super. 307, 313, 230 A.2d 907, 911 (Super. Ct. Law Div. 1967); *In re* Williams, 49 Misc. 2d 154, 166-70, 267 N.Y.S.2d 91, 106-10 (Fam. Ct. 1966).

41. State v. Lowry, 95 N.J. Super. 307, 317, 230 A.2d 907, 912 (Super. Ct. Law Div. 1967); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (1971); N.M. Stat. Ann. § 32-1-27(c)(2) (1978); N.D. Cent. Code § 27-20-27(2) (1974); Tenn. Code Ann. § 37-227(b) (1977); Vt. Stat. Ann. tit. 33, § 652 (Cum. Supp. 1980).

42. *E.g.*, State v. Lowry, 95 N.J. Super. 307, 317, 230 A.2d 907, 912 (Super. Ct. Law Div. 1967); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (1971); N.M. Stat. Ann. § 32-1-27(c)(2) (1978); N.D. Cent. Code § 27-20-27(2) (1974); Tenn. Code Ann. § 37-227(b) (1977); Vt. Stat. Ann. tit. 33, § 652 (Cum. Supp. 1980). In State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (Super. Ct. Law Div. 1967), the court stated that "what rights, procedures and rules are applicable to children of more tender years who have engaged in 'noncriminal' behavioral patterns, invites further research, analysis, discussion and promulgation of legislation . . . which would redefine rights of a juvenile and outline a procedure whereby they could be protected." *Id.* at 317, 230 A.2d at 912.

43. *E.g.*, L.L. v. Circuit Court, 90 Wis. 2d 585, 592-93, 280 N.W.2d 343, 347 (1979); *see, e.g.*, Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct. App. 1975); People v. Scott D., 34 N.Y.2d 483, 488-89, 315 N.E.2d 466, 469-70, 358 N.Y.S.2d 403, 406 (1974).

C. *The Minor's Right to Full Fourth Amendment Protection*

1. The Fundamental Fairness Analysis

The application of the Court's "fundamental fairness" standard establishes that a grant of fourth amendment protection will not have an adverse effect on the juvenile justice system's attempts to benefit the child. In *McKeiver v. Pennsylvania*,[44] the Court held that the grant of the right to a jury trial would have a negative effect on the system's ability to rehabilitate[45] because the presence of the jury would transform the juvenile proceeding into an adversary one.[46] Instead of cooperating with the judge, the state and child would be competing for the attention and sympathy of the jury, thereby destroying the intimate, protective atmosphere that the juvenile court judge requires in determining the treatment best suited to the minor's correctional needs.[47] The grant of full fourth amendment protection, however, does not carry with it the same effect as the physical presence of jurors in a room.

The grant of fourth amendment rights is best analogized to granting minors the privilege against self-incrimination. Protection against illegal searches and seizures, like the protection against self-incrimination, results in the exclusion of information that could possibly aid the judge in his attempts to treat the minor.[48] Despite this effect, the Court in *Gault* granted minors in a juvenile court setting the privilege against self-incrimination.[49] The Court concluded that withholding this privilege would result in greater harm to the system's goals than granting it.[50] A minor who is induced to confess and then disciplined is likely to believe that he has been betrayed.[51] Thereafter, he will react adversely to his treatment and be uncooperative, making chances for rehabilitation slim.[52] Similarly, a minor whose privacy has been invaded will feel that he has been unfairly treated.[53] The child will view with suspicion any further interaction with a system in which he has been previously mistreated. Without the minor's trust, it will become impossible for the juvenile system to

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44. 403 U.S. 528 (1971).
45. *Id.* at 545, 547, 550.
46. *Id.* at 545, 550.
47. *Id.* at 550.
48. *See* note 5 *supra* and accompanying text.
49. *In re* Gault, 387 U.S. 1, 55 (1967).
50. *Id.* at 42-55.
51. *Id.* at 51-52.
52. *Id.*
53. *See* Institute of Judicial Administration—American Bar Association, Juvenile Justice Standards Project, A Summary and Analysis 39-42 (1977) [hereinafter cited as Summary and Analysis]; H. Sandhu, Juvenile Delinquency Causes, Control and Prevention 166 (1977).

rehabilitate.[54] Thus, like the privilege against self-incrimination, fundamental fairness compels granting full fourth amendment protection to minors in a juvenile court proceeding.

2. Discrediting the Rehabilitative Model

An alternative and more compelling reason exists for granting minors all the due process protections available in a criminal proceeding. The Court's refusal to grant minors in a juvenile court setting all the due processs protections available in a criminal proceeding was made at a time when the failures of the juvenile justice system were only beginning to be uncovered.[55] Its decisions were based extensively[56] on two studies conducted by the President's Commission on Law Enforcement and Administration of Justice.[57] In comparison to the studies conducted in the mid-1970's, the Commission's reports were mild in their criticisms of the juvenile justice system. Although it was believed that the system failed to rehabilitate,[58] more research was deemed necessary before the findings could be considered conclusive.[59] Significantly, the Commission's studies concluded that, despite its many failings, the juvenile justice system should not be abandoned.[60] The Court's belief that the system could

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54. *See* Summary and Analysis, *supra* note 53, at 42-43.

55. In *Gault*, Justice Harlan mentioned the urgent need for better information on the juvenile court system. *In re* Gault, 387 U.S. 1, 77 (1967) (Harlan, J., concurring in part, dissenting in part). The studies used by the Court in the *Gault* line of cases similarly expressed a need for more information. *See, e.g.*, The President's Commission On Law Enforcement And Administration Of Justice, The Challenge Of Crime In A Free Society 55, 60-63 (1967) [hereinafter cited as Crime In A Free Society]; The President's Commission On Law Enforcement And Administration Of Justice, Task Force Report: Juvenile Delinquency And Youth Crime xii, 11-12 (1967) [hereinafter cited as Task Force Report].

56. The Task Force Report, *supra* note 55, was cited extensively in Breed v. Jones, 421 U.S. 519, 530 n.12, 535 n.14, 537 (1975), and in McKeiver v. Pennsylvania, 403 U.S. 528, 544 & nn.4 & 5, 546 & n.6 (1971). The Commission's report on Crime In A Free Society, *supra* note 55, was used in *In re* Gault, 387 U.S. 1, 13 n.11, 18 n.23, 20 n.26, 22 n.30, 30 n.44, 31 n.48, 33 n.52, 38 & n.65, 57 n.98, 58 n.102 (1967). Although not citing to either of the Commission's studies, the Court in *In re* Winship, 397 U.S. 358 (1970), based its findings on conclusions reached in *Gault*, *id.* at 359, 365-68, which were based on information provided in Crime In A Free Society, *supra* note 55.

57. Crime In A Free Society, *supra* note 55; Task Force Report, *supra* note 55.

58. Crime In A Free Society, *supra* note 55, at 79-80; Task Force Report, *supra* note 55, at 9. The reports largely confined their research to the juvenile courts. Very little information was available on the post-adjudicative treatment facilities of the juvenile justice system. Task Force Report, *supra* note 55, at 7.

59. *See* Crime in A Free Society, *supra* note 55, at 55, 60, 63; Task Force Report, *supra* note 55, at xii, 11, 12, 17.

60. In contrast to the conclusions of many later studies, *see* notes 65-75 *infra* and accompanying text, the Task Force Report, *supra* note 55, at 9, and Crime In A Free Society, *supra* note 55, at 81, declared that the juvenile justice experiment

still benefit the child[61] paralleled the conclusions of the Commission's reports. Its refusal to grant all constitutional protections[62] reflected the studies' conclusion that the rehabilitative goals of the system should still be pursued.[63]

The hope that was present in these early reports, however, is not found in later studies conducted during the 1970's. As more information has become available,[64] dissatisfaction with the system has grown to include not only what it has failed to accomplish, but also what it has succeeded in creating.[65] Children in need of counseling are being brutalized and schooled in crime by the very system set up to protect them.[66] One commentator has observed that the system has turned a group of neglected, problematic children into a class of hardened youthful criminals.[67]

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should not be abandoned. The studies recommended continued pursuit of the juvenile court's goal of rehabilitating offenders through individualized treatment. Crime In A Free Society, *supra* note 55, at 88; Task Force Report, *supra* note 55, at 9. The studies further concluded that the system's unique characteristics, its informality and confidentiality, should be preserved. Crime In A Free Society, *supra* note 55, at 88; Task Force Report, *supra* note 55, at 38, 40.

61. *See* notes 34-38 *supra* and accompanying text. The impact of the Commission's Reports upon the Court was best demonstrated in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), in which the Court explained that the recommendations of the Task Force Report, *supra* note 55, provided one of the bases for its refusal to extend the right to a jury trial to a minor in a juvenile proceeding. 403 U.S. at 544-46.

62. *See* note 38 *supra* and accompanying text.

63. *See* note 60 *supra* and accompanying text.

64. All four major decisions of the Court involving juvenile offender's due process rights relied on studies that were conducted before 1970. Therefore, although it has been only six years since the last Court decision on minors' due process rights, there is a twelve year gap in terms of research. During this time, much more research has been conducted.

65. The greatest criticism of the juvenile justice system is not its failure to rehabilitate but rather the adverse effect it has on the juvenile offender. Offenders are committed to institutions in which they are treated as junior criminals and come into constant contact with minors who have committed serious delinquent acts. *See* Institute of Judicial Administration—American Bar Association, Juvenile Justice Standards Project, Noncriminal Misbehavior 5 (1977) [hereinafter cited as Noncriminal Misbehavior]. The study stated that "the greatest vice of the system is its treatment of . . . ungovernable children in essentially the same way as youthful violators of the criminal law, with the maximum impetus (and opportunity for tutelage) given the former to become the latter." *Id.; see* Board of Directors, Nat'l Council on Crime and Delinquency, *Jurisdiction over Status Offenses Should Be Removed From the Juvenile Court: A Policy Statement*, 21 Crime and Delinquency 97, 98 (1975) [hereinafter cited as NCCD Policy Statement].

66. Noncriminal Misbehavior, *supra* note 65, at 5; NCCD Policy Statement, *supra* note 65, at 98; *see* L. Cole, *supra* note 13, at 10-12; M. Hyde, *supra* note 11, at 71, 86-93; T. Rubin. Juvenile Justice Policy, Practice, and Law 279 (1979); V. Streib, *supra* note 13, at 88.

67. K. Wooden, *supra* note 14, at 38-40. The author's conclusion was based in part on statistics showing that state training schools have a "recidivism rate of eight out of ten children," *id.* at 25, and that "75 percent of all adult prisoners . . . started on that path in the juvenile court system." *Id.* at 38-39. In 1909, one commentator,

Authoritative studies have concluded that the traditional juvenile justice system should be abandoned[68] or its jurisdiction severely limited.[69] For example, the Proposed Juvenile Justice Standards Project,[70] the most comprehensive study ever conducted on the juvenile justice system,[71] concluded that the system cannot rehabilitate

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in discussing the type of treatment facility needed for juvenile offenders, warned that "a real school, not a prison in disguise must be provided . . . . This cannot be done in one great building, with a single dormitory for all [of the] children in which there will be no possibility of classification along the lines of age or degree of delinquency. . . . Locks and bars and other indicia of prisons must be avoided." Mack, *supra* note 11, at 114. When comparing the warning of Mack to the realities that Wooden observed in his research, the failure of the system is striking. The training school of the 1970's "is a miniature penitentiary with high walls surrounding the grounds. All the buildings and cell block wings therein are interlocked by long corridors. Not only are individual cell doors secured, but each wing is also locked at all times. . . . Dubious educational and religious services are available to the children, along with the standbys of solitary confinement and of bloodhounds to locate any who run away." K. Wooden, *supra* note 14, at 28. The treatment the juvenile offender receives consists of various forms of physical control. *Id.* at 29-30, 106-07, 114-15, 129. Children are often brutalized at these institutions by hardened juvenile criminals. *Id.* at 110. Those running the institutions also contribute to the alienation and dehumanizing treatment that the minor receives. Beatings are common, and solitary confinement exists in every training school. *Id.* at 106, 129.

68. Summary and Analysis, *supra* note 53, at 21-24; V. Streib, *supra* note 13, at 88; K. Wooden, *supra* note 14, at 234.

69. Childrens Defense Fund, Children Out of School in America 62 (1974); National Advisory Commission on Criminal Justice Standards and Goals, Corrections 574 (1973); W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs 15 (1974); NCCD Policy Statement, *supra* note 65, at 98.

70. The Project consists of 23 volumes drafted by four committees. The first committee dealt with juvenile court jurisdiction. The volumes drafted by Committee I are *Abuse and Neglect, Juvenile Delinquency and Sanctions, Noncriminal Misbehavior, Police Handling of Juvenile Problems, Rights of Minors, Schools and Education,* and *Youth Service Agencies*. The second committee was responsible for court rules and procedures. The volumes drafted by Committee II are *Adjudication, Appeals and Collateral Review, Counsel for Private Parties, Court Organization and Administration, The Juvenile Probation Function: Intake and Predisposition Investigative Services, Pretrial Court Proceedings, Prosecution,* and *Transfer Between Courts*. Drafting Committee III researched the treatment and corrections of juvenile offenders and drafted volumes entitled *Architecture of Facilities, Correctional Administration, Dispositional Procedures,* and *Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*. Drafting Committee IV attempted to devise methods for coordinating the component parts of the juvenile justice system. The volumes submitted by this committee are *Juvenile Records and Information Systems, Monitoring,* and *Planning for Juvenile Justice*. Summary and Analysis, *supra* note 53, at 19-20.

71. *Id.* at 17-19. The Institute of Judicial Administration began the Project in 1971 and the American Bar Association became co-sponsor in 1973. More than 200 juvenile justice experts were involved in formulating the standards. *Id.* at 17. In addition to lawyers and judges, specialists were consulted from such "fields as social work, psychology, education, sociology, psychiatry, corrections, law enforcement, and health care." *Id.*

the minor.[72] The Project rejected the rehabilitative model[73] and recommended that minors be treated under a punitive model of juvenile justice.[74] It advocated an adversary juvenile court structure and greater due process protections for the child, including the right to fourth amendment protection.[75] These recommendations reflect a growing realization that the system is an unsaveable failure.

State legislatures have recognized that the system is ill-equipped to handle both serious offenders and status offenders. The increased incidence and severity of juvenile crime[76] has led legislatures to pass statutes that transfer jurisdiction over the most serious offenders to criminal court.[77] These statutes, designed to protect society rather than benefit the child,[78] reflect the withdrawal by states from the rehabilitative model and their movement toward a punitive model of juvenile justice.[79]

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72. *Id.* at 23 ("The unarticulated but fundamental premise of all of these principles . . . is genuinely shattering with regard to the function of juvenile court—that the prescribing of treatment or services by the court is not inherently beneficial to the juvenile . . . . Heretofore the court's intervention was assumed to be in the best interests of the child . . . .").

73. *Id.*

74. *Id.* at 190-204.

75. *Id.* at 23-24. The Project's proposed system, therefore, destroys all that the Court, in its decisions on juvenile offenders' due process rights, sought to protect. *See* notes 34-38 *supra* and accompanying text.

76. Foreword to National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention: Report of the Task Force on Juvenile Justice and Delinquency Prevention (1976) (from 1960 to 1974 youth crime "increased by more than 140 percent"); *Jurisdictional Statutes, supra* note 12, at 95 (increased frequency and severity of crime by juveniles).

77. Original jurisdiction over the minor is normally in the juvenile court. Transfer statutes are a mechanism through which minors can be removed from the juvenile court and referred to the criminal courts. Discretionary transfer statutes exist in many states. *E.g.*, Del. Code Ann. tit. 10, § 939(a) (1974); Ga. Code Ann. § 24-301(b) (Supp. 1980); Ill. Ann. Stat. ch. 37, § 701-2(1) (Smith-Hurd Supp. 1978); La. Rev. Stat. Ann. § 13:1570(A)(5) (West Supp. 1981); Md. Cts. & Jud. Proc. Code Ann. § 3-804(d)(1) (Supp. 1978); Mass. Gen. Laws Ann. ch. 119, § 61 (West Supp. 1981); Neb. Rev. Stat. § 43-202(3)(b), (c) (1978); Wash. Rev. Code Ann. § 13.40.-110 (Supp. 1981); Wyo. Stat. § 14-6-203(c) (1977). Some states have mandatory transfer statutes. *E.g.*, D.C. Code Encycl. § 16-2307 (West Supp. 1979); Fla. Stat. Ann. § 39.02(5)(B) (West Supp. 1981); Miss. Code Ann. § 43-21-31 (1972); N.Y. Penal Law § 10.00(18) (McKinney Supp. 1981); N.C. Gen. Stat. § 7A-280 (1969).

78. *See* Institute of Judicial Administration—American Bar Association, Juvenile Justice Standards Project, Transfer Between Courts 38 (1977) [hereinafter cited as Transfer Between Courts]; *Jurisdictional Statutes, supra* note 12, at 98-109. One commentator has observed that "[w]hereas the Supreme Court has focused on attempting to guarantee fundamental fairness to the juvenile, state legislatures in recent years have concentrated on protecting the public." *Id.* at 98 (footnote omitted).

79. Transfer Between Courts, *supra* note 78, at 38; *Jurisdictional Statutes, supra* note 12, at 99.

Additionally, state legislatures, having acknowledged the system's failure to rehabilitate, have attempted to change the system's treatment of the status offender.[80] States have created separate statutory classifications for these offenders[81] and have provided for the separate housing of incarcerated status offenders.[82] Similarly, the federal government has enacted legislation allocating federal funds to provide for local community facilities to house noncriminal juveniles.[83] Despite these changes, research indicates that the system still has an adverse

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80. Twenty-three percent of all boys and seventy percent of all girls that are placed in state institutions are status offenders. Siegal, Senna & Libby, *Legal Aspects of the Juvenile Justice Process: An Overview of Current Practices and Law*, 12 New Eng. L. Rev. 222, 228 n.21 (1976); Smith, *An Analysis of When Juveniles Must Be Afforded Due Process Rights*, 58 Neb. L. Rev. 136, 137 (1979).

81. Separate statutory classifications for status offenders exist in many states. *E.g.*, Alaska Stat. §§ 47.10.010, .080 (1979) (child in need of aid); Cal. Welf. & Inst. Code § 601 (West Supp. 1981) (truants); Colo. Rev. Stat. § 19-1-103(5)(a) (1978) (children in need of supervision); D.C. Code Encycl. § 16-2301(8) (West Supp. 1978) (children in need of supervision); Fla. Stat. Ann. § 39.01(9) (West Supp. 1981) (dependent child); Ga. Code Ann. § 24A-401(g) (Supp. 1980) (unruly child); Ill. Ann. Stat. ch. 37, § 702-3 (Smith-Hurd 1972) (minor otherwise in need of supervision); Kan. Stat. Ann. § 38-802(d), (f) (Supp. 1980) (wayward child or truant); La. Rev. Stat. Ann. § 13-1569(16) (West Supp. 1981) (neglected or dependent child); Md. Cts. & Jud. Proc. Code Ann. § 3-801(f) (Supp. 1978) (children in need of supervision); Mass. Gen. Laws Ann. ch. 119, § 21 (West Supp. 1981) (children in need of services); Mont. Rev. Codes Ann. § 10-1203(13) (1980) (youth in need of supervision); Nev. Rev. Stat. § 62.040(1)(b) (1979) (children in need of supervision); N.J. Stat. Ann. § 2A:4-45 (West Supp. 1980) (juvenile in need of supervision); N.M. Stat. Ann. § 32-1-3(M) (1978) (children in need of supervision); N.C. Gen. Stat. § 7A-278(5) (1969) (undisciplined child); N.D. Cent. Code § 27-20-02(4) (Supp. 1979) (unruly child); Ohio Rev. Code Ann. § 2151.022 (Page 1976) (unruly child); Okla. Stat. Ann. tit. 10, § 1101(c) (West Supp. 1980) (child in need of supervision); R.I. Gen. Laws § 14-1-3(g) (Supp. 1980) (wayward child); S.D. Codified Laws Ann. § 26-8-7.1 (Supp. 1980) (children in need of supervision); Tenn. Code Ann. § 37-202(5) (Supp. 1980) (unruly child); Tex. Fam. Code Ann. tit. 3, § 51.03(b) (Vernon Supp. 1980) (conduct indicating need for supervision); Vt. Stat. Ann. tit. 33, § 632(12) (Supp. 1980) (child in need of care or supervision); Wash. Rev. Code Ann. § 13.34.030(2) (Supp. 1981) (dependent child); Wis. Stat. Ann. § 48.13 (West Supp. 1978) (children in need of protection or services).

82. Noncriminal Misbehavior, *supra* note 65, app. A. Alaska, Maryland, Massachusetts, New Jersey, New Mexico, and the District of Columbia prohibit by statute any commitment of status offenders to the same institutions as delinquents. *Id.* New York has the same prohibition by virtue of judicial decision. *Id.* Louisiana, South Dakota, Tennessee, and Texas prohibit commitment of status offenders to state institutions housing delinquents. *Id.* Florida and Minnesota prohibit the placement of first time status offenders in state institutions for delinquents. *Id.* Georgia, Louisiana, and the District of Columbia prohibit the temporary detention of status offenders awaiting hearing in the same facilities as juveniles charged with delinquent conduct. *Id.*

83. The Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified at 42 U.S.C. § 5601 (1976) (amended 1977)).

effect on the status offender.[84] Numerous studies have concluded that the best treatment for these minors lies outside the juvenile justice system and have argued that the status offenders be removed from the system's jurisdiction.[85] The inability of the system to treat effectively the least serious juvenile offenders strongly indicates that the system is incapable of rehabilitating any of the minors subject to its control.

The Supreme Court's refusal to grant alleged juvenile offenders all the due process protections available in a criminal proceeding was based upon the premise that the system could potentially benefit the child.[86] Actions by state legislatures and studies conducted by experts in the juvenile justice field, however, have discredited this premise, demonstrating not only that the system fails to treat its wards,[87] but that it is inherently incapable of benefitting the child entrusted to its care.[88] The Court, therefore, should grant alleged juvenile offenders all the due process protections available in a criminal court including the right to full fourth amendment protection.

II. Parent, Child, and the Fourth Amendment.

Even when given fourth amendment rights, however, the protection can be meaningless if a parent is given an unfettered right to

84. Noncriminal Misbehavior, *supra* note 65, at 2-3. K. Wooden, *supra* note 14, at 37; Stiller & Elder, *"PINS—A Concept in Need of Supervision,"* 12 Am. Crim. L. Rev. 33, 38 (1974); *Juvenile Misbehavior, supra* note 13, at 742-45.

85. The Proposed Juvenile Justice Standards Project concluded that "[n]oncriminal misbehavior . . . should be removed from juvenile court jurisdiction." Summary and Analysis, *supra* note 53, at 22. The 1974 NCCD Policy Statement advocated removal of status offense jurisdiction, stating that the juvenile courts are incapable of effectively dealing with the noncriminal behavior of minors. NCCD Policy Statement, *supra* note 65, at 98. At the federal level, the Department of Health, Education and Welfare, in 1974, recommended the elimination of juvenile court jurisdiction over status offenders. Office of Youth Development, Dep't of Health, Educ. & Welfare, Model Acts for Family Courts and State-Local Children's Programs 14-15 (1974). Similar recommendations have been made by commentators. *E.g.*, M. Hyde, *supra* note 11, at 71-83; K. Wooden, *supra* note 14, at 234; Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 Yale L.J. 1383, 1405-07 (1974). Earlier studies concluded that serious consideration be given to eliminating juvenile court jurisdiction over status offenders. Crime In A Free Society, *supra* note 55, at 85; Task Force Report, *supra* note 55, at 26-27. These reports, however, took a modified stance, cautioning that the simple elimination of status offense jurisdiction was not the wisest choice. Crime In A Free Society, *supra* note 55, at 85; Task Force Report, *supra* note 55, at 25-27. Admitting that more research needed to be conducted, the early reports also expressed concern over having no alternative way of helping the status offender and observed that "[a] firm, objective way is needed to apply the truancy laws, fortify flagging parents, and encourage substitution of healthful for self-destructive pursuits before it is too late." Task Force Report, *supra* note 55, at 26 (footnote omitted); *accord*, Crime In A Free Society, *supra* note 55, at 85.

86. *See* notes 34-38 *supra* and accompanying text.

87. *See* notes 64-85 *supra* and accompanying text.

88. *Id.*

consent to the search of the child's room or belongings. Search pursuant to consent is one of the established exceptions to the warrant requirement of the fourth amendment.[89] This exception encompasses not only consent by the defendant, but also consent by a third party possessing "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[90] The legality of third party consent rests on the privacy interest that the fourth amendment seeks to protect.[91] When an individual and a third party possess "common authority" over an area or article, each party assumes the risk that the other may permit a search of it.[92] Each party's reasonable expectation of privacy as to the other is, therefore, destroyed.[93]

The Supreme Court has consistently placed severe limitations on third party consent. The concept of common authority has been given a narrow constitutional interpretation and has been confined factually to situations in which the third party clearly has equal access to the premises or article to be searched or seized.[94] In *United States* v.

89. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Vale v. Louisiana, 399 U.S. 30, 35 (1970). The state, however, must prove that the consent was freely and voluntarily given. United States v. Watson, 423 U.S. 411, 424 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Warrantless searches 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 (1967) (footnotes omitted); *accord*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); *see* Chimel v. California, 395 U.S. 752, 761-62 (1969); United States v. Jeffers, 342 U.S. 48, 51 (1951). Among the established exceptions to the warrant requirement are search incident to a lawful arrest, Abel v. United States, 362 U.S. 217, 234-35 (1960); Agnello v. United States, 269 U.S. 20, 30 (1925), and a search conducted with probable cause under exigent circumstances. Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of a fleeing felon); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (alcohol in the process of being absorbed into the body); McDonald v. United States, 335 U.S. 451, 454-56 (1948) (goods in the process of destruction or officers responding to an emergency).

90. United States v. Matlock, 415 U.S. 164, 171 (1974) (footnote omitted); *accord*, Schneckloth v. Bustamonte, 412 U.S. 218, 245-46 (1973); *see* Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

91. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); *see* notes 1-5 *supra* and accompanying text.

92. United States v. Matlock, 415 U.S. 164, 169-71 (1974); *see* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (by allowing cousin to use dufflebag, defendant assumed the risk that the cousin might let someone else look inside the bag).

93. *See* United States v. Matlock, 410 U.S. 164, 171 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

94. *E.g.*, United States v. Matlock, 415 U.S. 164, 168-69 (1974) (consent to the search of a room upheld when the third party had access to all compartments in the room and slept there regularly with defendant); Coolidge v. New Hampshire, 403 U.S. 443, 488-89 (1971) (consent upheld when defendant's wife permitted the search of a bedroom that she shared with her husband and the seizure of guns and clothing to which she had access); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (consent lawful

Matlock,[95] the Court stated that "[c]ommon authority is . . . not to be implied from the mere property interest," but rather is to be measured by the "mutual use of the property by persons generally having joint access or control for most purposes."[96]

A majority of state courts that have addressed the issue of parental consent to the search of a child's room and belongings have held parents to the same limitations that apply in normal third party consent situations.[97] Several state courts, however, ostensibly applying the mutual use requirement, have actually given parents an almost unfettered right to consent.[98] One state court has gone so far as to validate parental consent to search a child's room and possessions even though the minor had exclusive control over the area searched and items seized.[99] The effect of these minority decisions is to permit unrestricted parental waiver of a minor's fourth amendment protection.

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when defendant's cousin permitted the search of a dufflebag that he shared with the defendant and which was left at the cousin's home). The strict limitations placed upon third party consent have also been demonstrated in cases in which consent has not been validated despite a party's having use of the premises for some purposes. *E.g.*, Stoner v. California, 376 U.S. 483, 488 (1964); United States v. Jeffers, 342 U.S. 48, 51-52 (1951); Lustig v. United States, 338 U.S. 74, 76-77 (1949). In the preceding cases, the Court held that, despite the legal interest in the hotel room of a guest and access to the area by maids, janitors, and other personnel, a hotel proprietor could not validly consent to the search of the guest's room. Stoner v. California, 376 U.S. at 488-89; United States v. Jeffers, 342 U.S. at 51-52; Lustig v. United States, 338 U.S. at 76-77. Similarly, in Chapman v. United States, 365 U.S. 610 (1961), a landlord's consent to the search of a house occupied by a tenant was declared invalid even though the landlord had authority to enter the tenant's residence for certain purposes. *Id.* at 616-17.

95. 415 U.S. 164 (1974).

96. *Id.* at 171 n.7.

97. *E.g.*, *In re* Scott K., 24 Cal. 3d. 395, 404-05, 595 P.2d 105, 110-11, 155 Cal. Rptr. 671, 676-77 (father's consent to search son's toolbox invalid because the son owned the box and kept it locked), *cert. denied*, 444 U.S. 973 (1979); Bell v. State, 360 So. 2d 697, 700 (Miss. 1978) (mother's consent valid because she had "dominion and control" over searched room); People v. Mortimer, 46 A.D.2d 275, 277-78, 361 N.Y.S.2d 955, 958 (1974) (father's consent to search of son's gym bag invalid because son had exclusive control).

98. *In re* Salyer, 44 Ill. App. 3d 854, 859, 358 N.E.2d 1333, 1337, *cert. denied*, 434 U.S. 925 (1977); State v. Wagster, 361 So. 2d 849, 855 (La. 1978); *see* 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); Tate v. State, 32 Md. App. 613, 618-19, 363 A.2d 622, 626 (1976); People v. Deborah J. AA, 63 A.D.2d 808, 808, 405 N.Y.S.2d 333, 333-34 (1978).

99. *In re* Salyer, 44 Ill. App. 3d 854, 358 N.E.2d 1333, *cert. denied*, 434 U.S. 925 (1977). The facts of the case demonstrate the child's exclusive control. The minor's mother testified that her son always kept "his room locked with a combination lock on the outside and an inside lock." *Id.* at 856, 358 N.E.2d at 1334. The minor cleaned his room and brought his laundry out of the room to be cleaned. *Id.*, 358 N.E.2d at 1335. The minor also paid his mother for utility bills and house rent. *Id.*, 358 N.E.2d at 1335. To gain admittance to the minor's room, the mother was

In minimally restricting parental control over the fourth amendment rights of children, state courts have implied that the parent's fundamental right to raise his child is superior to the child's privacy interest.[100] Their reasoning reflects Supreme Court decisions holding that a parent has both the right and the duty to control the upbringing of his child.[101] This right to control is based on two assumptions. First, a child's physical and mental immaturity renders him incapable of making important decisions.[102] Second, parents possess the maturity to make difficult decisions and will act in the best interests of the child.[103]

The Court has stated, however, that these assumptions concerning parent and child do not always apply. In *Planned Parenthood v. Danforth*,[104] for example, the Court encountered a situation in which

required to knock and ask for permission to enter. *Id.*, 358 N.E.2d at 1334. Furthermore, the mother had not entered the minor's room more than twice in the three month period preceding the search. *Id.*, 358 N.E.2d at 1335. Nevertheless, the court validated the mother's consent to the search of her son's room. *Id.* at 359, 358 N.E.2d at 1337.

100. Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, 1055, 87 Cal. Rptr. 876, 880 (1970); *In re* Salyer, 44 Ill. App. 3d 854, 859, 358 N.E.2d 1333, 1336, *cert. denied*, 434 U.S. 925 (1977); State v. Wagster, 361 So. 2d 849, 855 (La. 1978). *See generally* State v. Clemons, 27 Ariz. App. 193, 194, 552 P.2d 1208, 1209 (1976); State v. Preston, 387 So. 2d 495, 497 (Fla. Dist. Ct. App. 1980); Jenkins v. State, 146 Ga. App. 458, 460, 246 S.E.2d 466, 468 (1978); Tate v. State, 32 Md. App. 613, 618-19, 363 A.2d 622, 626 (1976); People v. Deborah J. AA, 63 A.D.2d 808, 808, 405 N.Y.S.2d 333, 333-34 (1978). *See also In re* David W., 103 Cal. App. 3d 469, 471, 163 Cal. Rptr. 87, 90, *cert. denied*, 101 S. Ct. 622 (1980). In *In re* Salyer, 44 Ill. App. 3d 854, 358 N.E.2d 1333, *cert. denied*, 434 U.S. 925 (1977), the court validated the mother's consent, stating "that there is implicit in the rights and duties imposed upon a parent, the right to exert parental authority and control over a minor son's surroundings and that such implied right to control obviously includes a room in the home of the mother." *Id.* at 859, 358 N.E.2d at 1336. In Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970), the court validated parental consent to search a child's room based upon the premise that a parent has the right to control the minor. *Id.* at 1055, 87 Cal. Rptr. at 880. This reasoning was reaffirmed in dicta in *In re* Robert H., 78 Cal. App. 3d 894, 899, 144 Cal. Rptr. 565, 567 (1978).

101. Bellotti v. Baird, 443 U.S. 622, 638 (1979); Parham v. J.R., 442 U.S. 584, 601 (1979); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 518, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

102. *See* Bellotti v. Baird, 443 U.S. 622, 634, 640 (1979); Parham v. J.R., 442 U.S. 584, 602 (1979); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977); Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

103. Parham v. J.R., 442 U.S. 584, 602-03 (1979). The Court stated that "parents possess what a child lacks in maturity. . . . More important, historically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* at 602; *see* Bellotti v. Baird, 443 U.S. 622, 634, 640, 648 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 73-74 (1976); 1 W. Blackstone, Commentaries 447*; 2 J. Kent, Commentaries on American Law 190*.

104. 428 U.S. 52 (1976).

the interests of the child and parent were in conflict.[105] In holding that a statute imposing mandatory parental consent over the minor's right to an abortion was unconstitutional,[106] the Court indicated that the dual assumptions are rebuttable.[107]

In the context of the assertion of fourth amendment rights by a juvenile, the traditional reasons for permitting unrestricted control over a child's rights are not present. Parental consent does not benefit the minor because such consent increases the chances that a minor will be initiated into the juvenile justice system.[108] If the system could rehabilitate the child and actually nurture and provide care for its wards, parental waiver of a child's fourth amendment protections might be the minor's best interests. As has been demonstrated, however, the system harms rather than helps and is not in the child's best interests.[109]

Even if the unrestricted consent does not result in the child's entrance into the juvenile justice system, such consent has the practical effect of destroying the child's trust in his parents. The child is likely to feel betrayed by his parents, and any sense of security the minor had in his room or home will be destroyed.[110] Therefore, even when a parent, by consenting to a search, sincerely attempts to help his

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105. The state statute reviewed by the Court in *Danforth* required parental consent before a minor was entitled to an abortion. *Id.* at 74. The parent's right to control the upbringing of the child, therefore, was in conflict with the minor's right to terminate a pregnancy. *See id.* Cases prior to *Danforth* involved only conflicts between state and parent over control of the child. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

106. 428 U.S. at 74.

107. *See id.* at 74-75. Similarly, in Parham v. J.R., 442 U.S. 584 (1979), the Court stated that "[a]s with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents 'may at times be acting against the interests of their children' . . . creates a basis for caution." *Id.* at 602 (citation omitted).

108. *Cf.* Rakas v. Illinois, 439 U.S. 128, 136-38 (1978) (exclusionary rule allows criminals to go free); Alderman v. United States, 394 U.S. 165, 174-75 (1969) (same).

109. *See* pt. I (C)(2) *supra.*

110. Parental waiver of fourth amendment rights, by pitting parent against child, impairs the family structure. *See also* Parham v. J.R., 442 U.S. 584, 607 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976). In Parham v. J.R., 442 U.S. 584 (1979), the Court held that due process does not require that a child be given a hearing when his parents commit him to a state mental institution. *Id.* at 607. The Court's holding was based in part on the negative effect such a hearing would have on the family unit. "[A]n adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital. Moreover, it will make his subsequent return home more difficult." *Id.* at 610. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court held that a state may not condition a minor's right to an abortion on parental consent because disputes between parents and children on the issue would fracture family autonomy. *Id.* at 75.

child, such action will only result in further harm. By permitting unrestricted consent, state courts encourage law enforcement agents to ask the parents for consent instead of obtaining a warrant. This increases the number of instances in which a parent, by consenting to a search, harms the child by alienating him from his home and family.[111]

Moreover, parental consent is not necessary to protect the child from making an unwise decision. Unlike the right to an abortion, which involves the active choice of either having or not having a child,[112] assertion of fourth amendment rights does not force the minor to make a conscious decision. A minor faced with the situation of continuing or terminating her pregnancy must weigh factors in making the decision that is in her best interests.[113] The minor's maturity and the parent's ability to protect her from an unwise decision are, therefore, both relevant.[114] In contrast, an alleged juvenile offender is not required to act when asserting his fourth amendment rights. A counselor at the minor's hearing will make the choice of whether to assert a fourth amendment violation. The premise that the parent is protecting his child from making an unwise decision is not valid in the fourth amendment context. The attorney will protect the minor's interests.[115] Thus, the parent's right to raise the child should not take precedence over the minor's privacy interest. Parental waiver of a child's fourth amendment rights should be permitted only when the parent can meet the high standard of mutual use established by the Court in third party consent situations.

CONCLUSION

A minor in a juvenile court setting confronts "the worst of both worlds."[116] Often the product of a family that has not provided the care and guidance needed for the child's proper development, the

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111. *See* note 110 *supra* and accompanying text.

112. Bellotti v. Baird, 443 U.S. 622, 642 (1979). The Court stated that "[t]he pregnant minor's options are much different from those facing a minor in other situations . . . . A pregnant adolescent . . . cannot preserve for long the possibility of aborting . . . ." *Id.*

113. *Id.* A minor faces many alternatives in an abortion decision "such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family." *Id.* at 642-43.

114. *Id.* at 640. The Court concluded that "parental consultation often is desirable and in the best interest of the minor" in abortion cases. *Id.*

115. *See In re* Gault, 387 U.S. 1, 36 (1967). The *Gault* Court noted that neither the parent, probation officer nor judge can properly protect the child's interests in the juvenile proceeding. *Id.* at 35-36. "The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" *Id.* at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

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

minor now faces a system that promises help but actually harms. To permit parent or state to deprive the child of fourth amendment protection does not benefit the minor but results only in further mistreatment. Granting alleged juvenile offenders fourth amendment protection and restricting a parent's ability to waive that protection gives the minor no more than is due any other person in this country. The juvenile needs this protection and is constitutionally entitled to it.

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