Western New England Law Review

Volume 3 *3 (1980-1981)*
Issue 2

Article 10

1-1-1980

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—LIMITATION OF THE PARENTAL RIGHT TO CONSENT—In re Scott K., 75 Cal. App 3d 162, 142 Cal. Rptr. 61 (1977) rev'd 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671, cert. denied, 444 U.S. 973 (1979)

Albert N. Kapin

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—LIMITATION OF THE PARENTAL RIGHT TO CONSENT—*In re Scott K.*, 75 Cal. App. 3d 162, 142 Cal. Rptr. 61 (1977), *rev'd*, 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671, *cert. denied*, 444 U.S. 973 (1979).

I. INTRODUCTION

In re Scott K.[1] concerns the arrest of a seventeen-year-old minor for possession of marijuana. In 1976, Scott's mother found some marijuana in his desk drawer and turned the marijuana over to the police.[2] The police notified Scott's father of the impending arrest and requested his cooperation. Scott's father consented to the police officers' plan to apprehend Scott in the garage. He also told the police that they would be welcome inside the family residence after the arrest.[3] The police, lacking an arrest warrant, proceeded with this plan.

After the arrest, the police entered Scott's home. They searched Scott's bedroom without a search warrant but with his father's consent. Scott did not object to the search until the police discovered a locked toolbox. Scott possessed the only key to the lock. He initially refused to surrender the key; however, he changed his mind when the police informed him that they had been given permission to break the box open if a key was not provided. The search of the toolbox disclosed nine small plastic bags containing marijuana.[4]

At Scott's adjudicatory hearing,[5] the trial court decided that the arrest was illegal because no exigent circumstances existed to circumvent the requirement that the police obtain an arrest war-

---

1. 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671, *cert. denied*, 444 U.S. 973 (1979).

2. *Id.* at 398-99, 595 P.2d at 106, 155 Cal. Rptr. at 672.

3. *Id.* at 399, 595 P.2d at 107, 155 Cal. Rptr. at 673.

4. *Id.*

5. A juvenile adjudicatory hearing differs from a criminal proceeding in that its purpose is to correct the transgressions of the youthful offender by benevolently instilling a sense of parental supervision. *See In re* Schubert, 153 Cal. App. 2d 138, 313 P.2d 968 (1957).

The proceeding for declaring a minor to be a ward of the juvenile court is not a trial. The minor is relieved of the stigma of criminal conviction through the administration of corrective guidance. *See In re* Steiner, 134 Cal. App. 2d 391, 285 P.2d 972 (1955).

rant prior to making the arrest.[6] Nonetheless, the evidence secured in the seizure of the toolbox was found to be admissible. The court concluded that such evidence was not tainted[7] as the product of an illegal arrest. Rather, the search was an act independent of the arrest and resulted from both the mother's initial overtures to the police and the father's willingness to allow further inquiry into the matter.[8] The court evaluated the evidence and determined that Scott had violated section 11359 of the California Health and Safety Code.[9] Since Scott was a minor, the court, consistent with section 602 of the Welfare and Institute Code,[10] adjudged him a ward of the court and placed him on probation.

Scott appealed[11] his case to the state appellate court[12] on the ground that the evidence obtained should have been suppressed.[13]

---

6. 24 Cal. 3d at 399, 595 P.2d at 107, 155 Cal. Rptr. at 673; *see* People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629, *cert. denied*, 429 U.S. 929 (1976). "[W]arrantless arrests within the home are per se unreasonable in the absence of exigent circumstances. . . . '[E]xigent circumstances' means an emergency situation requiring swift action to . . . forestall the imminent escape of a suspect or destruction of evidence." *Id.* at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637.

7. The exclusionary rule of evidence operates to bar the admission of evidence which is illegally obtained by the state. As the decision in *Scott K.* indicates, such tainted evidence may result from an illegal search; however, the application of the rule is not limited to the fourth amendment. *See* Mapp v. Ohio, 367 U.S. 643 (1961). *See also In re* Donnie H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (1970). A minor's oral statements made during his custodial interrogation were properly suppressed in a proceeding to declare him a ward of the court. The statements concerning his commission of two felonies were made without knowledge of his right to counsel and his right to remain silent. *Id.* at 789-90, 85 Cal. Rptr. at 364-65.

8. 24 Cal. 3d at 399, 595 P.2d at 107, 155 Cal. Rptr. at 673.

9. CAL. HEALTH & SAFETY CODE § 11359 (West Cum. Supp. 1980). Section 11359 provides: "Every person who possesses for sale any maijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison."

10. CAL. WELF. & INST. CODE § 602 (West Cum. Supp. 1980). Section 602 provides:

> Any person who is under the age of eighteen years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

Id.

11. Appellant is entitled to review of errors in the adjudication proceeding on appeal from the judgment. *See In re* William C., 70 Cal. App. 3d 570, 577, 138 Cal. Rptr. 843, 849 (1977). *See also In re* Gault, 387 U.S. 1 (1967); note 47 *infra*.

12. *In re* Scott K., 75 Cal. App. 3d 162, 142 Cal. Rptr. 61 (1977), *rev'd*, 24 Cal. 3d at 395, 595 P.2d at 105, 155 Cal. Rptr. at 671. The full appellate opinion is reported only in the California Reporter.

13. *Id.* at 400, 595 P.2d at 107, 155 Cal. Rptr. at 673. When a party seeks to exclude tainted evidence from a proceeding, he brings a motion to suppress the

The majority opinion affirmed the lower court ruling, stating that the solution to juvenile misconduct resides within the family and that the courts should not tie the hands of well-intentioned parents who seek to correct their child's improper behavior.[14] This assertion of parental authority over the minor's claim of fourth amendment protections[15] became a focal point of the California Supreme Court's determination on the merits.

The California Supreme Court reversed the appellate court decision,[16] holding that fourth amendment protections should be extended to minors. The court distinguished between a warrantless police search and a private search executed under the guise of parental authority.[17] Since state action was found to be present in the search of the toolbox, the court decided that the minor was entitled to protection against unreasonable police conduct.[18] The majority of the justices, in granting safeguards against police improprieties, was confident that the effect of the decision would not compromise the efforts of parents to maintain a strong family hierarchy.[19]

The state supreme court decision discusses several important aspects of the relationship between a minor and the government. The court's analysis included inquiries into the extent to which

---

evidence in question. *See In re* Robert T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970). A policeman tricked a minor into allowing him to enter an apartment. Since there was never any consent to the entry, the adjudication of delinquency based upon the secured evidence was held to be invalid. *Id.* Although the minor let the police enter the premises, his action did not constitute consent since the right to consent to a search had not yet been extended to juveniles. *See* note 114 *infra* and accompanying text.

In the case of *Scott K.*, the California Supreme Court extended to minors the fourth amendment right of excluding tainted evidence from adjudicatory proceedings. 24 Cal. 3d at 402-03, 595 P.2d at 109, 155 Cal. Rptr. at 675. *See also* note 7 *supra*.

14. 142 Cal. Rptr. at 63.

15. The fourth amendment of the United States Constitution provides:

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

U.S. CONST. amend. IV. The California Supreme Court based its decision on protections springing from the California state constitution. *See* note 25 *infra* and accompanying text.

16. 24 Cal. 3d at 405, 595 P.2d at 111, 155 Cal. Rptr. at 677.

17. *Id.* at 400 n.2, 595 P.2d at 107 n.2, 155 Cal. Rptr. at 673 n.2.

18. *Id.* at 402, 595 P.2d at 108-09, 155 Cal. Rptr. at 674-75.

19. *Id.* at 400-03, 595 P.2d at 108-09, 155 Cal. Rptr. at 674-75.

rights against unreasonable searches and seizures are afforded to juveniles, the limitation which the parent-child relationship places upon the extension of these rights, and the degree to which parents may waive these rights. The court resolved these issues by merging both state law and federal constitutional precedent.

The United States Supreme Court has extended to minors many of the procedural guarantees[20] it has afforded to adults; however, this extension has never included fourth amendment protections. This results, in part, from the Court's reluctance to decide questions affecting the parent-child relationship in the home. While the Court has been unwilling to question the right of parents to maintain discipline over their children in the family setting,[21] the rights of the parent have given way to the power of the government where children have been threatened with exploitation in the public sphere.[22] Since fourth amendment questions arise more frequently in the privacy of the home, the Court has been able to assert this dichotomy as a basis for refusing to entertain questions involving family matters arising in the home.

In recent years, the United States Supreme Court has narrowed the scope of fourth amendment rights, as they pertain to adults, by permitting a broader interpretation of the concept of third-party consent.[23] Under this new formulation, it is difficult to determine who may validly give consent since the test[24] measures

---

20. While the United States Supreme Court has not considered the issue of fourth amendment rights in the context of the juvenile hearing, other rights have been extended to juveniles. *See In re* Winship, 397 U.S. 358 (1970) (right to be judged by a beyond a reasonable doubt standard); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (first amendment rights); *In re* Gault, 387 U.S. 1 (1967) (right to counsel, the right to confront witnesses, the right against self-incrimination, and the right to fair notice of charges). *See also* notes 35-39 & 47-59 *infra* and accompanying text.

21. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (allowing parents to direct the course of their child's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (permitting parents the right to raise their children). *See also* notes 69-77 *infra* and accompanying text.

22. *See* Ginsburg v. New York, 390 U.S. 629 (1968) (upholding law forbidding the sale of pornographic literature to minors); Prince v. Massachusetts, 321 U.S. 158 (1944) (prohibiting parents from publicly exploiting their children by forcing them to engage in religious activities). *See also* notes 69-77 *infra* and accompanying text.

23. *See* United States v. Matlock, 415 U.S. 164 (1974) (a woman could consent to the search of a bedroom that she shared with the defendant). *See also* notes 24 & 86-104 *infra* and accompanying text.

24. The standard for determining a valid third-party consent is based upon the principle of common authority.

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies

the degree of accessibility the consenting party has to the searched item. Since the Court has offered no clear resolution to the problems at issue in *Scott K.*, the California Supreme Court broadened the scope of inquiry by considering the precedents of other state courts in an effort to interpret the parameters of its own state constitution.[25]

II. DUE PROCESS AND *PARENS PATRIAE*

A. *Historical Background*

The similarities between the criminal and juvenile justice systems make it necessary to consider their inherent distinctions. The

---

the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, *see Chapman v. United States*, 365 U.S. 610 (1961) (landlord could not validly consent to a search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). *See also* note 92 *infra* and accompanying text.

25. The California Supreme Court decided the *Scott K.* case on the basis of article I, § 13 of the state constitution. 24 Cal. 3d at 400, 595 P.2d at 108, 155 Cal. Rptr. at 674. This provision states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13. *See also* note 15 *supra*.

This distinction is significant since the United States Supreme Court cannot review a state court's interpretation of its own state law as long as that interpretation does not restrict a federally created right. *See* Cooper v. California, 386 U.S. 58, 62 (1967) (specifically discussing the fourth amendment issue); Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1965).

The decision in *Scott K.* in no way restricted any federal rights. If anything, the case broadened the scope of fourth amendment protections afforded to individuals. Traditionally, the California Supreme Court has employed this tactic to broaden rights in the absence of United States Supreme Court initiative. *See generally* People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973) (search and seizure case); Rios v. Cozens, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973) (violation of due process); Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965) (claim of equal protection violation).

Pursuant to an appeal by the State of California, the United States Supreme Court tentatively docketed the case of *In re* Scott K. as No. 79-226. This petition for a writ of certiorari was denied on November 26, 1979. 444 U.S. 973 (1979).

juvenile justice system derived from the English common law,[26] a body of law which furthered the maintenance of both a strong nuclear family and a dominant parental leader.[27] The government's assumption of an interest in minors corresponded to the development of compulsory education programs which tended to introduce children into the public sector.[28] As a result, the government sought to emulate the role of the parent in the public sphere. A separate, nonadversarial court system was developed in order to satisfy the special needs of children.[29] The government's practice of assuming a parental role in the public domain became known as *parens patriae*.[30]

Under the doctrine of *parens patriae*, the juvenile justice system evolved as a corrective, rather than a punitive, institution.[31]

---

26. *See* Fox, *Philosophy & the Principles of Punishment in the Juvenile Court*, 8 FAM. L.Q. 373, 376 (1974); Geiser, *The Rights of Children*, 28 HASTINGS L.J. 1027, 1031 (1977).

27. *See* Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State Part II*, 4 FAM. L.Q. 410, 413 (1970). Parental power probably cannot be defined except as a residue of all power not lodged elsewhere by the law. *Id. See generally* Hafen, *Puberty, Privacy, & Protection: The Risks of Children's "Rights,"* 63 A.B.A.J. 1383 (1977).

28. *See* Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1383-84 n.43, 1388 (1976).

29. *See* Garlock, *"Wayward" Children and the Law 1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court*, 13 GA. L. REV. 341, 345-46 (1979); Comment, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (general discussion of the evolution of the juvenile justice system).

"The idea of a juvenile court certainly was not the development of a juvenile criminal court. It was to have a healthy specialized clinic, not to conduct criminal trials in evasion of the Constitution and Bill of Rights." DeBacker v. Brainard, 396 U.S. 28, 38 (1969) (Douglas, J., dissenting).

30. *Parens patriae* refers to the broad concept whereby the state assumes protective jurisdiction over minors. The theory applies in cases of public delinquency as well as in cases of parental neglect. *See* Jensen v. Sevy, 103 Utah 220, 237, 134 P.2d 1081, 1089 (1943). When viewed in this context, the primary purpose underlying the doctrine of *parens patriae* is the maintenance of the child's safety and well-being. *See* Chandler v. Chandler, 56 Wash. 2d 399, 404, 353 P.2d 417, 420-21 (1960).

Generally, courts have been hesitant in overruling precedent supporting the notion of the traditional family hierarchy. In most cases, the child's best interests are presumed to be synonymous with those of his parents. It is only when parents fail in their child rearing obligations that judicial intervention in the areas of delinquency and child abuse becomes necessary. Even so, the courts have been reluctant to consider the child's welfare as different from that of his parents. *See* Geiser, *supra* note 26, at 1031-32. *See also* notes 21-22 *supra* and accompanying text.

It appears that the decision in *Scott K.* signals a departure from rigid adherence to parental supremacy in the privacy of the home. *See also* note 75 *infra* and accompanying text.

31. *See* Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 397 (1970).

Since the system imposed no real sanctions, there was no apparent need for constitutional protections.[32] As enacted, the system attempted to provide for all a child's legal needs: parental protection inside the home was coupled with passive governmental attention outside the home.[33] It was believed that the adoption of *parens patriae* would obviate the need for procedural safeguards.

The legitimacy of a system based entirely upon *parens patriae* came into question at the time due process guarantees were being extended to adults in criminal matters.[34] The first departure from strict adherence to *parens patriae* occurred when a minor was tried as an adult and was convicted on the basis of his testimony taken in juvenile court.[35] Under this circumstance, it became evident that a total denial of rights at the waiver hearing[36] could unduly prejudice the minor's opportunity to obtain a fair and impartial trial. The question of which rights attached during the waiver hearing was

---

32. *See* Comment, *supra* note 29, at 109-10.

33. *Id.* at 110.

34. The extension of procedural due process rights reached its height during the latter years of the Warren Court. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (fourteenth amendment provided that states must adhere to fifth amendment protections against self-incrimination; therefore, a defendant had to be made aware of his right to remain silent); Escobedo v. Illinois, 378 U.S. 478 (1964) (fourteenth amendment provided that right to counsel included right to meet with retained attorney prior to trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (extended rights to counsel in noncapital cases to the states, via the fourteenth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (extending the exclusionary rule to the states as protection against unreasonable searches and seizures).

35. *See* Gallegos v. Colorado, 370 U.S. 49 (1962). In *Gallegos*, a 14-year-old was arrested for robbery and assault and was committed to a reform school. When the victim of the robbery subsequently died, the boy was charged with murder and tried as an adult. He was convicted on the basis of the confession he had made in juvenile court. In reversing, the United States Supreme Court stated, "Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." *Id.* at 54 (majority opinion by Douglas, J.).

36. Waiver hearings are conducted by the juvenile court to determine whether the minor should be tried as an adult defendant. Section 606 of the CAL. WELF. & INST. CODE (West 1972) provides:

> When a petition has been filed in a juvenile court, the minor who is the subject of the petition shall not thereafter be subject to criminal prosecution—based on the facts giving rise to the petition unless the juvenile court finds that the minor is not a fit and proper subject to be dealt with under this chapter and orders that criminal proceedings be resumed or instituted against him.

For additional discussion concerning the fitness of juveniles to stand trial in criminal matters, *see generally* Comment, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 U.C.L.A. L. REV. 988 (1976).

raised in *Kent v. United States*.[37] In *Kent*, the United States Supreme Court decided that, with regard to waiver proceedings, the minor is entitled to "the essentials of due process and fair treatment."[38] While the Court held that such a hearing need not conform to all the requirements of a criminal trial,[39] the decision did cast doubt upon the validity of a system which asserted *parens patriae* as a rationale for excluding all procedural rights.[40]

While the Court still adhered to the basic assumption that children and adults should be treated differently under a dual legal system, a line of cases emerged tending to obscure this distinction.[41] The first such case, *In re Gault*,[42] held that during an adjudicatory hearing a minor is entitled to the right against self-incrimination,[43] the right to counsel,[44] the right to notice of charges,[45] and the right to confront witnesses.[46] The Court considered the possibility of extending other related procedural rights[47] but chose instead to confine its holding to the facts as presented.[48] This

---

37. 383 U.S. 541 (1966).

38. *Id.* at 562.

39. *Id.* The California courts do not consider subsequent criminal prosecutions as a violation of the juvenile's right against double jeopardy. The rationale is that since juvenile hearings are not criminal matters, the minor is not subject to criminal sanctions twice for the same offense. People v. Silverstein, 121 Cal. App. 2d 140, 142-43, 262 P.2d 656, 657 (1953).

40. While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation.

383 U.S. at 555-56.

41. *See* notes 42-58 *infra* and accompanying text.

42. 387 U.S. 1 (1967).

43. *Id.* at 55.

44. *Id.* at 41.

45. *Id.* at 33-34.

46. *Id.* at 57.

47. *Gault* concerned the arrest and subsequent confinement of a minor who had been charged with making obscene phone calls. The Arizona courts failed to provide any of the protections mentioned in the text accompanying notes 43-46 *supra*. In granting a writ of habeas corpus, the United States Supreme Court discussed the minor's right to a transcript of the proceedings and the right to appellate review; however, the Court chose not to reverse on these grounds. *Id.* at 57-58.

48. *Gault* was concerned only with the adjudicatory phase of the hearing. "We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applica-

self-imposed restriction effectively limited the Court's ability to define the "totality of the relationship"[49] between the minor and his government.

Subsequent Supreme Court decisions have attempted to provide guidance in the area of procedural rights through a process of selective incorporation.[50] In addition to the fifth and sixth amendment guarantees provided in *Gault*, the Court has extended to minors first amendment rights,[51] as well as the right to be proven guilty beyond a reasonable doubt.[52] The Court fashioned a test for the extension of due process rights in *McKeiver v. Pennsylvania*:[53]

---

ble to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." *Id.* at 13.

While *Gault* did not discuss the dispositional phase of the juvenile process, there is support for the contention that certain rights should be extended in commitment proceedings when the state is involved. *See In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

> The serious consequences attendant upon involuntary commitment of a minor as a mentally ill or disordered person, and the significant potential for error in diagnosis convinces us that a minor who is mature enough to participate intelligently in the decision to independently assert his right to due process in the commitment decision must be permitted to do so.

Id. at 929, 569 P.2d at 1291, 141 Cal. Rptr. at 303. *See also* Comment, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186 (1978).

49. 387 U.S. at 13.

50. An analogy can be made between the method implemented by the United States Supreme Court in the area of juvenile law and the means employed in the extension of due process rights to defendants in criminal matters instituted by states. *See* notes 51-58 *infra*. *See also* Palko v. Connecticut, 302 U.S. 319 (1937).

The development of due process rights from the federal government to the states seemed to be a necessary prelude to eventual extension of those rights from adults to children: "If the Fourteenth Amendment has absorbed [the federal Bill of Rights] . . . , the process of absorption has had its source in the belief that neither liberty nor justice would exist if [it] . . . were sacrificed." *Id.* at 326. *See also In re* Scott K., 24 Cal. 3d at 401 n.4, 595 P.2d at 108 n.4, 155 Cal. Rptr. at 674 n.4. *See* note 20 *supra*.

51. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Students were suspended from school for wearing arm bands to protest the Vietnam War. The Court held that a passive demonstration came under the protections of first amendment rights to free speech. *Id.*

52. *In re* Winship, 397 U.S. 358 (1970). A boy committed an act that, if done by an adult, would have constituted larceny. Since the offense was of a criminal nature, the child's adjudication of guilt had to be demonstrated beyond a reasonable doubt. *Id.*

53. 403 U.S. 528 (1971) (the right to a jury trial is not constitutionally required). In his concurring opinion, Justice Brennan indicated that the right to a jury trial in an adjudicatory proceeding was not necessary as long as it was compensated by the inclusion of some other right: "[T]he states are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." *Id.* at 554.

"the applicable due process standard in juvenile proceedings as developed by *Gault* and *Winship* is fundamental fairness."[54]

While many of the due process protections have been granted to minors, not all these protections can be extended if the system is to remain nonadversarial.[55] Thus, for example, the right to trial by jury has been denied because of the inherently formalized confrontation that such a procedure necessarily entails.[56] The inclusion of a jury might frustrate the goals of a system in which benign legal counseling must be combined with swift disposition of cases.[57] By according to the child most of the privileges and withholding from him most of the sanctions, the courts can better inculcate a constructive appreciation for the legal process.[58]

B. *Analysis*

The first issue the California Supreme Court addressed in *In re Scott K.*[59] was whether the protection against unreasonable searches and seizures should be extended to minors.[60] Since the United States Supreme Court has not considered the fourth amendment as it relates to minors, the states are free to decide the matter individually.[61] Policy considerations support the extension of fourth amendment rights to minors. The theory underlying both the fourth and fifth amendments is exclusionary in nature. Generally, the fourth amendment rights take effect prior to the proceed-

---

54. *Id.* at 543. For a discussion of the standard of fundamental fairness in a procedural due process context, *see* Twining v. New Jersey, 211 U.S. 78 (1908).

> Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law.

Id. at 106. *See also* note 50 *supra*.

55. 1 W. LAFAVE, SEARCH & SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.5, at 88-89 (1978).

56. *But see In re* Carl W., 15 Cal. 3d 271, 285, 539 P.2d 807, 816, 124 Cal. Rptr. 47, 56 (1975). While the California State Constitution does not require jury trials for trials for juveniles, under extraordinary circumstances, advisory juries are permitted. *Id. See also* Comment, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L.J. 811 (1977); 45 TENN. L. REV. 534 (1978) (general discussion concerning jury trials for juvenile offenders).

57. *See* 1 W. LAFAVE, *supra* note 55, at 89.

58. Kent v. United States, 386 U.S. at 554.

59. 24 Cal. 3d at 395, 595 P.2d at 105, 155 Cal. Rptr. at 671.

60. *Id.* at 400, 595 P.2d at 108, 155 Cal. Rptr. at 674.

61. *See* note 25 *supra*. Because the United States Supreme Court has not decided this particular issue, the states have great latitude in broadening, as well as restricting, the application of the fourth amendment as it pertains to juveniles.

ing while the fifth amendment rights attach during the hearing. Since the decision in *Gault* extended the fifth amendment right against self-incrimination during the adjudicatory phase,[62] it is consistent to permit the inclusion of similar fourth amendment rights where evidence was obtained prior to the hearing.[63] The fact that recent United States Supreme Court decisions[64] have expanded the minor's substantive due process rights of privacy provides additional impetus for suggesting that the corresponding procedural rights also should be broadened.

The California court can base its acceptance of this position on both the growing trend of state court holdings favoring extension[65] and the California court's own recent *sub silentio* holding in the case of *In re Tony C.*[66] In *Tony C.*, the court ruled that a minor suspected of receiving stolen property and committing rape could not legally be detained without reasonable cause.[67] The decision in *Scott K.* follows as a logically consistent corollary to the principle implicitly held in *Tony C.* and enables California to provide minors with fourth amendment protections despite the absence of a definitive United States Supreme Court mandate.[68]

III. Parental Authority and Due Process

A second issue raised in *Scott K.* concerns the role of the parent with regard to the extension of fourth amendment rights to minors. Federal case law indicates that certain limitations are placed upon the preferred position that parents enjoy over their children.[69] While parents reign supreme in their households, the government has a viable interest in protecting minors engaged in pub-

---

62. *See* notes 42-49 *supra* and accompanying text.

63. *See* 1 W. LaFave, *supra* note 55, at 59.

64. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (minors have the right to own contraceptives without parental consent); Planned Parenthood v. Danforth, 428 U.S. 52, 72-74 (1976) (minors have the right to terminate their pregnancies without parental interference).

65. *See* State v. Lowry, 95 N.J. Super. 307, 313-17, 230 A.2d 907, 910-12 (Law Div. 1967); *In re* Williams, 49 Misc. 2d 154, 169-70, 267 N.Y.S.2d 91, 109-10 (Ulster City Fam. Ct. 1966); *In re* Morris, 29 Ohio Misc. 71, 72, 278 N.E.2d 701, 702 (1971); *In re* Harvey, 222 Pa. Super. 222, 228, 295 A.2d 93, 96-97 (1972); Cuilla v. State, 434 S.W.2d 948, 950 (Tex. Civ. App. 1968). *See also* note 50 *supra*.

66. 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

67. *Id.* at 892-94, 582 P.2d at 961-63, 148 Cal. Rptr. at 370-72.

68. 24 Cal. 3d at 402-03, 595 P.2d at 108-09, 155 Cal. Rptr. at 674-75.

69. *See* note 22 *supra* and accompanying text.

lic activity. The United States Supreme Court has maintained this dichotomy by upholding the rights of parents to bring up their children[70] and to direct their education.[71] Only when children were exploited in the public sector did the state rush to their defense.[72] Since these decisions were rendered prior to *In re Gault*,[73] they tended to support notions inherent in the concept of *parens patriae*.

The apparent effect of recent decisions[74] that have expanded the substantive due process rights of minors has been to reduce the scope of parental authority in the home.[75] As a practical matter, the addition of these rights has lessened the degree to which parents can place demands upon their offspring. These developments troubled Justice Clark, who, in his dissenting opinion in *Scott K.*, voiced concern that the decision would seriously impede parents' right to maintain discipline over their children: "[a] parent who, as in this case, has reasonable grounds to believe that a minor child is engaged in serious criminal activity, must be allowed to investigate that belief. . . . [T]he [resulting] search is justified as conduct in aid of the parental power of care and discipline."[76]

The majority of the court attempted to dissipate these fears by distinguishing a warrantless police search from a private one on the basis of whether state action was present.[77] Since the application of

---

70. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

71. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

72. *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968); Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944). These two cases curtail the rights of parents over their children when the state has a dominant interest in protecting their health and safety. *See also* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); note 22 *supra* and accompanying text. The power of the parent is limited to the extent that "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 234.

73. 387 U.S. at 1.

74. *See* note 64 *supra* and accompanying text.

75. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 693-94 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976). Both of these decisions reflect normal parental concerns which, until recently, have been decided in the private domestic domain.

The court in *Scott K.* failed to consider the question of substantive rights of privacy. Apparently, the court feared that such an approach would sufficiently restrict parents from investigating their child's wrongdoing. *See* 24 Cal. 3d at 403 n.8, 595 P.2d at 109 n.8, 155 Cal. Rptr. at 675 n.86. *See also* notes 107-15 *infra* and accompanying text.

76. 24 Cal. 3d at 406-07, 595 P.2d at 112, 155 Cal. Rptr. at 678 (Clark, J., dissenting).

77. *Id.* at 400 n.2, 595 P.2d at 107 n.2, 155 Cal. Rptr. at 673 n.2.

constitutional protections requires the existence of state action,[78] it is essential to determine who initiated the search. In the case of *Scott K.*, no state action was apparent in the mother's search of the desk drawer; therefore, the evidence seized was admissible.[79] The search of the toolbox, however, was initiated by the police. Since state action was present, any tainted evidence would be excluded from the judicial proceeding.[80] When viewed in this light, the decision does not compromise the parents' ability to investigate their child's wrongdoing. The extension of the fourth amendment to minors merely places an additional check upon unwarranted state interference. This only serves to protect the child from the improprieties of the police, not from the well-intentioned aims of his parents.

Justice Clark's dissent implied that parents would be powerless to deal with complicated social problems if they were precluded from working in concert with police.[81] The justice condoned this cooperative effort by supporting his argument with an agency theory: "[w]hat the father could do himself, he could do by an agent, whether that agent be a locksmith or a policeman."[82] According to Justice Clark, the action by police was no different than the policy which permits school officials to search school lockers under a theory of *in loco parentis*.[83]

Despite the dissent's assertions to the contrary, there are two major distinctions between an administrative school search and a police search of a private residence. School officials have an identifiable interest in a school locker:[84] lacking a warrant, police have no such interest in a private home. Additionally, under California law, school officials are recognized as private individuals. Since

---

78. *See generally* Burdeau v. McDowell, 256 U.S. 465 (1921). Evidence obtained in a private search is admissible even though the search may have been unreasonable. This is so because the constitutional safeguards protect individuals against state action, and not private action. *Id. See also* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). Under California law, evidence obtained in unreasonable searches by state officials is inadmissible in criminal proceedings. *Id.*

79. 24 Cal. 3d at 398-99, 595 P.2d at 106-07, 155 Cal. Rptr. at 672-73.

80. *Id.* at 405, 595 P.2d at 110, 155 Cal. Rptr. at 675. *See* notes 7 & 13 *supra*.

81. 24 Cal. 3d at 407-08, 595 P.2d at 112, 155 Cal. Rptr. at 678 (Clark, J., dissenting).

82. *Id.*

83. *Id. In loco parentis* is a theory by which school officials are delegated parental powers. *See generally* Brooks v. Jacobs, 139 Me. 371, 31 A.2d 414 (1943).

84. *See In re* Donaldson, 269 Cal. App. 2d 509, 510-12, 75 Cal. Rptr. 220, 221-22 (1969).

state action is not present, their searches are not conducted under the scope of constitutional protections.[85]

In *Scott K.*, the extension of fourth amendment rights actually imposes a benign effect upon parental power. Parents are not hampered in their ability to investigate wrongdoing since they, like school officials, can circumvent due process requirements by providing police with the evidence they seize. If parents choose not to involve the police, they still retain the power to govern their child's behavior. While it was not apparent in *Scott K.*, it seems that the extension of fourth amendment rights would reduce police involvement and would foster the resolution of domestic disputes.

IV. THIRD-PARTY CONSENT

The final issue discussed by the court in *Scott K.* concerns the extent to which parents, as third parties, can consent to a search of their child's belongings. Consent searches[86] have gained favor in recent years as the United States Supreme Court has attempted to provide police with greater investigatory powers. The current test to determine whether authority exists to allow a third party to consent to a search was derived from the combined rationales of two Supreme Court decisions: *Frazier v. Cupp*[87] and *United States v. Matlock*.[88] In *Frazier*, the Court departed from the broad provisions of the exclusionary rule by permitting one party to consent to the search of a duffelbag which he shared with defendant.[89] The Court upheld the search despite the fact that the consenting party possessed only half the items in the bag. The Court, in allowing one party to authorize the search, reasoned that defendant had assumed the risk that a third party would consent to a search of the jointly shared bag.[90]

In *Matlock*, the Court fashioned a standard for determining when a defendant had assumed this risk. The test evaluated whether the third party maintained common authority over the

---

85. *Id. See also In re* Christopher W., 29 Cal. App. 3d 777, 780, 105 Cal. Rptr. 775, 777 (1973).

86. Third-party consent searches are those in which third parties give police permission to investigate activity to which the defendant had not previously agreed. *See generally* Comment, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121 (1973); 41 TENN. L. REV. 923 (1974).

87. 394 U.S. 731 (1969).

88. 415 U.S. 164 (1974).

89. 394 U.S. at 740. *See also* note 7 *supra*.

90. 394 U.S. at 740.

items to be inspected.[91] Common authority was measured by the degree of access or control which the consenting party had with respect to the searched item. Under the *Matlock* standard, a mere property interest was insufficient to permit consent unless it was demonstrated that actual control was exerted over the item's use.[92] California cases decided prior to *Matlock* were consistent with this approach.[93]

The court of appeals failed to apply the *Matlock* test to the facts of *Scott K.* The facts indicate that Scott objected to the search when the police requested the keys to the toolbox.[94] Scott possessed the only key to the box, and his father readily admitted that his son maintained sole control over its contents.[95] There were no indications of any mutual use of the toolbox. Furthermore, the court of appeals agreed that "if the son had been an adult, the father would have had no right to consent to the opening and searching of the locked toolbox."[96] Presumably, the father's consent would not have satisfied the *Matlock* test in the absence of the parent-child relationship.

The threshold question in *Scott K.* is whether parents possess rights greater than those announced in *Matlock*. In his dissenting opinion, Justice Clark indicated that parents do enjoy greater rights. The justice voiced his support[97] of the result reached in *Vandenberg v. Superior Court*,[98] a California appellate court decision which followed a theory of consent premised upon the disparity of rights between parent and child.[99] In *Vandenberg*, the appellate court permitted a father, who shared a bedroom with his son, to consent to a search of their room as well as to a search of his

---

91. 415 U.S. at 171.

92. *See* note 24 *supra*.

93. People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964) (apartment guests could not consent to search of property of others jointly residing there); People v. Daniels, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971) (mother could not consent to search of adult son's suitcase); People v. Egan, 250 Cal. App. 2d 433, 58 Cal. Rptr. 627 (1967) (stepfather's consent was invalid in search of adult stepson's personal effects found in stepfather's bedroom); People v. Murillo, 241 Cal. App. 2d 173, 50 Cal. Rptr. 290 (1966) (roommate's consent to search residence was not valid with regard to the search of an attaché case).

94. 24 Cal. 3d at 399, 595 P.2d at 107, 155 Cal. Rptr. at 673.

95. *Id.*

96. 142 Cal. Rptr. at 62.

97. 24 Cal. 3d at 407-08, 595 P.2d at 112, 155 Cal. Rptr. at 678.

98. 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970).

99. *Id.* at 1055, 87 Cal. Rptr. at 880.

son's personal effects.[100] Justice Clark incorporated this position in his opinion: "a father may grant permission to enter and search a bedroom jointly occupied by the father and his son and such consent is valid although the son may protest the search."[101]

In the context of the present case, Justice Clark's reliance on the decision reached in *Vandenberg* is misplaced for several reasons. First, *Vandenberg* was decided prior to the federal ruling in *Matlock* and after a significant number of California decisions adhering to a theory of mutual use.[102] Second, the case of *People v. Daniels*,[103] decided a year after *Vandenberg*, invalidated a consent search by a mother who allowed police to search her son's locked suitcase.[104] The decision in *Daniels* is significant because it asserts the validity of the *Matlock* principle as a narrowly construed guideline under California law. Third, state law prohibits parents from waiving their children's constitutional guarantees.[105] If parents are unable to deny the existence of their children's rights, then the *Vandenberg* rationale is necessarily limited in both scope and effect. Finally, California law permits children to own property independently of their parents.[106] Such law would have no mean-

---

100. *Id.* at 1053-55, 87 Cal. Rptr. at 879-80.

101. 24 Cal. 3d at 408, 595 P.2d at 112, 155 Cal. Rptr. at 678 (Clark, J., dissenting).

102. *See generally* note 83 *supra* and accompanying text; *see also* People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973) (adult son locked himself in his room in an effort to resist his mother's consent search, exclusive occupancy was demonstrated, and the evidence obtained was inadmissible); People v. Flowers, 23 Mich. App. 523, 179 N.W.2d 56 (1970) (minor was being tried as an adult, and the court rejected the argument of parental supremacy, finding that the father could not give consent when he had no personal involvement in the suspected crime).

Arguably this theory of parental prerogative is similar to the agency theory the United States Supreme Court dispensed with in Stoner v. California, 376 U.S. 483 (1964). In *Stoner*, the Court denied the right of a hotel clerk to consent to a search of a guest's room on a theory of agency. "[T]he rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " *Id.* at 488.

103. 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971).

104. *Id.* at 42-45, 93 Cal. Rptr. at 631-33.

105. *See In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (due process rights of a 14-year-old cannot be waived by parents when child is subject to being committed to mental hospital); *In re* Ricky H., 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970) (parents may not influence minor's right to counsel by threatening not to pay the expenses).

106. *See* Emery v. Emery, 45 Cal. 2d 421, 432, 289 P.2d 218, 225 (1955) ("a minor child's property is his own and not that of his parents"). *See also* Estate of Yano, 188 Cal. 645, 206 P. 995 (1922).

ing if parental rights over the item in dispute were held to be superior to the child's rights. By granting fourth amendment rights to minors, the ruling in *Scott K.* operates to defeat any theory of consent which gives deference to parental standing.

V. LEGAL PARAMETERS

The California Supreme Court's holding in *Scott K.* gives rise to several generalizations. First, in order for a child to negate the consent of any third party, he must establish an absolute property interest in the item in question. In the home setting, it is arguable that a particular room may be shared by various family members and, therefore, a search of the room is not immune from third-party consent.[107] Since children may own property found within a room, it is likely that such personalized items would not be subject to the consent waiver.[108]

Second, if the child is present and objects to the search of an item of mutual use, the decision in *Scott K.* implies that parental consent would not outweigh the child's objections.[109] Cases which hold to the contrary[110] premise their result upon the disparity of rights between parent and child.[111] In view of the decisions rendered in *Daniels*[112] and *Scott K.*, such reasoning is no longer tenable under California law.

Finally, if the child is absent during the search of an item of mutual use, the implication is that the consent would be valid un-

---

107. This is especially so if the room is shared with a sibling or a parent, as in Vandenberg v. Superior Court, 8 Cal. App. 3d at 1048, 87 Cal. Rptr. at 876. Some jurisdictions have decided that parental authority reigns supreme even after the decision in United States v. Matlock, 415 U.S. at 164. *See* State v. Cook, 345 So. 2d 29 (La. 1977); Nelson v. State, 564 P.2d 254 (Okla. 1977).

The search of other rooms which serve as common rooms can be consented to by parents. *See* People v. Simmons, 49 Mich. App. 80, 211 N.W.2d 247 (1973) (dining room); People v. Bunker, 22 Mich. App. 396, 177 N.W.2d 644 (1970) (basement). Neither of these two decisions would be affected by the result reached in *Matlock*.

108. *See* People v. Daniels, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971) (suitcase); People v. Murillo, 241 Cal. App. 2d 173, 50 Cal. Rptr. 290 (1966) (attaché case).

109. 24 Cal. 3d at 404, 595 P.2d at 110, 155 Cal. Rptr. at 676.

110. *See* State v. Clemons, 27 Ariz. App. 193, 552 P.2d 1208 (1976); In Interest of Salyer, 44 Ill. App. 3d 854, 358 N.E.2d 1333 (1977); Tate v. State, 32 Md. App. 613, 363 A.2d 622 (1976).

111. *See* 3 W. LAFAVE, *supra* note 55, § 11.7, at 733-34.

112. *See* notes 93 & 94 *supra* and accompanying text.

der an assumption of risk theory.[113] If the item is not subject to mutual use, then any third-party consent to the search is invalid.

A related problem which may arise concerns the issue of whether the child lacks the capacity to exercise his rights. Arguably, the fourth amendment rights extended to children are not the same as those extended to adults because some children will lack the capacity to appreciate the nature of their rights. Such a position is not persuasive. Capacity, like common authority, is an issue dependent upon the particular facts of each case. The fact that an individual child may lack the capacity to exercise his rights should not affect the entire class of minors any more than a senile adult's inability to assert his rights should affect other senior citizens whose mental faculties are unimpaired. California law has indicated that a child as young as thirteen years old may consent to a search of his parent's home.[114] Certainly, a child who could exercise the right to consent could also exercise the right to deny consent. It must be the responsibility of the courts to closely scrutinize those situations in which a child has capacity but the parent's waiver of the protected right works to the child's ultimate disadvantage.

VI. CONCLUSION

The California Supreme Court's decision in *Scott K.* broadened the minor's rights vis-à-vis the state without unduly restricting the parent-child relationship. By minimizing unwarranted state interference, the decision may well encourage families to resolve juvenile problems among themselves. The limitation placed upon the parental right to consent to the search of a child's possessions is, in effect, an illusory one since the child's fourth amendment rights may be circumvented if the parent initiates the search.[115]

The most significant aspect of the decision, however, lies in the California Supreme Court's willingness to join other state jurisdictions in extending to minors rights which the United States Supreme Court has failed to consider.[116] By granting fourth

---

113. *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969); notes 87-90 *supra* and accompanying text.

114. *In re* Robert H., 78 Cal. App. 3d 894, 144 Cal. Rptr. 565 (1978).

115. *See* notes 79 & 80 *supra* and accompanying text.

116. *See* note 61 *supra* and accompanying text.

amendment protection to minors while withholding the criminal sanctions applicable to adults, the courts will be able to assess realistically whether the evolving system of juvenile justice accurately satisfies the corrective needs of the child.

Albert N. Kapin