

## PROTECTING PRETEENS: A CHILD'S PORTION OF THE FOURTH AMENDMENT†

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### INTRODUCTION

Picture yourself walking down a public sidewalk on a busy city street. Ambling toward you is a toddler, maybe a two-year-old, with no adults in sight. Would you just ignore the toddler and walk on by? Or, might you block her path and begin to question her unusual activity? Would you go so far as to pick her up and carry her back in the direction from which she was ambling, looking for the adult responsible for her care? If your custody of this toddler lasted for a while, might you check to see if she needs a new diaper? Would her protests and obvious “nonconsent” to this unwanted custody and invasion of personal privacy be relevant to you?

Now picture the same scene but replace the oncoming toddler with a young child, maybe an eight-year-old girl. Would you walk on by the young girl? What if it was midnight and this eight-year-old girl was walking in the most dangerous part of town? Would you at least ask her where she lived and why she was out so late? If she just ignored you and walked on, would you stop her and question her further? Could you even see yourself taking custody of this young child until you can get her home? Compare that scenario with an eight-year-old boy on Saturday morning walking down the sidewalk toward the neighborhood park, dribbling a basketball. While some concern

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might cross your mind, would you ever consider stopping the boy, questioning him, or taking him into custody? What if it was midnight?

What if the oncoming sidewalk ambler is a seventeen-year-old boy? What if it were Saturday morning near the neighborhood park or midnight in the high crime area? Would you feel any particular need to be protective of him, or would you interact with him the same as if he were a man over the age of twenty-one? Might you even walk on by more quickly and cross to the other side of the street out of concern that the seventeen-year-old boy might be a threat to your safety?

The final part of our picture is that now you are a police officer, so the Fourth Amendment presumably constrains your desire to stop, frisk, arrest, and search sidewalk ambler. You know full well that a stop requires reasonable suspicion of criminal activity, and an arrest requires probable cause that this person has committed a specific crime. Would you, as a police officer, ignore the ambling toddler because of no evidence of criminal activity? Would you need such evidence to stop either of the eight-year-olds described above? How about the seventeen-year-old? Assuming the answers to these hypothetical scenarios seem intuitively obvious, how do we justify exceptions to Fourth Amendment requirements based upon a vague sliding scale of age and vulnerability? If we have an even stronger expectation of community caretaking for the police officer than for the private citizen, how do we guide implementation of that function between rescuing children from potential harm and protecting individual liberty and privacy?

Most of us especially treasure our right to privacy, our right to be let alone. This desire—sometimes demand—for privacy may be particularly virulent for teenagers. Do preteen children have privacy rights as well, albeit somewhat reduced in intensity and strength? This article probes that question but finds an almost barren legal landscape in which to begin to frame answers to this question.

## I. THE CHILDREN OF THIS INQUIRY

The line between childhood and adolescence is drawn here between ages twelve and thirteen, both to simplify the analysis

and to comport with general assumptions of developmental psychology.<sup>1</sup> The beginning of the age range in this analysis is age seven. This recognizes long-established norms from the common-law infancy defence and subsequent statutory provisions which provide a rebuttable presumption of criminal incapacity for persons age seven to fourteen.<sup>2</sup>

*A. Young Children, Homicide, and the Justice Process*

Children ages seven to twelve interact with many areas of American law, as is reflected in now common law school courses on “children and the law.”<sup>3</sup> However, this article narrows the scope to primarily just one facet of American criminal law. Our arena is homicide law and procedure, cases which typically put maximum stress on the criminal justice system and the community in which the homicide occurred. Therefore, we must identify the unique legal issues that arise when homicide offenders are ages seven to twelve at the times of their homicides. Even much younger children have been known to commit homicide, but their cases simply do not enter the legal system and almost never are made public.

Any criminal case, certainly any homicide case, portends serious adverse consequences for preteens. The formal sentencing options of criminal courts and disposition options of juvenile courts are obviously among the most severe, and even the collateral consequences of such convictions and adjudications

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<sup>1</sup> In an earlier era, offenders may have had to be at least age twelve to have any criminal liability at all, at least for capital offenses. WAYNE R. LAFAVE, *CRIMINAL LAW* 486 n.8 (4th ed. 2003) (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 23 (photo. reprint 1979) (1769); 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 22 (London, Sollom Emlyn 1778)).

<sup>2</sup> LAFAVE, *supra* note 1, at 485-86.

<sup>3</sup> Perusing the tables of contents of the casebooks for such courses reveals the wide range of legal issues, with criminal and juvenile offenses constituting only a very small part of the legal world of children. *See, e.g.*, SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM* ix-xxvi (3d ed. 2004); DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW* xi-xxxi (2d ed. 2003); LESLIE J. HARRIS & LEE E. TEITELBAUM, *CHILDREN, PARENTS, AND THE LAW* ix-xxvi (2002).

can be debilitating.<sup>4</sup> Homicide cases typically showcase legal rights and procedures, certainly as compared to minor offenses, and an analysis of preteens' rights might begin with an assumption that they are the same as those of teenagers and adults. At least for such serious juvenile cases, we also will assume that the overriding goal of the defense is to protect the due process rights of the child, including Fourth Amendment rights.

The subjects of our inquiry, homicide offenders ages seven to twelve, are very few in comparison to older juvenile homicide offenders, but they do exist. Table 1 below gives us a thirty-year pattern of annual homicide arrests for crimes by offenders in this young age group plus those who were age thirteen. Over the three decades represented, offenders age thirteen and younger averaged just over 100 each year. This group obviously includes thirteen-year-olds who presumably commit more homicides than any one-year age group younger than thirteen. Nonetheless, we can assume that at least some of these 100 plus arrestees each year were age twelve and younger. It is probable that several times that number is a more accurate estimate, but many of these cases are handled more informally as children in need of services from various governmental agencies.

Table 1

Murder and Non-Negligent Homicide Arrestees Ages Thirteen and Younger<sup>5</sup>

<u>Year/Arrests</u>	<u>Year/Arrests</u>	<u>Year/Arrests</u>
1977: 104	1987: 118	1997: 106

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<sup>4</sup> See, e.g., Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1114-15 (2006).

<sup>5</sup> JAMES ALAN FOX & MARIANNE W. ZAWITZ, HOMICIDE TRENDS IN THE UNITED STATES 20 (2007) (Table: Homicide Offenders by Age), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf>. The 2006 arrest figure came from FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2006 (2007), available at [http://www.fbi.gov/ucr/cius2006/data/table\\_38.html](http://www.fbi.gov/ucr/cius2006/data/table_38.html).

1978: 125	1988: 106	1998: 105
1979: 94	1989: 129	1999: 91
1980: 111	1990: 100	2000: 73
1981: 86	1991: 142	2001: 52
1982: 94	1992: 150	2002: 66
1983: 84	1993: 168	2003: 79
1984: 73	1994: 209	2004: 83
1985: 97	1995: 151	2005: 60
1986: 98	1996: 99	2006: 72

30-year total: 3,125

Annual average: 104

### *B. Selected Examples of Such Cases*

The intentional homicide committed a generation ago by Cameron Kocher, a nine-year-old, fourth-grade Cub Scout, stirred national attention.<sup>6</sup> The uncontested facts, as accepted by the Supreme Court of Pennsylvania,<sup>7</sup> seem to indicate an open-and-shut case:

On the morning of March 6, 1989, a snow holiday from school, Jessica Ann Carr was fatally shot while riding as a passenger on a snowmobile owned by Mr. and Mrs. Richard Ratti, neighbors of the petitioner. On that morning, petitioner had been playing Nintendo at the Rattis' home but stopped playing when Mr. Ratti forbade the children to play because the children had made a mess in the kitchen. Some children, the victim included, started riding snowmobiles but the petitioner returned home. At some point after returning home the petitioner procured the key to his father's locked gun cabinet and removed a hunting rifle equipped with a scope. He loaded the weapon with ammunition, opened a window, removed the screen, and pointed the gun outside. The gun discharged,

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<sup>6</sup> See, e.g., Anthony DePalma, *Grieving for Dead Girl, Town Asks: Should Boy, 10, Face Murder Charge?*, N.Y. TIMES, Aug. 26, 1989, § 1, at 6 (Kocher was nine years and ten months old at the time of the crime, but ten years old by the time he was charged).

<sup>7</sup> Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992). In the spirit of full disclosure, readers should be aware that the author was co-counsel for Cameron Kocher in this case.

striking Jessica Ann Carr in the back and fatally wounding her. The scope of the rifle struck the petitioner's forehead and left a visible wound. He returned the rifle to the gun cabinet and hid the empty shell casing.<sup>8</sup>

On first impression, the *Kocher* case may appear to be a textbook example of murder. Certainly the defendant's acts provide a solid case for the prosecution, but the obvious hurdle is whether a nine-year-old can have a murderous mens rea. In this case, Kocher's parents waived his Fourth Amendment rights when the police came to their house, and the resulting questioning and search revealed the above factual information.<sup>9</sup> Without these evidence-gathering processes, the prosecution would not have had such an open-and-shut case.

Intentional homicide cases of even younger children may raise even more strongly the issue of competence to understand the crime and the process which ensues. Here is a New York case involving a seven-year-old and a nine-year-old:

The petitions allege that on May 10, 1981 the two respondents acting in concert with intent to cause the death of another did intentionally push Furguron E. and Jabril B. into Jamaica Bay, thereby resulting in the death by drowning of Furguron E. and Jabril B.; or under circumstances evincing a depraved indifference to human life the respondents recklessly engaged in conduct which created a grave risk of death to another by pushing Furguron E. and Jabril B. into Jamaica Bay, thereby resulting in their deaths by drowning.

Respondent Robert G. was seven years, five months old and respondent Darwin J. was nine years, six months old at the time of the alleged offenses. . . .

. . . .

Dr. Ruth Feibel, a qualified psychiatrist . . . testified that Robert G. presented a developmental lag and that he was less capable than other children his age to understand what the meaning of a trial is. . . . Dr. Feibel stated that Robert did not

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<sup>8</sup> *Id.* at 1309-10.

<sup>9</sup> *See* DePalma, *supra* note 6.

completely understand the charges against him, nor did he fully grasp the meaning of death. Further, he cannot separate the facts from emotional experience or fantasy from actuality and he was not capable, therefore, of giving a meaningful account to help anybody defend him.<sup>10</sup>

Under what if any circumstances would this seven-year-old be competent to understand and assert his Fourth Amendment rights?

It comes as no surprise that young children sometimes play with fire, so there will be cases in which the arson murder formulation will be apt. Here is a 2007 case involving a ten-year-old Ohio boy:

The fire scene last week was like some surrealist painter's conceptualization of hell: small children falling from windows, bodies ablaze. A burning woman crying, "Save my babies!" with her dying breath. Firefighters shouldering their way into an inferno in a desperate, doomed rescue effort.

In the end there were five sets of remains: four children, one woman.

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Police quelled the speculation Friday with news that a 10-year-old boy inside the home intentionally set the fire. Timothy Douglas Byers is charged with juvenile delinquency by way of aggravated arson and five counts of murder, even though officials say he didn't mean to kill his mother, his sister and three other children.

"I know he's only 10, but he took my babies away from me," said Christy Winans, mother of three of the victims. "I hope he never sees the light of day."<sup>11</sup>

The felony murder doctrine is controversial, and the arson-murder version is no exception.<sup>12</sup> However, with the reduced

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<sup>10</sup> *In re Robert G.*, 468 N.Y.S.2d 422, 423-26 (N.Y. Fam. Ct. 1983).

<sup>11</sup> Mary McCarty & Tom Beyerlein, *Family, Friends Recount Lives of Victims Killed in Fire; Police Say 10-Year-Old Boy Intentionally Set Fire that Killed his Mother, Sister and Three Others*, DAYTON DAILY NEWS, Sept. 23, 2007, at A15.

specificity of the criminal intent for murder, this prosecutive approach may be particularly effective against such very young children.

Children, like adults, may lose self-control when confronted with provocation or in the heat of passionate anger. Here are two equally horrible infanticide cases, one with a seven-year-old in Tampa and the other with a nine-year-old in Trenton:

The Hillsborough County State Attorney's Office charged an 8-year-old boy with aggravated manslaughter Tuesday in the beating death of his infant half-sister.

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The boy is accused of throwing 7-month-old Jayza Laney Simms down the stairs of her parents' East Tampa home, then kicking her and beating her with a wood board on May 22. The boy lives in Lakeland with his mother but was visiting his father, his father's girlfriend and their two daughters at the time. He told police he was mad because the baby wouldn't stop crying, so he hit her.

The baby's parents were outside their apartment when the beating occurred. The baby's mother found the battered girl after the boy came outside and said she was bleeding. She was pronounced dead on arrival the same day at St. Joseph's Hospital.

The boy, who was 7 years old at the time, initially denied doing anything to the baby. He later admitted to beating the girl, police said. The boy is being charged as a juvenile, but he will not be arrested or booked into jail.<sup>13</sup>

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An 11-month-old boy was fatally beaten at a home day center, and authorities have charged a 9-year-old boy also attending the day care with the death and the center's owner

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<sup>12</sup> See generally LAFAYE, *supra* note 1, at 744-65.

<sup>13</sup> Candace Rondeaux, *Boy, 8, Charged in Death of Baby*, ST. PETERSBURG TIMES, July 20, 2005, at 1B (original paragraph breaks omitted).

with putting the child in harm's way. Authorities said the older boy repeatedly hit Tahir Francis in the head a week ago, causing skull fractures. Tahir was taken to a hospital and died about six hours later. "I want to know what kind of home the 9-year-old comes from," father Tafawah Francis told The Associated Press on Thursday. "He doesn't understand, you can't do these things to a baby." . . . The 9-year-old has been charged with the juvenile equivalent of aggravated manslaughter and has been released on house arrest to his parents.<sup>14</sup>

Final examples come from the murkier area of unintentional killings resulting from reckless or grossly negligent behavior. Probably the most common scenario for young children that comes to mind is playing with guns:

Appellant, a nine-year-old boy, was declared to be a ward of the juvenile court . . . after a finding that he committed involuntary manslaughter by shooting another boy in violation of [the Penal Code]. The juvenile court found appellant had no intent to kill but "there was an intent to commit a reckless and dangerous act." Appellant was placed on four years probation less two days served in juvenile hall subject to certain conditions.

. . . .

Appellant's father kept a .22 caliber rifle in the entryway closet of the family home to "scare off dogs." The rifle was in a loaded condition with the safety probably off. Although appellant had once shot the rifle, he had never been taught how to use the gun nor had he received any instruction on the gun's safety mechanism or on safety rules for handling guns. Nevertheless, appellant's father had "mentioned" to appellant that it was unsafe to point a gun at anyone. He had warned appellant to stay away from the gun. Appellant also had been told by his parents not to have playmates in the house when they were absent.

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<sup>14</sup> *Boy, 9 Charged in Baby's Fatal Beating at Day Care*, HOUSTON CHRON., Aug. 31, 2007, at A9.

The victim was 18 to 24 inches from the muzzle of the gun when it was fired by appellant. The bullet struck the victim in the center of the chest, piercing the heart.<sup>15</sup>

A much stranger case of an eight-year-old child being charged with involuntary manslaughter is this case from Brooklyn:

With the 8-year-old boy whose school bus antics led to the death of a classmate being held in a diagnostic testing facility, Mayor Bloomberg is questioning the wisdom of pursuing criminal charges against such a young child. The boy . . . apparently snuck onto a locked school bus and released the parking brake, causing it to roll forward and kill . . . a classmate . . . . Police arrested him on charges of criminally negligent homicide, but there is now growing sentiment that the charge was too severe.<sup>16</sup>

The above examples remind us that preteen children can and do commit horrible, outrageous homicides. We can and should expect that such cases be investigated thoroughly and aggressively by law enforcement. Such investigations can be expected to be confronted by typical Fourth Amendment issues.

## II. SCOTUS,<sup>17</sup> THE FOURTH AMENDMENT, AND CHILDREN

What unique Fourth Amendment issues arise when the homicide offenders are preteens as described above? It may be only human nature for law enforcement officers to be more protective of younger children, with less thought given to their Fourth Amendment rights against unreasonable search and seizure. The overriding concern may be for protection and rescue from danger, but what do we do when their “rescue” uncovers evidence of criminal activity? We have little specific guidance for officers in these unusual cases.

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<sup>15</sup> *In re Michael B.*, 149 Cal. App. 3d 1073, 1073-78 (Cal. Dist. Ct. App. 1983).

<sup>16</sup> E.B. Solomont, *Mayor Questions Merit of Charging Boy in Death of 8-Year-Old Girl*, N.Y. SUN, May 25, 2006, at 4.

<sup>17</sup> This common acronym for The Supreme Court of the United States is used throughout this article.

Major SCOTUS cases addressing the general due process rights of juveniles have almost always dealt with teenagers. *Kent v. United States*<sup>18</sup> in 1966 is the first of this parade of juvenile cases. Sixteen-year-old Morris Kent had been accused of robbery and rape, and the Supreme Court held that this juvenile offender had some procedural due process rights in judicial waiver hearings to transfer his case to criminal court.<sup>19</sup> The next year the Court decided *In re Gault*, the seminal case in juvenile law.<sup>20</sup> Fifteen-year-old Gerald Gault reportedly had made a lewd telephone call to a female neighbor and was then subjected to very informal juvenile court proceedings.<sup>21</sup> The Court's holding in *Gault* is seen as the constitutional domestication of juvenile courts, requiring basic procedural due process rights such as notice of charges, a fair and impartial hearing, assistance of defense counsel, and the privilege against self-incrimination.<sup>22</sup>

In 1970, the Supreme Court decided *In re Winship*.<sup>23</sup> *Winship* involved the youngest offender and the only preteen among these leading cases, here a twelve-year-old was accused of stealing money from the victim's pocketbook.<sup>24</sup> The Court in *Winship* extended the *Gault* requirement of basic due process rights to include the right to proof beyond a reasonable doubt that he violated a criminal law.<sup>25</sup> However, the following year the Court held in *McKeiver v. Pennsylvania*<sup>26</sup> that the procedural due process rights afforded juveniles do not necessarily include the right to a jury in juvenile court delinquency proceedings.<sup>27</sup> Joseph McKeiver was sixteen years old when he

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<sup>18</sup> *Kent v. United States*, 383 U.S. 541 (1966).

<sup>19</sup> *Id.* at 553-55.

<sup>20</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>21</sup> *Id.* at 4-8.

<sup>22</sup> BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL* 9-12 (2d ed. 2009).

<sup>23</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>24</sup> *Id.* at 360.

<sup>25</sup> *Id.* at 378.

<sup>26</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>27</sup> *Id.* at 553.

committed the robbery for which he was adjudicated delinquent.<sup>28</sup>

*Fare v. Michael C.*<sup>29</sup> dealt with the custodial interrogation of a sixteen-year-old about a murder. The *Fare* Court acknowledged a juvenile's right to invoke his Fifth Amendment right to remain silent by asking for the assistance of an attorney, but the Court held that this juvenile (Michael C.) had asked only for his probation officer and that was a different matter.<sup>30</sup> Nonetheless, the Court in *Fare* did not move toward reducing the procedural due process rights of juveniles. The last case arrayed here is *Schall v. Martin*,<sup>31</sup> involving the pretrial detention of a fourteen-year-old following his arrest for robbery and assault.<sup>32</sup> On its way to approving pretrial detention the Court noted that "[t]here is no doubt that the Due Process Clause is applicable in juvenile proceedings."<sup>33</sup>

Returning to the focus of this article, it is frustrating that none of those leading juvenile law cases dealt directly with the Fourth Amendment rights of juveniles against unreasonable arrests, searches, and seizures. Almost all SCOTUS Fourth Amendment cases deal with adult suspects and arrestees. Nonetheless, leading scholars assume that the constitutional limitations on arrest and search and seizure "apply to adults and juveniles alike."<sup>34</sup> The attached appendix lists major state cases dealing with a child's Fourth Amendment rights for each state.

But, further dividing the subject class, are preteens and teenagers to be treated the same under these provisions? Statutes and case law generally do not distinguish between preteens and teens for arrest and search and seizure. However, when the issue is whether the juvenile is competent to waive a procedural due process right, it is common for the courts to be concerned about the age and maturity of the juvenile in question.

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<sup>28</sup> *Id.* at 534-35.

<sup>29</sup> *Fare v. Michael C.*, 442 U.S. 707, 710 (1979).

<sup>30</sup> *Id.* at 727-28.

<sup>31</sup> *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>32</sup> *Id.* at 257-58.

<sup>33</sup> *Id.* at 263.

<sup>34</sup> SAMUEL M. DAVIS ET AL., *supra* note 3, at 1073.

Another difference in the application of Fourth Amendment rights between adults and juveniles is the location of the child at the time of the arrest or search and seizure. If the child is in school, we have several SCOTUS cases to provide guidance, albeit none specifically for preteens. If the child is at home, the Fourth Amendment rights of the child's adult parent, caretaker, or guardian trump those of the child, and even the rights of the child typically are exercised by that adult. For the unaccompanied child on the public sidewalk, the Fourth Amendment environment is completely murky. These situations are explored in more detail below.

### A. *The Fourth Amendment in Schools*

#### 1. The Early Cases

Major SCOTUS cases addressing the Fourth Amendment rights of juveniles have dealt only with teenagers in school settings, with little guidance as to how these holdings might apply to preteens. In *New Jersey v. T.L.O.*<sup>35</sup> in 1985, the Court dealt with a school official's search of a fourteen-year-old student's purse in school.<sup>36</sup> Ten years later in *Vernonia School District 47J v. Acton*,<sup>37</sup> the issue was general drug testing for school athletes, in this case, a seventh grade student who was about thirteen years old.<sup>38</sup> *Vernonia* was extended in *Board of Education v. Earls*<sup>39</sup> to include drug testing for any extracurricular activity by middle and high school students.<sup>40</sup> The new case, *Safford Unified School District #1 v. Redding*<sup>41</sup> dealt with the strip search in school of a thirteen-year-old girl.<sup>42</sup> Although these four leading cases dealt directly only with the Fourth

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<sup>35</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>36</sup> *Id.* at 328.

<sup>37</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>38</sup> *Id.* at 649-51.

<sup>39</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>40</sup> *Id.* at 826.

<sup>41</sup> *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).

<sup>42</sup> *Id.* at 2638.

Amendment rights of teenagers, the extended analysis below nonetheless seeks guidance as to our specific issue.

In *New Jersey v. T.L.O.*<sup>43</sup> the Court determined that students have a right to be free from unreasonable searches and seizures by school officials.<sup>44</sup> The appeal stemmed from a decision of the New Jersey Supreme Court suppressing the discovery of marijuana in fourteen-year-old T.L.O.'s purse, because the New Jersey high court determined that an assistant principal's search of her purse was unreasonable.<sup>45</sup> The principal searched the purse only after the respondent was caught smoking in a school bathroom.<sup>46</sup> The Court acknowledged that school officials have an important interest in maintaining safety and order, but that interest must be balanced against the child's constitutionally protected right to privacy.<sup>47</sup> The Court held: 1) school officials are representatives of the State and not parental surrogates who can claim immunity from the Fourth Amendment,<sup>48</sup> 2) school officials must have a reasonable suspicion that the proposed search will turn up evidence of wrongdoing,<sup>49</sup> and 3) the search is limited in scope to the nature of the infraction and must not be excessively intrusive given the age and gender of the accused.<sup>50</sup> Note that *T.L.O.* held that "reasonable suspicion," not "probable cause," was the requirement to make a school search of a student's purse acceptable under the Fourth Amendment. We will come back later to *T.L.O.*'s specific mention of the *age* of the accused.

The Court extended the *T.L.O.* holding in *Vernonia School District 47J v. Acton*.<sup>51</sup> In *Acton*, the Court denied a Fourth Amendment challenge to the school district's policy of randomly testing seventh grade student-athletes for drug use.<sup>52</sup> The

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<sup>43</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>44</sup> *Id.* at 334.

<sup>45</sup> *Id.* at 327-28.

<sup>46</sup> *Id.* at 328.

<sup>47</sup> *Id.* at 339.

<sup>48</sup> *Id.* at 336-37.

<sup>49</sup> *Id.* at 341-43.

<sup>50</sup> *Id.* at 342.

<sup>51</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>52</sup> *Id.* at 664-66.

Court upheld the policy on the grounds that there was a compelling government interest in preventing the cognizable harm of bodily damage resulting from long-term drug use.<sup>53</sup> In *Board of Education v. Earls*,<sup>54</sup> the Court generally extended the *Acton* principle to all extracurricular activities.

The outcome of these cases suggests that children have a lesser right to privacy under the Fourth Amendment than adults where it can be shown that cogent policy reasons exist for denying the right to privacy in a particular instance. The unique situation of the school setting provides those cogent policy reasons, but apparently the age of the child has some significance in making this determination.

## 2. The Impact of *Redding* in 2009

In *Safford Unified School District #1 v. Redding*,<sup>55</sup> the Court further extended the *T.L.O.* holding in considering whether the Fourth Amendment prohibits public school officials from conducting a strip search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.<sup>56</sup> The majority held that while school officials had reasonable suspicion to search the child's backpack and outer clothing, that suspicion did not extend to searching the child's underwear. The Court's opinion, written by Justice Souter, was based in large part on its previous decision in *T.L.O.* The Court upheld that a school search "will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."<sup>57</sup>

In October 2003, an assistant principal at Safford Middle School, Kerry Wilson, called Savana Redding, then thirteen years old, into his office for questioning.<sup>58</sup> Wilson showed Red-

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<sup>53</sup> *Id.* at 661-63.

<sup>54</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>55</sup> *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).

<sup>56</sup> *Id.* at 2637.

<sup>57</sup> *Id.* at 2639 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

<sup>58</sup> *Id.* at 2638.

ding four 400-mg ibuprofen pills and one 200-mg naproxen pill, and then told her that he had received a report from another student that she was passing out pills to other students.<sup>59</sup> Redding denied doing so and allowed Wilson to search her backpack.<sup>60</sup> When Wilson was unable to find any other pills, he instructed an administrative assistant to take Redding to the school nurse's office to search her clothing for pills.<sup>61</sup> In the presence of the administrative assistant and the school nurse, Redding was asked to remove her shirt and pants.<sup>62</sup> Redding was then "told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree."<sup>63</sup> No pills were found on Redding that day.<sup>64</sup>

As it relates to the privacy rights of children, section III-B of the Court's opinion sheds the most light on when a child acquires the Fourth Amendment right to privacy and how far that right extends. The Court speaks of Redding's "subjective expectation of privacy against" the type of search she was forced to undergo and "the reasonableness of her expectation."<sup>65</sup> Specifically, the Court mentions that while Redding may have expected her body to be exposed in order to change her clothes for gym class, she did not expect to have her body exposed during a strip search.<sup>66</sup> Therefore, the school's actions impinged on her Fourth Amendment rights.<sup>67</sup> Accordingly, a child's right to privacy is based upon the factors outlined in *T.L.O.* plus the child's own expectation of privacy and the reasonableness of that expectation.<sup>68</sup>

Therefore, as it stands today, a court reviewing a school administrator's search of a child must determine four things.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2641.

<sup>66</sup> *Id.* at 2642.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

First, there was a reasonable suspicion that the search would turn up evidence of the student's violation of some rule or policy. Second, the extent of the search was on par with the nature of the infraction, and not overly intrusive in light of the age and gender of the child. Third, the search did not exceed the student's expectation of privacy. And fourth, if the search did exceed the child's expectation, the child's privacy expectation must be reasonable in light of the privacy expectations of other, similarly situated children.

Based on this holding, it seems that the extent of a child's Fourth Amendment right to privacy varies from child to child. It cannot be stated with absolute certainty exactly how much protection the Fourth Amendment provides children, because, to borrow language from Justice Thomas, a child's Fourth Amendment rights are "vague and amorphous."<sup>69</sup> Whether a child has a right to privacy is based on that child's own subjective mental state. Further, even if a child recognizes that she has a right to privacy, that right only extends as far as the child expected and only if other children determine her expectation to be reasonable. That creates problems in and of itself, because what may seem reasonable to the average eight-year-old is likely not reasonable to the average jury member. Indeed, are preteens' right to privacy ever recognized as "reasonable" by society?

Therein lies the rub, because what a child considers to be reasonable is not necessarily reasonable to an adult, such as the six-year-old with the "No Parents Allowed" sign on his bedroom door. Difficulties also arise because of the Court's reliance on the language from *T.L.O.* stating that the extent of a search is "not excessively intrusive in light of *the age and sex* of the student and the nature of the infraction."<sup>70</sup> For instance, Redding's expectation of privacy was deemed reasonable, in part, because "adolescent vulnerabilit[ies] intensifie[d] the patent intrusiveness of the exposure."<sup>71</sup> Does that mean a thirteen-

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<sup>69</sup> *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

<sup>70</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (footnote omitted) (emphasis added).

<sup>71</sup> *Redding*, 129 S. Ct. at 2641.

year-old girl has a higher expectation of privacy because of the changing nature of her physiology than an eight-year-old boy who has not yet reached puberty? There is also the additional question of whether the age and gender factors are only applicable on review, or whether any government action must take those factors into account.

While the Court was able to provide some framework for how the Fourth Amendment applies to children, it seems as if the Court's standard is so flexible that it creates unjust results in a number of likely scenarios. Therefore, the *Redding* decision appears to have created more questions than it answered about how the Fourth Amendment applies to children.

### *B. Fourth Amendment Rights Outside of Schools*

It seems generally accepted that children in school are already in some form of custody and have lowered expectations of privacy for their persons and possessions. As for children located elsewhere at the time, "The Supreme Court has not explicitly addressed the applicability of the Fourth Amendment to arrests and searches of juveniles outside of the school context."<sup>72</sup> The most obvious place to find children other than in school is in their homes, typically the most protected area for Fourth Amendment purposes. In the spirit of our opening hypothetical situations, consider the options if the police knock on the door to a house and it is opened by a child standing inside the home. Assuming the police would need probable cause plus almost always a warrant to search the house, could a child living in the house consent to that search and waive any Fourth Amendment rights? If the child refuses to consent, can the child's parent override the child's refusal to consent to a search? What about consensual arrest versus an arrest? Does it make a difference if the child is seventeen, or thirteen, or nine?

One of the first suggestions that the Court should give juveniles the full panoply of protections under the Fourth Amendment outside of schools came in 1980 when Justice Marshall wrote a fairly lengthy dissent to the Court's denial of peti-

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<sup>72</sup> FELD, *supra* note 22, at 69.

tion for certiorari in *Levell v. California*.<sup>73</sup> The petitioner was a thirteen-year-old who was suspected of burglary.<sup>74</sup> After becoming a suspect, police contacted the child's mother and she agreed to bring him to the station for questioning.<sup>75</sup> When she failed to bring him in at the appointed time, an investigator told two officers to go to her home to find out when she would bring the child to the station for questioning.<sup>76</sup> The officers went to the house and upon finding the mother in bed, they asked her why she did not bring the boy in for questioning the previous day and if she still planned to bring him.<sup>77</sup> She told them that her car had broken down, but they could take the boy who was also sleeping at that very moment.<sup>78</sup> The police woke up the boy and took him to the police station where they promptly gave him his *Miranda*<sup>79</sup> rights, which he waived prior to confessing to the burglary.<sup>80</sup>

Justice Marshall's dissenting opinion observed that "[i]f [the boy] had been five years older when the arrest occurred" there would be no doubt that the arrest would be deemed illegal under the Fourth Amendment.<sup>81</sup> Furthermore, his "subsequent confession would have to be suppressed as the fruit of an illegal arrest."<sup>82</sup> Marshall cited all of the major cases extending constitutional rights to minors in finding that, but for parental consent, the Fourth Amendment would have protected the child.<sup>83</sup> In addition to being troubled by the fact that parents could waive the constitutional rights of their children as they saw fit, Marshall was disturbed that the Court determined that the boy was too immature to decide whether to accompany the police to the station, but not so immature as to knowingly and

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<sup>73</sup> *Levell W. v. California*, 449 U.S. 1043 (1980) (Marshall, J., dissenting)

<sup>74</sup> *Id.* at 1043.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1043-44.

<sup>78</sup> *Id.*

<sup>79</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>80</sup> *Levell W.*, 449 U.S. at 1044.

<sup>81</sup> *Id.* at 1045 (citing *Dunaway v. New York*, 442 U.S. 200, 216 (1979)).

<sup>82</sup> *Id.* at 1046 (citing *Wong Sun v. United States* 371 U.S. 471, 484 (1963)).

<sup>83</sup> *Id.* at 1045-49.

voluntarily waive his *Miranda* rights before confessing to the burglary.<sup>84</sup>

Consider the situation in which the child is alone on the streets with no teacher or parent to provide custody. One jurisdiction that has explored this issue more thoroughly than most is the State of Washington. That state has recognized that the community caretaking exception to the Fourth Amendment can apply to protecting the welfare of children, freeing police from strict compliance with Fourth Amendment prohibitions when dealing with children. Two cases that are almost factually identical bear directly on when that exception applies. In *State v. Acrey*,<sup>85</sup> the Supreme Court of Washington held that a search did not violate a minor's Fourth Amendment rights under the community caretaking exception, but in *State v. Kinzy*<sup>86</sup> the court held that police officers had unlawfully detained and searched a minor, therefore the community caretaking exception did not apply.

In *Kinzy*, two officers on bicycle patrol stopped at a street corner where a girl, Kinzy, who appeared to be between approximately eleven and thirteen years old, was in the company of two other girls and an older man late on a school night.<sup>87</sup> The officers stated that they stopped Kinzy because they perceived her to be a "youth at risk" based on the fact that the street corner was in an area known for drug trafficking and because the police officers knew her male companion based on previous narcotics contacts.<sup>88</sup>

When the police stopped to question her, Kinzy put her head down and began walking away.<sup>89</sup> The police then grabbed her and began questioning her.<sup>90</sup> Kinzy told police her name and actual age, sixteen, but the police still believed her to be younger based of her appearance.<sup>91</sup> The police also decided to

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<sup>84</sup> *Id.* at 1047-49.

<sup>85</sup> *State v. Acrey*, 64 P.3d 594 (Wash. 2003).

<sup>86</sup> *State v. Kinzy*, 5 P.3d 668 (Wash. 2000).

<sup>87</sup> *Id.* at 670-71.

<sup>88</sup> *Id.* at 671.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

search Kinzy for weapons, because she was acting nervous and kept putting her hands in her pockets.<sup>92</sup> The officers completed a pat down search and did not find any weapons, but they asked her to keep her coat open for their safety.<sup>93</sup> At that point, one of the officers noticed that there appeared to be “white/creme flecks of rock cocaine on the black lining of [her] coat.”<sup>94</sup> A field test concluded that the substance was in fact cocaine and Kinzy immediately admitted to having more cocaine in her bra.<sup>95</sup>

At trial, Kinzy sought to have the cocaine deemed inadmissible evidence because it was the result of an illegal search and seizure.<sup>96</sup> The trial court denied her motion and found that the cocaine was admissible under the “community caretaking exception” and the intermediate appellate court upheld that decision.<sup>97</sup> The state supreme court, however, reversed that finding.<sup>98</sup>

The state supreme court examined whether the stop was lawful under two exceptions to the Fourth Amendment. First, the court determined that detaining Kinzy was not lawful under *Terry v. Ohio*<sup>99</sup> because they did not have “a reasonable, articulable suspicion that criminal activity [was] afoot.”<sup>100</sup> Instead, the officers stopped Kinzy because they were concerned about her safety.<sup>101</sup> Next, the court determined that the stop of Kinzy did not fall under the “community caretaking function”<sup>102</sup> exception to the Fourth Amendment, because there was potential for abuse of the community caretaking exception.<sup>103</sup> The court balanced the public’s interest in ensuring the safety of its children against Kinzy’s right to be free from police intrusion and

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 672.

<sup>97</sup> *Id.* at 681.

<sup>98</sup> *Id.*

<sup>99</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>100</sup> *Kinzy*, 5 P.3d at 675 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)).

<sup>101</sup> *Id.*

<sup>102</sup> *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

<sup>103</sup> *Kinzy*, 5 P.3d at 679.

found that, under the particular circumstances, Kinzy's right to "freedom of association, expression and movement" was more important than risking police abuse of the exception.<sup>104</sup>

The Supreme Court of Washington again considered the application of the community caretaking exception to children three years later in *State v. Acrey*.<sup>105</sup> In *Acrey*, police responded to a 911 call about "juveniles fighting in a commercial area" of Renton, Washington.<sup>106</sup> The call came in shortly after midnight on a weeknight and the officers who responded to the call found five males "who appeared quite young and fit the description provided by the anonymous caller" at the location given by the caller.<sup>107</sup> The officers stopped the five boys and asked them if they had been fighting.<sup>108</sup> The boys responded that they were not fighting and that they had "been playing around and were walking to a 7-Eleven convenience store" approximately five miles away.<sup>109</sup>

The officers determined that the boys had in fact not been fighting and were not engaged in any criminal activity, but because "it was after midnight on a week night in a commercial area with no open businesses and no nearby residences" they should get the boys to their respective homes.<sup>110</sup> The officers then told the boys to sit on the sidewalk while they contacted the boys' parents.<sup>111</sup> When the officers asked Adam Acrey for his name and the telephone number where they could reach his parents, he told them his name was "Jubuaire Davison," but gave them his mother's real name and his real home telephone number.<sup>112</sup> The officers were able to contact Acrey's mother and she asked them to bring him home because she did not own a vehicle.<sup>113</sup>

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<sup>104</sup> *Id.* at 676-79.

<sup>105</sup> *State v. Acrey*, 64 P.3d 594 (Wash. 2003).

<sup>106</sup> *Id.* at 596.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 596-97.

Prior to taking Acrey home, one of the officers conducted a pat down search to check Acrey for weapons, in spite of the fact he did not think Acrey was armed, because such a search was standard department procedure for the officer's own safety.<sup>114</sup> The officer felt something at the bottom of Acrey's pants and, when asked what the object was, Acrey told him it was money.<sup>115</sup> The officer removed the object and discovered that it was in fact paper money, some coins, and two baggies of marijuana.<sup>116</sup> Acrey was then placed under arrest and a search incident to that arrest yielded more marijuana, money, and crack cocaine on Acrey's person.<sup>117</sup>

Acrey's motion to have the evidence of the drugs suppressed at trial was denied at both the trial and intermediate appellate court levels.<sup>118</sup> On appeal to the state supreme court, Acrey conceded that the officers' initial stop of the boys on suspicion of fighting was a permissible *Terry* stop.<sup>119</sup> Acrey relied on *Kinzy*, however, and argued that the evidence should nonetheless be suppressed because he should have been let go once it was determined was not engaged in criminal activity.<sup>120</sup> The court disagreed and found that the police had committed no wrong in further detaining the boy to contact his mother.<sup>121</sup>

The court distinguished Acrey's case from *Kinzy* in two ways. First, unlike *Kinzy*, the police had reason to stop Acrey and his friends under *Terry*, where the police had no reason to stop *Kinzy*.<sup>122</sup> Second, the court adopted the opinion of the lower appellate court in holding that the purpose for detaining Acrey was to confer with his mother, whereas the detainment of *Kinzy* was to enforce a de facto curfew law that abused the community caretaking exception.<sup>123</sup> In *Kinzy*'s case the police

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<sup>114</sup> *Id.* at 597.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 598.

<sup>120</sup> *Id.* at 599.

<sup>121</sup> *Id.* at 603.

<sup>122</sup> *Id.* at 601.

<sup>123</sup> *Id.*

never shifted from their law enforcement duties, but with regards to Acrey, the officers became “divorced” from their law enforcement duties and instead focused on ensuring the welfare of Acrey and his friends.<sup>124</sup> Therefore, the intrusion on Acrey’s freedom for purposes of contacting his mother was slight when balanced against the public’s interest in protecting children.<sup>125</sup>

The *Kinzy* and *Acrey* decisions offer little practical guidance to Washington police officers about when they may lawfully search children without violating the Fourth Amendment. If the officers do not believe a child is engaged in criminal activity, then stopping and frisking the child for any other purpose is seemingly an automatic violation of the child’s Fourth Amendment right to privacy. If, however, the police have a reasonable suspicion that the child has or will engage in criminal activity, then there is the potential that a subsequent frisk or search will be lawful even if the police determine that there is no longer a basis for the criminal stop. As *Kinzy* demonstrated, even if police in Washington truly believe they are acting in the best interests of the child and the community, without something more they cannot impinge upon the child’s right to privacy.

### III. FOURTH AMENDMENT GUIDANCE FOR POLICE OFFICERS

Police officers are expected to investigate crimes, deliver babies, quell disturbances, and generally act as ambassadors of goodwill within the community. A specific definition of the role of the police is elusive at best: “The total range of police responsibilities is extraordinarily broad. . . . Anyone attempting to construct a workable definition of the police role will typically come away with old images shattered and with a new-found appreciation for the intricacies of police work.”<sup>126</sup> As such, the role that police officers are expected to take in the community does not always comport with a rigid application of the Fourth

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<sup>124</sup> *Id.* at 602.

<sup>125</sup> *Id.*

<sup>126</sup> Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 261 (1998) (quoting HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 21 (1977)).

Amendment, particularly when it comes to dealing with children.

Particularly because we know from *T.L.O.* and *Redding* that children have some Fourth Amendment rights, but because the extent of those rights varies from state to state (see appendix), it is difficult to formulate clear-cut rules that police can always abide by and not violate a child's Fourth Amendment rights. The problem stems from the fact that children are always assumed to be in the custody of someone, whether it be their parents or the state. Children are always presumed to be in custody on one of three levels.

At the first level, children are subject to the authority and control of their parents. These duties stem from early American common law:

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. . . . The duties that are enjoined upon children to their parents are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives.<sup>127</sup>

The Supreme Court upheld this view of parental power in *Meyer v. Nebraska*<sup>128</sup> and *Pierce v. Society of Sisters*.<sup>129</sup> Both cases recognized that parents have the right to direct the upbringing of their children and, with very few exceptions parents are still entitled to that right. In the context of the Fourth Amendment, this right most commonly manifests itself in parental dominion over the home, because "courts tend to recognize a superior right in the parents to keep the family home

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<sup>127</sup> SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 11-12 (2d ed. 2003) (quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 216, 222 (Boston, Little, Brown, & Co. 11th ed. 1866)).

<sup>128</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>129</sup> *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

free of criminal activity.”<sup>130</sup> As a result, parental rights within the home are almost always superior to those of a child, so much so that a parent may consent to a police search even when a child is “present and objecting.”<sup>131</sup> Even though California recognized that parents cannot consent to search of all of a child’s belongings,<sup>132</sup> LaFave points out that the *Scott K.* rule is a minority position.<sup>133</sup> Therefore, police officers will most likely not violate a child’s Fourth Amendment rights within the home if they obtain prior consent to search from the child’s parents or legal guardians.

While parents generally have unchallenged authority in their homes, in certain instances parental authority over the child may be superseded by the state. The government can override parental interest either through the use of its traditional police powers or *parens patriae*. “The police power is the state’s inherent plenary authority to promote the public health, safety and welfare generally.”<sup>134</sup> The police power is most commonly exerted when the police perform law enforcement functions, like criminal investigation or arrest. The doctrine of *parens patriae* is the state’s ability to enforce “the interests of society to protect the welfare of children” when necessary (and over any objection of the child’s parents).<sup>135</sup> *Parens patriae* is most commonly seen when the state removes a child from a home because it has determined that the child’s parents are unfit to raise their child. But within the context of the Fourth Amendment, *parens patriae* power appears to be coterminous with the ‘community caretaking’ exception.

As illustrated by *Kinzy* and *Acrey*, these two state powers are often in tension with one another for purposes of the Fourth Amendment. The traditional view of the Fourth Amendment adopted by the Supreme Court is that when police are engaging in purely law enforcement functions, searches

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<sup>130</sup> 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.4(b) (4th ed. 2004).

<sup>131</sup> *Id.*

<sup>132</sup> *In re Scott K.*, 595 P.2d 105, 111 (Cal. 1979).

<sup>133</sup> LAFAVE, *supra* note 130, at § 8.4(b).

<sup>134</sup> RAMSEY & ABRAMS, *supra* note 127, at 10.

<sup>135</sup> *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

“conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . .”<sup>136</sup> The Court has also held that there are few exceptions to the warrant requirement and those exceptions are “specifically established and well-delineated . . . .”<sup>137</sup> Therefore it seems that when police officers come into contact with juveniles for purposes related to law enforcement, then at a bare minimum those children should be afforded the same Fourth Amendment protections as adults. Greater protections should be afforded to children if police officers reasonably doubt that the child is capable of making adult-like decisions. The closer a child is to the age of majority, the less likely it will be that the child will need more protection than what is given to adults.

Consider *Kinzy*, for example. There the court determined that Kinzy’s right of privacy was coextensive with that of an adult because of her age, relative intelligence, and demonstrated high level of maturity. Had she been only eight or nine years old, it is unlikely that the court would have treated her in the same fashion, because even at nine years old it is less likely that she would be able to make the adult-like decisions necessary to protect her interests. The obviously murky area for police, and the courts, is when the child in question is right at pubescent age. As the Supreme Court recognized in *Redding*, at that age children begin to exhibit a greater expectation of privacy and they also become more capable of making intelligent decisions. But, like all things in life, a police officer dealing with a child of twelve or thirteen should err on the side of caution and offer the child the same Fourth Amendment protection that an adult would be given in the same circumstances.

The same advice should be parsed out to police officers when they must deal with children for non-law enforcement purposes, i.e., instances where they are purely concerned with the child’s welfare. When the State is “[a]cting under its *parens patriae* power, [it] may pursue ends that would be impermissible under the police power because they are unrelated to any

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<sup>136</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>137</sup> *Id.*

harm to third parties or to the public welfare.”<sup>138</sup> Therefore, police officers should take even greater caution in protecting the child’s right to privacy, because it is more likely that the police power will conflict with what is in the best interests of the child.

#### CONCLUSION

The Supreme Court has adhered to the Fourth Amendment’s warrant requirement, because it has determined that a warrant issued by a judge or magistrate acting as a neutral third-party is the best means to protect against potential overzealousness by police officers so that the Fourth Amendment continues as a strong shield against invasions of personal liberty.<sup>139</sup> One of the exceptions to the Fourth Amendment’s warrant requirement is the previously mentioned “community caretaking function”:

Local police officers, unlike federal officers, frequently investigate [incidents] in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.<sup>140</sup>

In *Cady*, the Court determined that evidence of a murder was admissible because it was first discovered while police were not acting in a law enforcement capacity. Rather, it was discovered after the police arrested an off-duty Chicago police officer, Cady, for drunk driving and they began searching for his service revolver. The police believed Cady was required to carry the gun with him at all times and, rather than risk having the gun fall into inexperienced or malicious hands, they searched his vehicle after he passed out and could not tell them where it was. The Court recognized that it was reasonable and in the best welfare of the community to allow police to search

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<sup>138</sup> Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1199 (1980).

<sup>139</sup> *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

<sup>140</sup> *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

for the weapon in that situation. Therefore, because the search was reasonable given the circumstances, the resulting unexpected discovery of the murder evidence was admissible.

Courts have generally moved to this standard of reasonableness when determining whether a search comes under the community caretaking exception.<sup>141</sup> The test for reasonableness involves balancing the intrusion, both in its scope and duration, against the need for the intrusion.<sup>142</sup> So, for example, when police stop a child after midnight on a Wednesday in October, the intrusion on his liberty is less likely to violate the principles of the Fourth Amendment if he is eight years old, but more likely to violate the amendment if he is seventeen. The test of reasonableness can thereby be seen as one of commonsense. If police see the seventeen year old and do not have reason to believe that criminal activity is afoot, then the Fourth Amendment requires letting him continue on his way.

If the police encounter the younger child, they probably have the ability to at least stop and question him about his age and identity, and to try and contact his parents. The permission to stop him, however, is not permission to search him. Using *T.L.O.* and *Redding* for guidance, the police cannot search him unless there is at least reasonable suspicion that the boy has committed some crime. As *Acrey* demonstrates, the police are probably limited to calling the boy's mother to find out whether she wants the boy to come home. And, as absurd as the result seems, they cannot go against the mother's wishes unless it is explicitly clear that allowing the boy to continue on his way will result in some great, cognizable harm. Not allowing the boy to continue on his way would violate both the boy's Fourth Amendment rights and his mother's right to direct his upbringing.

If for some reason the police decide to take the boy home without the consent of his parents, either because they cannot establish contact or it is in the boy's best interests to be taken out of the area, the question then becomes one of whether the

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<sup>141</sup> Livingston, *supra* note 126, at 263-64.

<sup>142</sup> *Id.* at 264.

police can search the child prior to taking him home. Most likely, the police can conduct a pat down search of the child prior to transport, because the limited intrusion on the child's right is outweighed by the officer's need to ensure his own safety. Therefore, a court would likely deem the pat down search in that instance to be reasonable.

In an earlier work, this author examined other aspects of preteens caught up in the criminal justice system but did not directly address Fourth Amendment issues.<sup>143</sup> That article suggested:

[A] proposal to eliminate all children (age twelve and under) who commit homicide from offender jurisdiction in any court of law, either juvenile or criminal. In almost every case, those children would be in dire need of court services such as counselling and treatment, but imposing punishment should be forbidden. Children of such tender years almost never would be capable of having the mens rea required for homicide crimes. They should never be allowed to waive their rights regarding arrest, search and seizure, and interrogation, and almost never would they be competent to be tried. Most certainly, imposing adult punishments upon children, even for homicide, is unjust.<sup>144</sup>

This article's investigation of the even murkier area of Fourth Amendment rights of preteens continues to support this proposal.

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<sup>143</sup> Victor Streib, *Precocious Killers: Justice for Homicidal Preteens*, 28 CHILD. LEGAL RTS. J. 33 (2008).

<sup>144</sup> *Id.* at 43.

## APPENDIX

*State Cases Dealing with a Child's Fourth Amendment Rights*

<u>State</u>	<u>Case(s)</u>
Alabama*	<i>Ex parte</i> W.T.K., 586 So. 2d 850 (Ala. 1991)
Alaska*	J.M.A. v. State, 542 P.2d 170 (Alaska 1975)
Arizona (not recognized by State SC, but recognized by both app. Divisions)	<i>In re</i> Tiffany O., 174 P.3d 282 (Ariz. Ct. App. 2007); <i>Bell v. Superior Court In and For Pima County</i> , 574 P.2d 39 (Ariz. Ct. App. 1977)
Arkansas	
California*	<i>In re</i> William G., 709 P.2d 1287 (Cal. 1985); <i>In re</i> Scott K., 595 P.2d 105 (Cal. 1979)
Colorado*	<i>People ex rel.</i> R.A., 937 P.2d 731 (Colo. 1997); <i>People ex rel.</i> D.F.L., 931 P.2d 448 (Colo. 1997); <i>People ex rel.</i> S.J., 778 P.2d 1384 (Colo. 1989)
Connecticut*	<i>Ramos v. Town of Vernon</i> , 254 Conn. 799, 761 A.2d 705 (Conn. 2000)
Delaware	<i>State v. Christine D.</i> , No. JN88-0822, 1989 WL 5502 (Del. Fam. Ct. Jan. 25, 1989)
D.C.	<i>In re</i> B.K.C., 413 A.2d 894 (D.C. 1980)
Florida	<i>L.S. v. State</i> , 805 So. 2d 1004 (Fla. Dist. Ct. App. 2001)
Georgia*	<i>In re</i> D.H., 673 S.E.2d 191 (Ga. 2009)
Hawaii*	<i>In re</i> Doe, 73 P.3d 29 (Haw. 2003)
Idaho	
Illinois*	<i>In re</i> Lakisha M., 882 N.E.2d 570 (Ill. 2008)
Indiana*	<i>Trowbridge v. State</i> , 717 N.E.2d 138 (Ind. 1999)
Iowa	<i>In re</i> D.G., No. 01-0752, 2002 WL 31307836 (Iowa Ct. App. Oct. 16, 2002)
Kansas	<i>In re</i> J.M.E., 162 P.3d 835 (Kan. Ct. App. 2007)
Kentucky*	<i>Lamb v. Holmes</i> , 162 S.W.3d 902 (Ky. 2005) (school setting)
Louisiana	<i>In re</i> Moten, 242 So. 2d 849 (La. Ct. App. 1970)
Maine*	<i>State v. Michael M.</i> , 772 A.2d 1179 (Me. 2001)
Maryland*	<i>In re</i> David S., 789 A.2d 607 (Md. 2002)
Massachusetts*	<i>Commonwealth v. A Juvenile</i> (No.2), 580 N.E.2d 1014 (Mass. 1991)
Michigan	<i>People v. Taylor</i> , 542 N.W.2d 322 (Mich. Ct. App.

State	Case(s)
	1995)
Minnesota*	<i>In re</i> B.R.K., 658 N.W.2d 565 (Minn. 2003)
Mississippi	
Missouri*	<i>In re</i> J.R.M., 487 S.W.2d 502 (Mo. 1972)
Montana*	<i>In re</i> B.A.M., 192 P.3d 1161 (Mont. 2008); <i>State v. Allen</i> , 612 P.2d 199 (Mo. 1980)
Nebraska*	<i>In re</i> Jabreco G., 683 N.W.2d 386 (Neb. Ct. App. 2004); <i>In re</i> Andre W., 590 N.W.2d 827 (Neb. 1999)
Nevada*	<i>A Minor v. State</i> , 517 P.2d 183 (Nev. 1973)
New Hampshire*	<i>In re</i> Vernon E., 435 A.2d 833 (N.H. 1981)
New Jersey	<i>State v. Lowry</i> , 230 A.2d 907 (N.J. Super. Ct. Law Div. 1967); <i>In re</i> L.B., 240 A.2d 709 (N.J. Super. Ch. Div. 1968)
New Mexico*	<i>State v. Paul T.</i> , 993 P.2d 74 (N.M. 1999)
New York*	<i>In re</i> Marrhonda G., 613 N.E.2d 568 (N.Y. 1993); <i>In re</i> Williams, 267 N.Y.S.2d 91 (N.Y. Fam. Ct. 1966)
North Carolina	<i>In re</i> I.R.T., 647 S.E.2d 129 (N.C. Ct. App. 2007); <i>In re</i> J.L.B.M., 627 S.E.2d 239 (N.C. Ct. App. 2006)
North Dakota	
Ohio*	<i>In re</i> C.S., 847 N.E.2d 1177 (Ohio 2007); <i>State v. Davis</i> , 381 N.E.2d 641 (Ohio 1978)
Oklahoma	
Oregon*	<i>State v. Hall</i> , 115 P.3d 908 (Or. 2005); <i>State v. Carsey</i> , 664 P.2d 1085 (Or. 1983)
Pennsylvania	<i>In re</i> Harvey, 295 A.2d 93 (Pa. Super. Ct. 1972)
Rhode Island	
South Carolina	<i>In re</i> Thomas B.D., 486 S.E.2d 498 (S.C. Ct. App. 1997)
South Dakota*	<i>Thornton v. City of Rapid City</i> , 692 N.W.2d 525 (S.D. 2005)
Tennessee	<i>State v. Roland</i> , No. E2002-00927-CCA-R3-CD, 2003 WL 21983024 (Tenn. Crim. App. Dec. 22, 2003) (noting juveniles not entitled to higher constitutional protections)
Texas	<i>Lanes v. State</i> , 767 S.W.2d 789 (Tex. Crim. App. 1989)
Utah*	<i>State ex rel. A.C.C.</i> , 44 P.3d 708 (Utah 2002)

<u>State</u>	<u>Case(s)</u>
	(declining to address whether Fourth Amendment applied to juvenile delinquency proceedings but nonetheless using Fourth Amendment reasoning in holding that the defendant did not have a reasonable expectation of privacy); <i>In re</i> K.C.C., 636 P.2d 1044 (Utah 1981).
Vermont	
Virginia	
Washington*	State v. Acrey, 64 P.3d 594 (Wash. 2003); State v. Kinzy, 5 P.3d 668 (Wash. 2000)
West Virginia*	State v. Todd Andrew H., 474 S.E.2d 545 (W. Va. 1996)
Wisconsin	
Wyoming*	<i>In re</i> ALJ, 836 P.2d 307 (Wyo. 1992)

\* Denotes decision of that State's highest court.