THE COSTS OF YOUTH: VOLUNTARY SEARCHES AND THE LAW'S FAILURE TO MEANINGFULLY ACCOUNT FOR AGE

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The United States Supreme Court paved the way for comprehensive juvenile-justice reform during the sentencing phase when it announced its decisions in Roper, Graham, *and* Miller. *The decisions made clear that juveniles are constitutionally different than adults under the Eighth Amendment. Yet these protections have not been extended to consent searches under the Fourth Amendment, where the consequences impact far more juveniles. Many states offer protections for juveniles in other areas of law, such as statutory rape, marriage, medical decisions, and contracts. Yet very few states have given any meaningful consideration to youthfulness in determining whether a juvenile has granted voluntary consent. This Note examines the Eighth Amendment decisions that have provided juveniles with added protections for sentencing and argues that courts should give more consideration to youthfulness under the Fourth Amendment. Regardless of whether courts extend the concept that juveniles are constitutionally different, this Note argues that state legislatures should enact statutes that grant these protections.*

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INTRODUCTION

The following stories illustrate a common experience throughout the United States: juveniles submitting to authority figures and consenting to searches of their person, vehicles, or other objects.

In 2005, a sheriff's deputy acting as a Florida high school's resource officer, removed a student from class after receiving information that the student possessed marijuana.[1] After informing the student why he was pulled from class, the deputy asked the student to consent to a search of his backpack.[2] The student consented, handing the deputy his backpack and holding out his arms, believing that if he did not consent, the deputy would pin him to the ground and search the backpack anyway.[3] During the search, the deputy discovered marijuana.[4] The court held that the consent was voluntary despite the student's removal from class during regular school hours, the deputy's failure to warn the student he had a right to refuse the search, the potential disciplinary consequences if the student left the school,[5] and the student's own belief he had no choice but to consent.[6]

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1. I.R.C. v. Florida, 968 So. 2d 583, 585 (Fla. Dist. Ct. App. 2007).
2. *Id.* at 586.
3. *Id.*
4. *Id.* at 585.
5. Florida law requires students between ages 6 and 16 to attend school. Even once a student reaches the age of 16, the student must file a written declaration of intent to terminate school enrollment. FLA. STAT. ANN. § 1003.21(1)(a)–(c) (West, Westlaw current through the 2019 First Reg. Sess. of the 26th Legis.). In each instance of nonattendance, Florida law requires the district school superintendent to pursue a criminal prosecution against the student's parent. FLA. STAT. ANN. § 1003.27(2)(a). Further, if the student accumulates 15 unexcused absences in a 90-day period, the superintendent must notify Florida's Department of Highway Safety & Motor Vehicles; the Department then does not allow the minor student to obtain a driver's permit or license and suspends any permit or license the student may have. FLA. STAT. ANN. § 1003.27(2)(b).
6. *I.R.C.*, 968 So. 2d at 587.

During a routine traffic stop in 2009, an Arizona police officer smelled burnt marijuana as he approached the stopped vehicle.[7] A second officer was called for backup, and the first officer arrested the driver while the second officer commanded the passenger, Victor, to exit the vehicle.[8] Victor consented to a pat-down search of his body.[9] During the pat-down, the officer felt a bulge in Victor's pant pocket, which Victor admitted was marijuana.[10] In a motion to suppress, Victor's attorney argued that juveniles "are inherently vulnerable and prone to feeling compelled to comply with the requests of an adult authority figure."[11] However, the Arizona Court of Appeals rejected the argument, holding that age is only one factor considered in determining voluntary consent.[12]

In 2010, a New Mexico officer conducted a traffic stop on 17-year-old Carlos because the officer could not read the vehicle's license plate from 50 feet away.[13] The officer requested to search Carlos's person after smelling marijuana inside the vehicle.[14] Carlos consented, and the search came up empty.[15] Carlos then consented to a search of his vehicle after the officer called for backup.[16] This time, the search revealed baggies of marijuana and a pipe.[17] Carlos's attorney argued that the New Mexico Children's Code conferred greater protection to juveniles and that because the officer failed to advise Carlos of his right to refuse consent, the court should suppress the evidence.[18] However, the New Mexico Court of Appeals refused to extend greater protections to juveniles, holding that juveniles are subject to the same rights and responsibilities as adults.[19]

While some of these searches may come up empty, others serve as a turning point in the juvenile defendant's life.[20] Although juvenile arrests are down in recent years,[21] the consequences juveniles face are stark when they grant officers consent to search. Depending on what comes of the search, the juvenile may face a sentence

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7. *In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776, at *1 (Ariz. Ct. App. Jan. 15, 2009).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *2.
12. *Id.*
13. State v. Carlos A., 284 P.3d 384, 385 (N.M. Ct. App. 2012).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 386.
19. *Id.* at 388.
20. *See, e.g.*, I.R.C. v. Florida, 968 So. 2d 583 (Fla. Dist. Ct. App. 2007) (search resulted in discovery of marijuana); *In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776 (Ariz. Ct. App. Jan. 15, 2009) (search resulted in discovery of marijuana); *Carlos A.*, 284 P.3d 384 (search resulted in discovery of marijuana and drug paraphernalia).
21. Office of Juvenile Just. and Delinquency Prevention, *Juvenile Arrests*, U.S. DEP'T. JUST. (Dec. 6, 2017), https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp. Over 850,000 juveniles were arrested in 2016, which is down 58% since 2007. *Id.*

as light as probation[22] or as severe as years behind bars.[23] Many states have implemented drug-treatment programs and other diversion programs for nonviolent offenders, but they do not utilize their treatment programs as often as one might think. Relying on U.S. Department of Justice data, one study found that more than 60,000 juveniles are serving time in juvenile-detention facilities, with about 75% serving time for nonviolent offenses.[24] That does not include the number of juveniles that the United States court systems send to adult facilities each year—a staggering 95,000 juveniles in 2011.[25]

On any given day in the United States, there are more than 1,200 juveniles serving time in adult facilities.[26] The United States incarcerates more of its youth than any other country in the world.[27] This mass incarceration of youth leads to devastating consequences, most notably the large number of juveniles who are sexually abused while incarcerated.[28] Juveniles are five times more likely to experience sexual assault while incarcerated than adult inmates, and this typically occurs within the first 48 hours of detention.[29] Of those that report sexual abuse, more than three-quarters fell victim to jail staff on more than one occasion.[30]

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22. *See* Nat'l Inst. of Just., *Drug Courts*, OFFICE OF JUST. PROGRAMS (Aug. 23, 2018), https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx. The use of probation-available sentences has become increasingly common with the creation of juvenile drug courts, which many jurisdictions have implemented. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3422 (Westlaw current through the First Reg. Sess. of the Fifty-Fourth Legis. (2019)); 730 ILL. COMP. STAT. ANN. 166/35 (West, Westlaw current through P.A. 101-628); MICH. COMP. LAWS ANN. § 600.1076 (West, Westlaw current through P.A. 2020, No. 23, of the 2020 Reg. Sess., 100th Legis.). These courts typically impose probation on the defendant, and unless the defendant violates the provisions of the probation sentence, any further proceedings are dismissed.

23. *See* MONT. CODE ANN. § 41-5-2503 (West, Westlaw current through the 2019 Sess.) (allowing the district court to sentence convicted juveniles the same as if they were adults).

24. Sarah Mimms & Stephanie Stamm, *2 Million Kids Are Arrested in the U.S. Every Year. Congress Is Trying to Change That.*, ATLANTIC (May 2, 2014), https://www.theatlantic.com/politics/archive/2014/05/2-million-kids-are-arrested-in-the-us-every-year-congress-is-trying-to-change-that/450522/. One would think that if these treatment and diversion programs were being utilized, there would not be so many juvenile offenders incarcerated in juvenile-detention facilities for nonviolent offenses.

25. Michael Garcia Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2016/children-behind-bars (last visited Feb. 4, 2020).

26. Carmen E. Daugherty, *Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard*, CAMPAIGN FOR YOUTH JUST. 6 (2015), http://cfyj.org/images/pdf/Zero_Tolerance_Report.pdf.

27. Mimms & Stamm, *supra* note 24.

28. *See* William Tipton & Terri Poore, *Remembering Youth in Adult Jails & Prisons During Sexual Assault Awareness Month*, CAMPAIGN FOR YOUTH JUST. (Mar. 30, 2017), http://www.campaignforyouthjustice.org/across-the-country/item/remembering-youth-in-adult-jails-prisons-during-sexual-assault-awareness-month.

29. *Id.*

30. Daugherty, *supra* note 26, at 15.

Youthful inmates are also 19 times more likely to commit suicide than the general juvenile population and 36 times more likely to commit suicide in an adult-detention facility than a juvenile-detention facility.[31]

Juveniles receive no added protection under the Fourth Amendment, as courts treat age as only one factor in determining voluntary consent.[32] If anything, juveniles have *diminished* rights compared to adults under the Fourth Amendment. In *New Jersey v. T.L.O.*, the U.S. Supreme Court held that children do not lose their constitutional rights when they enter the halls of a public school, but the school setting "requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[33]

Though Fourth Amendment jurisprudence does not suggest added protection for juveniles, the U.S. Supreme Court clearly distinguished juvenile rights under the Eighth Amendment.[34] Starting in 2005, the Court created a categorical ban against the use of the death penalty for juvenile offenders.[35] Five years later, the Court extended the *Roper* ruling, stating that life-without-parole sentences imposed against nonhomicide juvenile offenders violate the Eighth Amendment.[36] In 2012, the Court extended the *Graham* decision even further, prohibiting mandatory life-without-parole sentences against juvenile offenders, even those convicted of homicide.[37] Perhaps the most important language in these three cases comes from *Miller*: "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."[38] This language is the foundation for a more progressive view of the U.S. Constitution and how the unique characteristics of juveniles should afford them greater protection under not only the Eighth Amendment, but also the Fourth Amendment, specifically regarding searches and consent.

Part I of this Note discusses the Eighth Amendment caselaw regarding juvenile sentencing and analyzes the reasoning underlying those decisions. Part II of this Note takes a deeper look at the Fourth Amendment and its development through history. Part II also analyzes various state responses to juvenile consent searches. Part III discusses the application of the Court's theoretical approach regarding the Eighth Amendment to the Fourth Amendment, specifically juvenile consent searches. Ultimately, this Note argues two things: (1) if children are constitutionally different for sentencing purposes, they should be different for search

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31. Neelum Arya, Liz Ryan, Jessica Sandoval, & Julie Kudrna, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUST. 1, 4 (Nov. 2007), https://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

32. United States v. Quintero, 648 F.3d 660, 667 (8th Cir. 2011).

33. 469 U.S. 325, 326, 338–39 (1985).

34. *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012).

35. *Roper*, 543 U.S. at 568.

36. *Graham*, 560 U.S. at 75.

37. *Miller*, 567 U.S. at 489.

38. *Id.* at 471.

purposes as well, and regardless, (2) states can and should take steps to offer greater protection for juveniles when it comes to granting consent for searches.

I. JUVENILE STATUS UNDER THE EIGHTH AMENDMENT

A. Roper*: A New Era of Juvenile Justice*

Nearly 20 years ago, the U.S. Supreme Court decided *Roper v. Simmons*,[39] which began a series of cases that brought about sweeping changes to the juvenile criminal justice system.[40] The case involved a 17-year-old boy, Christopher Simmons, who tossed a middle-aged woman from a bridge, drowning her in the water below.[41] At trial, Simmons was convicted of murder and sentenced to death, but the Missouri Supreme Court overturned his death sentence, prompting the U.S. Supreme Court to take the case.[42] The case drew immense national attention from interest groups, many arguing for the Supreme Court to draw a categorical ban for the use of the death penalty against minors.[43] And the Court did just that.[44] Writing for the majority, Justice Kennedy provided three differences between adults and juveniles: (1) juveniles lack maturity and have an underdeveloped sense of responsibility, which often results in poor decisions; (2) juveniles are more susceptible to peer pressure; and (3) character traits of juveniles are more flexible than that of adults, who tend to have more fixed traits.[45] Relying on these

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39. 543 U.S. 551.

40. The effects of the *Roper* decision are still being felt across the nation, as states address juvenile justice issues such as transfer laws, sex offender registration, and other sentencing schemes; courts across the country continue to work out the implications of the *Roper* decision, and the U.S. Supreme Court has addressed other juvenile justice issues since the 2005 decision. Marsha Levick & Steven A. Drizin, *Celebrating the 10th Anniversary of* Roper v. Simmons: *One Small Step for Christopher Simmons, One Giant Step for Juvenile Justice Reform*, HUFFINGTON POST (Mar. 2, 2015), https://www.huffingtonpost.com/marsha-levick/celebrating-the-tenth-anniversary-of-roper-v-simmons_b_6777134.html.

41. Paul Raeburn, *Too Immature for the Death Penalty?*, N.Y. TIMES MAG. (Oct. 17, 2004), https://www.nytimes.com/2004/10/17/magazine/too-immature-for-the-death-penalty.html.

42. *Roper*, 543 U.S. at 557–60. The Missouri Supreme Court's decision was based on national consensus and the U.S. Supreme Court's decision in *Atkins v. Virginia*. *Id.* at 559–60. *Atkins* held that the U.S. Constitution barred the government from imposing a death penalty against mentally handicapped persons. Atkins v. Virginia, 536 U.S. 304 (2002). The Missouri Supreme Court's decision was criticized because it was seen as predicting what the U.S. Supreme Court *may* conclude, rather than what the caselaw stated. *See* S. Starling Marshall, *"Predictive Justice"?:* Simmons v. Roper *and the Possible End of the Juvenile Death Penalty*, 72 FORDHAM L. REV. 2889, 2890 (2004).

43. *See, e.g.*, Brief for the Am. Psychological Ass'n, and the Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief for Juvenile Law Ctr.et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief of the Am. Medical Ass'n et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

44. *Roper*, 543 U.S. at 551.

45. *Id.* at 569–70.

differences, as well as the fact that even the best-trained psychological experts have extreme difficulty differentiating juvenile conduct due to immaturity and juvenile conduct due to irreparable corruption, the Court held that a death sentence imposed against those younger than 18 violates the Eighth Amendment.[46]

However, the *Roper* decision did not solve everything. Those facing death sentences for crimes committed as a juvenile had their sentences converted to life sentences, which have their own unique set of problems.[47] At the time the *Roper* decision was handed down, over 2,000 people in the United States were serving life sentences for crimes they committed as a juvenile.[48] The U.S. Supreme Court had the opportunity to change that four years later.[49]

B. Graham *and a Meaningful Opportunity for Release*

In 2003, Terrance Graham, then 16 years old, attempted to rob a restaurant in Jacksonville, Florida with his friends.[50] Wearing ski masks, Graham and his friends entered the restaurant, struck the manager in the back of his head with a metal bar, and fled the building without taking any money.[51] Charged as an adult, Graham accepted a plea deal and was sentenced to a term of three years on probation.[52] Less than six months later, Graham found himself in a world of trouble for essentially the same type of crime.[53] He and two other friends, who were both 20 years old, forcibly entered a residence and held two men at gunpoint, robbing them of various valuables.[54] Later that same night, the three friends attempted a second home invasion, but one of the friends was shot.[55] Graham drove the friend to the hospital, but after leaving the friend, a police officer attempted to stop Graham's vehicle.[56] Graham failed to stop, fleeing at high speeds before crashing into a telephone pole.[57] Graham eventually admitted to violating his probation by fleeing from law enforcement and faced a minimum five years in prison; his defense counsel sought a five-year sentence, the pretrial services recommended Graham

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46. *Id.* at 569–70, 573–74.

47. Brianne Ogilvie, *Is Life Unfair? What's Next for Juveniles After* Roper v. Simmons, 60 BAYLOR L. REV. 293, 294–95 (2008) (noting that juveniles facing a death sentence have attorneys fighting diligently for their cause since death-penalty cases trigger automatic appeals). The Supreme Court later clarified that part of the reasoning of the *Roper* ruling was due to the existence of life-without-parole sentencing. *Id.* at 294.

48. Lauren Fine, *Death Behind Bars: Examining Juvenile Life Without Parole in* Sullivan v. Florida *and* Graham v. Florida, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 24, 24 (2009).

49. While the opinion was delivered in 2010, oral argument was held in 2009. Graham v. Florida, 560 U.S. 48 (2010).

50. *Id.* at 53.

51. *Id.*

52. *Id.* at 53–54.

53. *Id.* at 54.

54. *Id.*

55. *Id.*

56. *Id.* at 54–55.

57. *Id.* at 55.

serve at most four years, and the prosecution requested up to 45 years.[58] Claiming that the court could do nothing more to help Graham, the judge sentenced him to life in prison, and because Florida abolished its parole system, Graham would have no chance at life outside prison walls ever again.[59]

As noted above, part of the reason the Court ruled the way it did in *Roper* was because of the existence of life-without-parole sentencing.[60] However, whatever comfort the Court had with juvenile life-without-parole sentences in 2005 had disappeared by 2010. In a 6–3 decision, the Court held that life-without-parole sentences are constitutionally prohibited when imposed against juveniles convicted of nonhomicide offenses.[61] The Court noted that even though many jurisdictions allow for juvenile life-without-parole sentences, such sentences are rarely used in practice.[62] Regardless, society's view of what sentences are appropriate is not determinative under an Eighth Amendment analysis.[63] Instead, the Court relied heavily upon the differences between juveniles and adults, noting that juveniles' actions are not as "morally reprehensible as that of an adult."[64] The Court likened life-without-parole sentences to the death penalty in that it gives no chance or hope of restoration and rehabilitation.[65] After analyzing the various penological goals—retribution, deterrence, incapacitation, and rehabilitation[66]—the Court ultimately held that states need not guarantee a juvenile's eventual release, but must provide some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[67]

Florida advanced several arguments against a categorical ban on juvenile life-without-parole sentences, including that age should be a factor the trial judge takes into consideration when determining an appropriate sentence.[68] However, Justice Kennedy and the majority rejected this argument. Kennedy stated that courts could not distinguish juveniles with psychological maturity, thus potentially justifying a life sentence, from the majority of juveniles who have a capacity for

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58. *Id.* at 55–56. The prosecution requested that Graham serve 30 years on the armed burglary count and 15 years on the attempted armed burglary count, so the sentence could be 30 years if it ran concurrently, or 45 years if it ran consecutively. *Id.*

59. *Id.* at 56–57. Graham could hypothetically be released from prison if he was granted executive clemency. The judge referenced Graham's family and support system willing to help him as a reason Graham was beyond repair. Interestingly, Justice Kennedy began the *Graham* decision by highlighting that Graham's parents were crack cocaine addicts, he was diagnosed with ADHD in elementary school, he began drinking and using tobacco at age 9, and he began smoking marijuana at age 13. *Id.* at 53.

60. Ogilvie, *supra* note 47, at 294.

61. *Graham*, 560 U.S. at 82.

62. *Id.* at 62–67.

63. *Id.* at 67.

64. *Id.* at 68.

65. *Id.* at 69–70.

66. *Id.* at 71–75.

67. *Id.* at 75.

68. *Id.* at 77.

change and rehabilitation.[69] He also stated that differences between juvenile and adult offenders are "too marked and well understood" to allow a juvenile nonhomicide offender to receive a life-without-parole sentence.[70] The *Graham* decision caused many people—with the charge led by legal scholars and law students—to call for extension of its logic to other areas of juvenile criminal justice.[71] However, there are no reported decisions arguing that *Graham*'s logic could extend to how juveniles are treated under the Fourth Amendment.

C. Miller*'s Ban on Mandatory Juvenile Life Without Parole Sentencing Schemes*

The U.S. Supreme Court broadened *Graham*'s holding in 2012 when it ruled that mandatory life-without-parole for those under 18 violated the Eighth Amendment, even for homicide offenders.[72] The Court consolidated two different cases for the purposes of its opinion. One case involved 14-year-old Kuntrell Jackson, who robbed a video store with his two friends.[73] Jackson's friend shot and killed a store employee when the employee threatened to call police; Jackson stood outside the store during the entirety of the incident.[74] Arkansas prosecutors charged Jackson as an adult for felony murder, and the trial court denied Jackson's motion to remove the case to juvenile court.[75] Jackson was convicted and sentenced to life without parole as mandated by Arkansas law.[76] The other case involved 14-year-old Evan Miller who struck a neighbor in the head and then lit the neighbor's trailer on fire—the neighbor died of his injuries.[77] Miller was originally charged in juvenile court, but Alabama prosecutors successfully removed the case to adult court charging Miller with murder in the course of arson.[78] Relying on testimony of Miller's friend, Miller was convicted and sentenced to life without parole which

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69. *Id.* at 77–78.

70. *Id.* at 78.

71. *See, e.g.*, Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 78–82 (2012) (arguing that juveniles should not serve time in adult prisons and that detention facilities should be created with juvenile rehabilitation as a key focus); Krisztina Schlessel, Graham's *Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity for Release,"* 40 FLA. ST. U. L. REV. 1027, 1060–62 (2013) (arguing that *Graham*'s holding should apply to lengthy term-of-years sentences that essentially equate to a life-without-parole sentence); John "Evan" Gibbs, *Jurisprudential Juxtaposition: Application of* Graham v. Florida *to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 968–73 (2011) (arguing that *Graham* should be extended to adult noncapital life-without-parole sentences); Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 133–52 (2010) (arguing that *Graham* could be used to strike down juvenile transfer laws, which allow juvenile offenders to be transferred to the adult criminal justice system).

72. Miller v. Alabama, 567 U.S. 460, 465 (2012).

73. *Id.*

74. *Id.* at 465–66.

75. *Id.* at 466.

76. The Arkansas statute gave trial judges discretion in sentencing those convicted of capital murder to death or life without parole. *Id.*

77. *Id.* at 467–68.

78. *Id.* at 468–69.

Alabama law required as a mandatory minimum.[79] However, the Supreme Court reversed both decisions, stating that mandatory life sentencing schemes for juveniles are constitutionally prohibited because they fail to consider the youthfulness of the offender.[80]

II. THE FOURTH AMENDMENT TELLS A DIFFERENT STORY FOR JUVENILES

Embodied in the Fourth Amendment of the U.S. Constitution is the core principle that every person should be free from government intrusion. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[81] The Constitution's reasonableness requirement for police procedures only applies to activities that constitute a search or seizure.[82] In determining what constitutes a search, the U.S. Supreme Court has developed a two-part reasonableness test: (1) whether the person has an actual expectation of privacy, and (2) whether the expectation is one that society is prepared to recognize as reasonable.[83] *Katz*'s expectation-of-privacy test is viewed in conjunction with a common-law-trespassory approach to determine what is a search.[84] When the government obtains information by physically intruding on persons, houses, papers, or effects, a search has undoubtedly occurred.[85] The Fourth Amendment's "ultimate touchstone is reasonableness,"[86] so warrantless searches occurring outside the judicial process are *per se* unreasonable.[87] Of course, like so many other rules the Supreme Court has developed, there are exceptions.[88]

A. Consent Searches

As discussed in the examples above, an overwhelming number of searches of juveniles are conducted under the consent-search exception to the Fourth Amendment's warrant requirement. Before discussing how consent searches affect

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79. *Id.* at 469.

80. *Id.* at 477–80.

81. U.S. CONST. amend. IV.

82. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974).

83. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

84. United States v. Jones, 565 U.S. 400, 411 (2012); *see* United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (*Katz* does not subtract anything from the Fourth Amendment's protections "when the Government does engage in [a] physical intrusion of a constitutionally protected area").

85. *Jones*, 565 U.S. at 404–05; Florida v. Jardines, 569 U.S. 1, 5, 8–9 (2013) (holding that police may walk up to a home just as any other person is able to but using a police dog to explore areas around the home in hopes of discovering incriminating evidence violates the ordinary license to approach a home; thus, without a warrant, the intrusion violates the Fourth Amendment).

86. Brigham City v. Stuart, 547 U.S. 398, 398 (2006).

87. Mincey v. Arizona, 437 U.S. 385, 390 (1978).

88. *Id.*

juveniles specifically, it is important to lay the foundation of consent searches generally. One well-settled exception to the Fourth Amendment's warrant requirement is consent searches.[89] However, this is not blanket consent, and the Constitution requires voluntary consent, free of any implied or express coercion.[90] Comparing voluntary consent searches to voluntary confessions, the *Schneckloth v. Bustamonte* Court emphasized that any subtle hint of coercion would render the consent involuntary.[91] The Court made passing reference to the potential vulnerability of the person giving consent,[92] yet held that knowledge of the right to refuse consent is only one factor in the totality of the circumstances.[93] One may wonder how consent is voluntary when the person giving consent feels as though there is no choice but to grant it.[94] But the Court has failed to acknowledge this reality, confirming in its consent cases that it believes the average person genuinely thinks that there is a choice between refusing and granting consent.[95] In reality, the overwhelming majority of people grant consent when asked during a traffic stop, suggesting that the Court's analysis fails to consider the practical realities of interactions with officers.[96]

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89. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

90. *Id.* at 228.

91. *Id.* at 229.

92. *Id.* ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.").

93. *Id.* at 227, 229–30 (stating that requiring the government to affirmatively prove that the defendant knew of the right to refuse consent would create serious doubt whether consent searches would continue to be used).

94. *See, e.g.*, State v. Jepson, 292 P.3d 660, 663 (Or. Ct. App. 2012) (stating that a defendant's "mere acquiescence" to police authority does not constitute consent).

95. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 206 (2002) (appearing to rely on the fact that the officer asked defendants if they objected to a search as evidence that a normal person would feel as though they could refuse consent); Florida v. Bostick, 501 U.S. 429, 439–40 (1991) (upholding a consent search during a drug interdictory stop on a bus because the officers did nothing to make the passengers believe they were not free to leave, and thus, no seizure occurred).

96. *See* ILL. DEPT. TRANSP., ILLINOIS TRAFFIC & PEDESTRIAN STOP STUDY: 2017 ANNUAL REPORT 10 (2017), https://idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2017/2017%20ITSS%20Executive%20Summary.pdf (showing that 85–90% of those who were asked for consent to search ultimately granted the officer's request). Another report showed that only 3 of over 16,000 Los Angeles drivers who were asked to consent to a search eventually refused to grant consent. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1662 (2012). Further, despite so many people granting consent, search success rates are relatively low: success rates in Arizona were 14.5%, while they ranged from 25–33% in Illinois depending on the race of the driver. Robin S. Engel, Jennifer Calnon Cherkauskas, Michael R. Smith, Dan Lytle & Kristan Moore, *Traffic Stop Data Analysis Study: Year 3 Final Report* 124–25 (Nov. 1, 2009), http://www.azdps.gov/sites/default/files/media/Traffic_Stop_Data_Report_2009.pdf; ILL. DEPT. TRANSP., *supra*.

Despite the Supreme Court's holding that consent searches do not require the government to demonstrate that the person's consent was knowingly given,[97] courts have found consent involuntary in other circumstances. One instance is when officers gain consent by claiming authority to search. For example, the Court in *Bumper v. North Carolina* overturned a conviction that was based on the recovery of a .22 rifle.[98] The officers told the homeowner that they had a search warrant when in fact they did not, so the woman allowed the officers into the home.[99] The Court reasoned that when an officer claims authority to search under the guise of a warrant, the officer has in effect announced that the occupant has no right to resist.[100] Similarly, when an officer repeatedly tells a DUI suspect that state law requires submission to blood-alcohol-content ("BAC") testing, the suspect's consent is not voluntary.[101] Some other factors that may determine whether consent is coerced, and thus not voluntary, include the following: (1) whether the officers display their weapons;[102] (2) the psychological atmosphere in which consent is given;[103] and (3) whether multiple officers are present.[104]

When a person grants consent for an officer to conduct a search, it does not mean that the officer has unlimited authority to search.[105] Instead, the search's scope is limited to what is expressly stated or reasonably understood from the exchange between the officer and the consenter.[106] In determining whether the officer acted within the scope of the consent granted, courts will look to the expressly stated purpose for the search.[107] In *Florida v. Jimeno*, the officer informed the driver that he had reason to believe there were narcotics in the vehicle, so naturally, the general consent could reasonably include containers found within the vehicle that could hide

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97. *Schneckloth*, 412 U.S. at 227, 229–30.

98. 391 U.S. 543, 544, 546, 550–51 (1968).

99. *Id.* at 546, 550.

100. *Id.* at 550.

101. State v. Valenzuela, 371 P.3d 627, 634 (Ariz. 2016) (reiterating that officers may still inform arrestees of the law's requirements, but they must do so in a way that does not coerce the arrestee to believe the officer has authority without a warrant to compel samples for BAC testing).

102. Florida v. Bostick, 501 U.S. 429, 448 (1991) ("[T]he choice of the police to 'display' their weapons during an encounter exerts significant coercive pressure on the confronted citizen").

103. United States v. Rothman, 492 F.2d 1260, 1265 (9th Cir. 1973) (holding consent was involuntary because "it was systematically psychologically coerced" when defendant was handcuffed, held in custody, taken to a separate room, read his *Miranda* rights, and interrogated for several hours). Voluntary consent can be found even when the person giving consent is in custody. *Id.*

104. United States v. Winningham, 140 F.3d 1328, 1332 (10th Cir. 1998). However, presence of several officers is not alone dispositive without some other factor such as the officers drawing their weapons. *See* United States v. Cruz-Mendez, 467 F.3d 1260, 1265–66 (10th Cir. 2006).

105. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 251 (1991).

106. *Id.* at 251–52.

107. *Id.* at 251.

illegal drugs.[108] However, there are limits to this approach. The container searched in *Jimeno* was a brown paper bag,[109] but the results may differ when the search involves a locked container.[110] Alternatively, while the *Jimeno* court focused on the expressly stated purpose of the search, that alone does not seem to be dispositive. Even if the purpose of the search is not stated, courts have found that a general consent to search a vehicle includes any readily-opened closed containers found within the vehicle.[111] Drivers should reasonably expect that when requested to grant consent for a vehicle search, the officer is seeking evidence of illegal activity, which a closed container could bear.[112]

Once consent is given, the general approach is that it can likewise be withdrawn.[113] If the person granting consent wishes to later withdraw, it must be an "unequivocal act or statement."[114] In fact, failure to expressly and unequivocally object to the search once it has begun may be viewed as an indicator that the search was within the scope of the consent.[115] Courts have found that an individual successfully withdraws consent when that individual tells the officer to wait[116] or when the individual slams the vehicle's trunk shut as the officer begins to search it.[117] However, it does not follow that the search must cease if the officer has probable cause to continue the search.[118] With the general consent-search doctrine laid out, we can now examine how the Fourth Amendment applies to juveniles.

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108. *Id.*

109. *Id.* at 250.

110. *Id.* at 251–52 (stating that it would likely be unreasonable to think that a general consent to search a vehicle's trunk could extend to the breaking open of a locked suitcase located in the trunk).

111. United States v. Snow, 44 F.3d 133, 135 (2d Cir. 1995).

112. *Id.*

113. *See, e.g.*, United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005). Many courts seem to follow this approach, although some decisions disagree. People v. Kennard, 488 P.2d 563, 564 (Colo. 1971) ("After consent has been granted to conduct a search, that consent cannot be withdrawn."); Smith v. Commonwealth, 246 S.W. 449, 451 (Ky. 1923) ("where one voluntarily consents to a search . . . he will not, after such search has commenced, and while it is in progress, be permitted to withdraw such consent").

114. United States v. Martel-Martines, 988 F.2d 855, 858 (8th Cir. 1993) (stating that passive conduct falls well short of this standard).

115. United States v. Espinosa, 782 F.2d 888, 892 (10th Cir. 1986) (defendant stood in silence throughout the 14-minute search of his vehicle, doing nothing to withdraw or limit the search).

116. *See* United States v. Fuentes, 105 F.3d 487, 489 (9th Cir. 1997).

117. *See* United States v. Flores, 48 F.3d 467, 468 (10th Cir. 1995).

118. One exception to the warrant requirement is when officers have probable cause to believe that the vehicle contains contraband. United States v. Ross, 456 U.S. 798, 807–08 (1982). If probable cause is established prior to withdrawal of consent, the search may continue without running afoul of the Fourth Amendment. *See* State v. Hayes, 51 S.W.3d 190, 194 (Mo. Ct. App. 2001); Espinoza v. State, No. CACR 09-160, 2009 WL 3153231, at *5 (Ark. Ct. App. Sept. 30, 2009); United States v. West, 219 F.3d 1171, 1178 (10th Cir. 2000); Camden v. Commonwealth, 441 S.E.2d 38, 40 (Va. Ct. App. 1994).

B. Juveniles & the Fourth Amendment

1. Juveniles at School

While the Fourth Amendment offers protections for all people, its application to juveniles has differed.[119] One of the most important juvenile Fourth Amendment decisions came in 1985 when the U.S. Supreme Court held that the Constitution's prohibition on unreasonable searches and seizures does not stop at the schoolhouse doors.[120] As a result, although the Fourth Amendment protects schoolchildren, those protections are somewhat reduced.[121] Writing for the majority in *New Jersey v. T.L.O.*, Justice White held that school officials need not obtain a warrant before conducting searches on students because it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[122] Moreover, the Court lowered the level of suspicion school officials need to initiate a search.[123] Instead of the traditional probable cause requirement, school officials can conduct any search reasonable under the circumstances.[124] The reasonableness test asks two questions: whether the action was justified at its inception, and whether the search conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[125]

As *T.L.O.* illustrates, minors do not have the same expectation of privacy while in school, but courts have allowed for some consideration of a minor's mental capacity to give voluntary consent for a search. Because voluntary consent is analyzed under a totality-of-the-circumstances test, the consenter's age is not dispositive.[126] Age is one factor a court will consider, along with other potentially age-based factors, such as education and intelligence.[127] While courts may consider the consenter's age, many courts afford little weight to age as they move away from consideration of individual characteristics.[128]

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119. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 338–40 (1985).

120. *Id.* at 333 (stating that the Fourth Amendment applies to public school officials).

121. *See generally* Barry C. Feld, T.L.O. *and* Reddings *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 852–65 (2011) (criticizing the decision for affording juveniles in schools fewer protections than a similarly situated adult by abandoning Fourth Amendment jurisprudence in allowing full searches without probable cause).

122. *T.L.O.*, 469 U.S. at 340.

123. *Id.* at 340–42 (stating that in narrow instances, such as school searches, the Fourth Amendment's reasonableness need not rise to the level of probable cause).

124. *Id.* at 341.

125. *Id.* at 341–42.

126. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973) (noting that in cases involving a totality-of-the-circumstances test, no single criterion resolves the case).

127. *E.g.*, United States v. Smith, 260 F.3d 922, 924 (8th Cir. 2001); United States v. Boone, 245 F.3d 352, 361–62 (4th Cir. 2001); United States v. Galberth, 846 F.2d 983, 987 (5th Cir. 1988); United States v. Wellins, 654 F.2d 550, 555 (9th Cir. 1981).

128. Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L & SOC. CHANGE 1, 1 (2014); *see infra* Section III.B; *see supra* Introduction.

2. Juveniles at Home

There is one unique instance in which at least one state's courts look at age more in-depth: when a minor gives consent for officers to search a residence where the minor resides.[129] The general rule is that a person can grant consent to search a home, so long as that person has "common authority" over the home.[130]

Florida has developed a three-part test to determine whether a minor's consent to search a home is valid—the prosecution must show the following: (1) the minor shares a home with an absent, nonconsenting parent; (2) the officer entering the home reasonably believes, based on articulable facts, that the minor shares common authority with the parent to allow entry into the home; and (3) by *clear and convincing* evidence the minor's consent was freely and voluntarily given under the totality of the circumstances.[131] This approach, at least on its face, creates a heavier burden on the prosecution to show that a minor's consent is valid. However, it's not much consolation for the minor, as these cases tend to involve a minor granting consent for a search that results in the discovery of incriminating evidence used against an adult parent or relative, and not the minor. So if consent is invalid, it would protect the adult parent or relative.[132]

While courts are skeptical about children granting consent to search a home, parents almost always have the right to consent to searches of the minor children's bedrooms.[133] This is true even when the minor child objects to the search.[134] This approach treats juveniles differently in an adverse way because the outcome would be different if it involved two adult cotenants outside the parent-

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129. *See generally* United States v. Matlock, 415 U.S. 164, 169–71 (1974) (stating that consent may be given by someone with "common authority" over the area subject to the search).

130. *See id.* at 171.

131. Saavedra v. State, 622 So. 2d 952, 954 (Fla. 1993) (emphasis added).

132. *See id.* at 954–55 (15-year-old son answered door, allowing officers into his father's home where officers arrested the father and later conducted a search incident to arrest); State v. Folkens, 281 N.W.2d 1, 2–3 (Iowa 1979) (minor and minor's sister allowed police chief into their mother's home which she shared with her boyfriend, resulting in evidence used against the boyfriend in prosecution for sexual assault); State v. Scott, 729 P.2d 585, 586–87 (Or. Ct. App. 1986) (two minor females consented to search of home, which resulted in evidence used against their father).

133. *In re* D.C., 115 Cal. Rptr. 3d 837, 842 (Ct. App. 2010) (finding that "common authority over the child's bedroom is inherent in the parental role").

134. *Id.* at 844–47.

child context.[135] However, there are some states that provide greater protection for minors giving consent,[136] which will be further discussed in Part III.

III. GIVING MEANING TO "KIDS ARE DIFFERENT" IN FOURTH AMENDMENT CONTEXTS

While the U.S. Supreme Court has afforded greater protection to juveniles under the Eighth Amendment,[137] it has failed to create similar protections under the Fourth Amendment.[138] Even though the Court has acknowledged age as a factor in voluntariness for consent searches, lower courts have been inconsistent in looking at the consenter's age.[139] This failure to acknowledge the consenter's age does not align with the Supreme Court's Eighth Amendment jurisprudence, in which it has repeated over the last decade-and-a-half that kids truly are different.[140] This Note's main argument is that the Court's "kids are different" approach should be applied to the Fourth Amendment's consent searches. There are several ways that this can be done: (1) the U.S. Supreme Court can extend this approach to the Fourth Amendment by developing a different reasonableness standard for minors; (2) absent the Supreme Court's willingness to extend the "kids are different" concept, state and federal trial courts can focus more on the consenter's age when analyzing voluntariness; or (3) state legislatures can and should enact statutes that provide greater protection for juveniles by focusing more on age in the voluntariness analysis.

A. Reasonableness Should Encompass the "Kids Are Different" Approach

When the U.S. Supreme Court handed down *Roper*, *Graham*, and *Miller*, it relied heavily upon juvenile brain development and the differences between juveniles and adults which was brought to the Court's attention through petitioners'

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135. *Id.* at 840–42 (agreeing with appellant that adults sharing a residence do not have apparent authority over the other's bedroom absent the officers discovering some other information regarding the living arrangement). However, the court distinguished an adult child living in his parent's home, stating that consent of a parent is reasonable unless the circumstances show that the adult child has exclusive control over their own bedroom. *Id.* Minors do retain some constitutional rights over their own possessions, but the evidence must show that the parent had zero possessory interest in the item. *In re* Scott K., 595 P.2d 105, 107–08, 110–11 (Cal. 1979) (holding that a father could not consent to search of his 17-year-old son's locked toolbox, especially because the father informed officers that the toolbox was his son's and the son was the only one with a key).

136. *See* MONT. CODE ANN. § 41-5-331 (West, Westlaw current through the 2019 Sess.).

137. *Supra* Part I.

138. *Supra* Part II.

139. Annitto, *supra* note 124, at 1–2.

140. Graham v. Florida, 560 U.S. 48, 62–82 (2010); Roper v. Simmons, 543 U.S. 551, 553–54, 564–74 (2005); Miller v. Alabama, 567 U.S. 460, 471 (2012) ("*Roper* and *Graham* establish that juveniles are constitutionally different than adults for purposes of sentencing.").

amicus briefs.[141] The Court seemed to embrace the differences between juveniles and adults.[142] Many of the differences that led the Court to believe children and adults are different could easily be used to argue that the two should be treated differently under the Fourth Amendment.[143]

For example, in *Roper*, the Court explained that juveniles tend to have a "lack of maturity and an underdeveloped sense of responsibility," which often results in "impetuous and ill-considered actions and decisions."[144] The Court's conclusions are well-grounded in science as well.[145] Even though adolescents may, at times, display adult-level maturity, the fact is that their brains are still developing—most importantly in areas that control impulses, making it more difficult for adolescents to accurately assess risks and rewards.[146] An adolescent who fails to partake in risky behavior would actually be a statistical deviant when

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141. *See generally* Brief of Juvenile Law Ctr. et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646); Brief of Former Juvenile Ct. Judges as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646); Brief for the Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646); Brief of Council of Juvenile Corr. Adm'rs et al. as Amici Curiae in Support of Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412); Brief of Amici Curiae Educators in Support of Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412); Brief for the Am. Medical Ass'n et al. as Amici Curiae in Support of Neither Party, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412); Brief of Juvenile Law Ctr. et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief for the Am. Psychological Ass'n, and the Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

142. *See Roper*, 543 U.S. at 578–79 (holding that the Eighth and Fourteenth Amendments prohibit an imposition of the death penalty against offenders who committed their crimes under the age of 18); *Graham*, 560 U.S. at 82 (holding that "the Constitution prohibits a life without parole sentence against juveniles who did not commit homicide"); *Miller*, 567 U.S. at 489 (holding that mandatory life without parole sentencing schemes violate the Eighth Amendment by not considering the age of the defendant and other age-related factors, even if the offense committed was homicide).

143. *See Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48; *Miller*, 567 U.S. 460.

144. *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). This is not the first time the Court has reached this conclusion. *See* Eddings v. Oklahoma, 455 U.S. 104, 115–17 (1982) (stating that youth "is a time and condition of life when a person may be most susceptible to influence and to psychological damage," and is "more than a chronological fact").

145. *See, e.g.*, Brief for the Am. Medical Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4–6, 10–11, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412); Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 8–9, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).

146. Brief for the Am. Medical Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412); Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 8–9, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).

considering adolescents as a whole.[147] It is more likely that an adolescent will cave to peer pressure because adolescents have a more difficult time regulating emotions, such as fear or rejection.[148]

Why does this matter under the Fourth Amendment? During interactions with police, it is quite likely that the civilians involved feel varying degrees of fear, even if they are obeying the law and have no substantial reason to be afraid.[149] This reaction is quite normal amongst all people, including adults.[150] However, in adolescents, these fear emotions are likely more inconsistent and volatile,[151] leading to poorer decision-making when dealing with police.[152] This has two major consequences: (1) the officer may be able to draw out incriminating information from the adolescent that an adult would otherwise not provide; and (2) the adolescent may consent to a search without fully understanding the consequences of that decision.[153] Despite these differences between juveniles and adults, the U.S.

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147. Brief for the Am. Medical Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 5–6, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412) (stating that "[r]isk-taking of all sorts – whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity – is so pervasive that 'it is statistically aberrant to refrain from such behavior during adolescence.'") (quoting Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n.1 (2000)).

148. Brief for the Am. Medical Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 10–11, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).

149. *See* Rick Paulas, *The Psychological Impact of Driving Among Police Cars: Examining That Jumpy Feeling You Get When a Cop Car Pulls Behind You-and You've Done Nothing Wrong*, PACIFIC STANDARD (Sept. 29, 2015), https://psmag.com/news/bad-boys-bad-boys-what-you-gonna-do.

150. *See id.* The U.S. Supreme Court has even recognized this enhanced vulnerability and fear among juveniles. Haley v. Ohio, 332 U.S. 596, 599–600 (1948) ("[W]e cannot believe that a lad of tender years is a match for the police . . . [h]e needs counsel and support if he is not to become the victim first of fear, then of panic."). In *Haley*, the Court went as far as stating that when a "mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used." *Id.* at 599. The Court went on to reverse the conviction because the police had held the 15-year-old boy in secret custody without obtaining an attorney and interrogated him for several hours during the middle of the night. *Id.* at 599–601.

151. Brief for the Am. Medical Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 11–12, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).

152. *See* Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 781–82 (1996).

153. *Id.* at 781 (stating that juveniles "develop the ability, at different rates, to weigh the pros and cons of different courses of action and foresee their consequences, especially in pressure-filled situations"); *see, e.g.*, I.R.C. v. Florida, 968 So. 2d 583, 585 (Fla. Dist. Ct. App. 2007) (consent led to discovery of marijuana in juvenile's backpack); *In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776, at *1, ¶ 4 (Ariz. Ct. App. 2009) (consensual pat-down search led to discovery of marijuana); New Mexico v. Carlos A., 284 P.3d 384, 385, ¶

Supreme Court applies the same totality-of-the-circumstances test—including age as a factor—to both when determining whether consent is voluntary.[154]

The Supreme Court has only spoken in very limited contexts regarding differences between juveniles and adults in the Fourth Amendment context. In 2010, the Court appeared to take a step toward developing an approach that more strongly considered the consenter's age.[155] Writing for the majority in *Graham*, Justice Kennedy stated that an offender's age is relevant to the Eighth Amendment, emphasizing that criminal-procedure laws that fail to take defendants' youthfulness into account are flawed.[156] Although this was in the context of the Eighth Amendment,[157] Justice Kennedy's inclusion of criminal-procedure laws as a whole could be seen as advocating for stronger consideration of age.[158] However, it could be argued that Justice Kennedy simply mandated that criminal-procedure laws must *consider* the defendant's youthfulness, which would already hold true in the context of the Fourth Amendment.[159]

With Justice Kennedy's retirement,[160] it is less likely that the Court will develop a different voluntariness test or categorical ban regarding juveniles giving consent for searches.[161] Based on the foregoing, it does not appear that the Court will develop any separate test in analyzing voluntariness for juvenile offenders granting consent. Instead, state and federal trial courts should place a larger emphasis on the defendant's youthfulness in their voluntary consent analyses. Regardless, state legislatures should enact laws which afford juveniles greater protections under the Fourth Amendment.

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5 (Ct. App. 2012) (consensual vehicle search led to discovery of marijuana and drug paraphernalia).

154. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (including age in a list of potential factors a court may consider in its voluntariness analysis).

155. *See* Graham v. Florida, 560 U.S. 48, 76 (2010).

156. *Id.*

157. *Id.*

158. Justice Kennedy also authored the Court's opinion in *Roper v. Simmons*, which held that the death penalty as imposed against juvenile offenders violated the U.S. Constitution's Eighth Amendment. 543 U.S. 551, 578 (2005).

159. *See, e.g.*, *Schneckloth*, 412 U.S. at 226 (listing age as one factor to consider in a totality-of-the-circumstances test).

160. Justice Kennedy announced his retirement in a letter to President Trump dated June 2018. Robert Barnes, *Justice Kennedy, the Pivotal Swing Vote on the Supreme Court, Announces His Retirement*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html.

161. Justice Kennedy served as the Court's central swing vote, keeping the Court from swaying further to the left or right. *Id.* President Trump nominated and the Senate narrowly confirmed Justice Brett Kavanaugh, giving the Court a solid conservative majority. Sheryl Gay Stolberg, *Kavanaugh is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

B. State and Federal Trial Courts Should More Strongly Consider Age & Youthfulness

Although it seems unlikely that the U.S. Supreme Court will create a test that gives juvenile offenders greater protections regarding consent searches, the lower federal courts and state courts have wide discretion to more strongly consider a defendant's age and youthfulness.[162] Yet, few courts have given age much consideration.

Consider the case of Kathleen Jermaine, a 16-year-old girl suspected of trafficking cocaine.[163] Jermaine was approached by an officer at a train station who requested consent to search her bag.[164] According to the officer, she looked at him "trembling very nervously" without answering.[165] After asking her once again, Jermaine put her head down and said "yes," which led to the discovery of cocaine.[166] The trial court suppressed the evidence, finding that Jermaine could not have consented due to her age and police presence.[167] However, the appellate court reversed, implying that the fact Jermaine purchased a train ticket from New York evidenced that she was not "emotionally or mentally immature," and thus her consent was valid.[168]

Another example of a court not giving much consideration to a defendant's age is in the Texas juvenile delinquency action, *In re L.C.*[169] The Texas Court of Appeals upheld the juvenile court's determination that a 15-year-old boy's consent to search his person was voluntary,[170] despite the officer repeatedly asking the boy for consent and admitting that the boy seemed disoriented.[171] The court announced that it based its decision on the totality of the circumstances, but, rather than truly examine all of the circumstances, it seemed to latch heavily onto the idea that the

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162. Trial court judges are given wide discretion to determine whether consent is voluntary based on the totality of the circumstances. *See In re* J.M., 619 A.2d 497, 500 (D.C. 1992) (stating that the appellate court is "bound to uphold the trial court's finding that a search was consensual unless such a finding is clearly erroneous."); State v. Butler, 302 P.3d 609, 612 (Ariz. 2013) (stating that trial court rulings on motions to suppress are reviewed for abuse of discretion and evidence and facts presented to the trial judge are considered in the light most favorable to sustaining the trial court's ruling); State v. Artic, 786 N.W.2d 430, 439 (Wis. 2010) (stating that a circuit court's finding of facts will not be overturned unless they are clearly erroneous, but the appellate court independently applies those facts to the constitutional principles).

163. *In re* Jermaine, 582 A.2d 1058, 1059–60, 1064 (Pa. Super. Ct. 1990).

164. *Id.* at 1059–60.

165. *Id.* at 1059.

166. *Id.* at 1059–60.

167. *Id.* at 1063.

168. *Id.* at 1064.

169. *In re* L.C., No. 03-02-00070-CV, 2003 WL 21241582 (Tex. Ct. App. May 30, 2003).

170. *Id.* at *1, *4.

171. *Id.* at *1–2.

defendant had used both verbal and non-verbal gestures to indicate his consent after the officer's persistence.[172]

These are just some examples of how courts approach youthfulness.[173] Although many courts are reluctant to take age into full consideration, some have shown willingness to fully consider age and youthfulness of defendants. One noteworthy example of a court analyzing the offender's age more in-depth is seen in *People v. K.N.*[174] There, the New York City court grappled with whether a 17-year-old's consent to provide a buccal-DNA sample during processing was voluntary.[175] Analyzing the voluntariness of K.N.'s consent, the judge extensively discussed *Roper*, *Graham*, and *Miller* to show how the U.S. Supreme Court has made important recognitions regarding juvenile status.[176] Explaining further, the judge acknowledged the importance of focusing on juvenile rehabilitation and displayed understanding of a juvenile's susceptibility to fear during interactions with police.[177] Ultimately, the judge determined that the juvenile's consent was involuntary and ordered the DNA sample destroyed and all evidence of such returned to the juvenile.[178]

Other state courts have also acknowledged the differences between juveniles and adults.[179] In *State v. Jones*, the Washington Court of Appeals explained: "some minors, simply by reason of their age or immaturity, may be incapable of consenting to a police entry; others may be overawed and will permit entry despite strict parental instructions or admonitions not to permit an entry."[180] However, the court ultimately found that neither problem existed in the case.[181] In another case, Arizona prosecutors argued that implied-consent laws that accompany obtaining a driver's license should be applied equally to adults and juveniles.[182] The

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172. *See id.* at *3–4.

173. *See also* I.R.C. v. Florida, 968 So. 2d 583, 587 (Fla. Dist. Ct. App. 2007); *In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776, at *2 (Ariz. Ct. App. Jan. 15, 2009); State v. Carlos A., 284 P.3d 384, 386–87 (N.M. Ct. App. 2012).

174. *See* 87 N.Y.S.3d 862, 869–73 (N.Y. City Crim. Ct. 2018).

175. *Id.* at 868–69.

176. *See id.* at 869–73.

177. *See id.* at 872 ("Adults, let alone terrified minors, are barely able to comprehend the grave consequences of surrendering their DNA to law enforcement.").

178. *Id.* at 864–65, 872–73. New York State law required that a juvenile's parent, legal guardian, or court-appointed guardian ad litem be present for questioning of the juvenile. *Id.* at 871. The judge inferred from the statute's purpose that a juvenile's parent, legal guardian, or court-appointed guardian ad litem must also be present before a juvenile can consent to a buccal swab for DNA profiling. *Id.* at 871–72.

179. *See* State v. Jones, 591 P.2d 796, 799–800 (Wash. Ct. App. 1979); *see also* State v. Scott, 729 P.2d 585, 587–88 (Or. Ct. App. 1986) (reversing the trial court's adoption of a per se rule that held a minor could not consent to the search of a home).

180. *Jones*, 591 P.2d at 799 (finding that a 13-year-old could allow officers to enter the home).

181. *Id.*

182. State v. Butler, 302 P.3d 609, 612 (Ariz. 2013) (the prosecutors argued that "adult privileges carry adult responsibilities."). Implied consent laws outline how officers can

Arizona Supreme Court rejected the prosecution's argument, referencing several U.S. Supreme Court cases that made clear that an offender's age is a factor in determining voluntary consent.[183] The Arizona Supreme Court explained that courts should not blind themselves to the reality that juveniles tend to possess less maturity and are more susceptible to negative influences and outside pressures.[184] The Court added that age *and* presence of a juvenile's parents are relevant factors in determining consent for a search.[185] Based on the totality of the circumstances, the court reversed the appellate court, upholding the trial court's determination that the juvenile's consent was involuntary.[186]

The above cases demonstrate state courts' abilities to more strongly consider a defendant's youthfulness and age. While these courts still employed the totality-of-the-circumstances test, in which age is only one factor,[187] each discussed juvenile and adult differences[188] even if, as in some cases, the court ultimately found that the consent was voluntary.[189]

C. States Should Enact Statutes with More Protections

Even if the U.S. Supreme Court develops a stricter voluntariness test when applied to juvenile defendants, or if state courts apply their own standards when considering age and youthfulness, this Note argues that state legislatures, and perhaps even Congress, can and should pass legislation that offers greater protections to juvenile defendants. Although this Note takes no position on the separation of powers issue,[190] the argument goes that the U.S. Constitution delegates

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obtain consent to blood and breath tests during DUI stops, and what consequences follow when a person refuses to submit to the test. *See* ARIZ. REV. STAT. ANN. § 28-1321 (Westlaw current through the 2019 Sess.). *Butler* involved a 16-year-old boy who was suspected of DUI after school officials smelled marijuana on him shortly after he arrived at school. *Butler*, 302 P.3d at 611. A deputy sheriff detained the teenager, read him his *Miranda* warning, read him the Arizona implied-consent statute, and then drew his blood. *Id.* Based on the test's results, prosecutors charged the teenager with DUI, but the juvenile court granted his motion to suppress the blood test, because it violated Arizona's Parents' Bill of Rights and that his consent was involuntary under the totality of the circumstances. *Id.*

183. The Arizona Supreme Court pointed to *J.D.B. v. North Carolina*, 564 U.S. 261 (2001), which held that age is a relevant factor in determining whether a child is in custody. *Butler*, 302 P.3d at 612–13. The Court also referenced *Roper v. Simmons*, specifically for the purpose of showing that the U.S. Supreme Court has recognized the "diminished culpability" and marked differences of juvenile offenders. *Id.*

184. *Id.* at 613.

185. *Id.*

186. *Id.* at 613–14.

187. People v. K.N., 87 N.Y.S.3d 862, 869–71 (N.Y. City Crim. Ct. 2018); State v. Jones, 591 P.2d 796, 799 (Wash. Ct. App. 1979); *Butler*, 302 P.3d at 612–14.

188. *See K.N.*, 87 N.Y.S.3d at 869–73; *Jones*, 591 P.2d at 799; *Butler*, 302 P.3d at 612–14.

189. *See, e.g.*, *Jones*, 591 P.2d at 799.

190. *See* Jeffrey Rosen, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html (discussing Chief Justice John Roberts's comments regarding judges' proper role as an

the power to create bills to the legislative branch.[191] This power is not unique to the U.S. Constitution, as states also have similar provisions in their own constitutions.[192] Some states, but not many, have taken these express powers to enact legislation that affords juvenile defendants greater protections in the criminal-justice system.

1. Montana Leads the Way in Juvenile Consent-Search Protections

One state that offers greater statutory protections for juvenile consent searches is Montana.[193] Montana's state legislature passed the Montana Youth Court Act in 1974, which provides youths with added protection when taken into custody for questioning.[194] Under the statute, the youth must be advised of the right against self-incrimination and the right to counsel, and the youth's parents shall be immediately notified.[195] Once these rights are read, the youth may do the following: (1) make an effective waiver if age 16 or older; (2) upon agreement between the parent and youth, effectively waive the rights if younger than 16; or (3) waive the rights after consulting with counsel if the parent and youth cannot agree.[196] Although the Montana Youth Court Act rights are not triggered until the youth is in custody,[197] Montana courts have also used the Act to invalidate a youth's consent to search.[198]

In *State v. Allen*, police responded to 16-year-old Annie Smith's apartment based on a noise complaint.[199] Upon arriving, the noise had quieted down, but the

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"umpire" who calls "balls and strikes"). *But see* Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207 (2012) (arguing that the umpire-judge comparison is inaccurate, as judges do make law and cannot avoid doing so). *See also* Jack G. Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976) (arguing that judges must make law and cannot avoid doing so).

191. U.S. CONST. art. I, § 7. The Constitution lists enumerated powers of Congress, in which it may pass bills to carry out. *See id.* art. I, § 8 (listing the power to borrow money, regulate commerce, and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof," among other powers).

192. *E.g.*, ARIZ. CONST. art. IV, § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives. . . ."); NEV. CONST. art. IV, § 1 ("The Legislative authority of this State shall be vested in a Senate and Assembly. . . ."); PA. CONST. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly. . . ."). Note that none of the above constitutional provisions delegate legislative authority to the judiciary.

193. *See* MONT. CODE ANN. § 41-5-331 (West, Westlaw current through the 2019 Sess.).

194. *Id.*

195. *Id.*

196. *Id.* In Montana, minors are those people younger than 18 years of age, so the Montana Youth Court Act applies to all individuals younger than 18. MONT. CODE ANN. § 41-1-101 (West, Westlaw current through the 2019 Sess.).

197. *See id.*; Evans v. Mont. Eleventh Judicial Dist. Ct., 995 P.2d 455, 458 (Mont. 2000).

198. State v. Allen, 612 P.2d 199, 205 (Mont. 1980).

199. *Id.* at 200.

officers smelled marijuana emanating from Smith's apartment.[200] They entered the apartment and noticed some marijuana in plain view;[201] the officers requested and received Smith's consent to search the rest of the apartment, which resulted in discovery of more marijuana.[202] Noting that the officers failed to read Smith her Montana Youth Court Act rights and notify her parents, the Montana Supreme Court deemed her consent involuntary.[203] The Court reasoned "[t]here is no question that consent to search the premises required Ms. Smith to waive her Fourth Amendment right to be free of unreasonable searches under the United States Constitution," and without the reading of rights and parental notification, Smith "lacked the capacity to give this consent."[204]

Although the Montana courts have adopted a sort of *Miranda* warning for youth under the Montana Youth Court Act, the U.S. Supreme Court has yet to do the same using constitutional law,[205] asserting that adopting such a warning would be "thoroughly impractical."[206] The Court is not alone in its determination not to afford greater protections for any persons giving consent, including minors.[207] Many federal[208] and state courts[209] have expressly declined to require a *Miranda*-like

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 205. The Montana Youth Court Act has been amended since the *Allen* decision. In *Allen*, the Act's age threshold was 12, and stated "when the youth is over the age of 12 years and the youth and his parents agree, they may make an effective waiver." *Id.* Thus, the previous version was stricter, never allowing a minor to make an effective waiver without parental consent or advice of counsel. *Id.* As noted above, the current version allows those 16 and older to make an effective waiver without parental consent or advice of counsel. MONT. CODE ANN. § 41-5-331 (West, Westlaw current through the 2019 Sess.).

204. *Allen*, 612 P.2d at 205.

205. Schneckloth v. Bustamonte, 412 U.S. 218, 231–32 (1973).

206. *Id.* at 231.

207. *See id.* at 231–32.

208. *See* United States v. Goosbey, 419 F.2d 818, 819 (6th Cir. 1970) ("We cannot accept the recently suggested rule that a specific warning of fourth amendment rights is necessary to validate a warrantless search . . . ."); United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096, 1102 (3d Cir. 1970) ("[W]e do not subscribe to relator's contention that his consent to the search of his apartment was rendered a nullity because he was not aware of his Fourth Amendment rights and he had not been advised as to these rights at the time his consent was given."); Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967) (rejecting the argument that *Miranda*-like warnings "must or ought to be mechanistically duplicated when circumstances indicate the advisability of requesting a search"); *see also* United States v. Noa, 443 F.2d 144, 147 (9th Cir. 1971) ("[S]pecific warnings of Fourth Amendment rights are not necessary to validate the search.").

209. *See* State v. Oldham, 438 P.2d 275, 282–83 (Idaho 1968) (declining to require a *Miranda*-like warning for consent searches, and instead relying upon the voluntariness of the consent); *see also* Hohnke v. Commonwealth, 451 S.W.2d 162, 168 (Ky. Ct. App. 1970) (stating that failure of officer to notify defendant of right to refuse consent is only a factor in determining voluntariness); State v. Custer, 251 So. 2d 287, 288 (Fla. Dist. Ct. App. 1971) ("Advising one of his right of refusal to consent to a search is not required to validate that consent or to Prima facie establish the voluntariness thereof.").

warning of Fourth Amendment rights. Montana enacted the Montana Youth Court Act around the same time many of these courts declined to require a warning before an individual waives his or her Fourth Amendment rights.[210] Yet, there is no evidence[211] that the warning and notification requirements of the Montana Youth Court Act frustrate police procedures or have been "thoroughly impractical."[212]

2. Other Areas Where States Have Granted Juveniles Added Protections

Granting juveniles added protections under the Fourth Amendment would not be unprecedented—many states have a long history of granting juveniles unique rights and protections.[213] There are two main areas where these protections come up: (1) statutory-rape laws, and (2) marriage laws. However, there are other examples where governments recognize the uniqueness of juveniles, and thus have

210. The Montana Youth Court Act was enacted in 1974. MONT. CODE ANN. § 41-5-331 (West, Westlaw current through the 2019 Sess.); *e.g.*, *Oldham*, 438 P.2d 275; *Custer*, 251 So.2d 287; *Gorman* 380 F.2d 158; *Noa*, 443 F.2d 144; *Schneckloth*, 412 U.S. 218.

211. Much of the provisions are still intact, including the warning and notification requirements. *See* MONT. CODE ANN. § 41-5-331. The Act's continuity for over 45 years must have some meaning—the Act is workable, and the warning requirements are not "thoroughly impractical." *See Schneckloth*, 412 U.S. at 231.

212. *See Schneckloth*, 412 U.S. at 231.

213. *See* W. VA. CODE ANN. § 48-2-301 (West, Westlaw current through 2019 Second Extraordinary Sess.) (age of consent for marriage law); UTAH CODE ANN. § 76-5-401 (West, Westlaw current through 2019 Second Special Sess.) (statutory-rape law).

tailored laws with that in mind. These include driver's licensing requirements,[214] underage-drinking laws,[215] medical laws,[216] and even contract laws.[217]

Statutory-rape laws are perhaps some of the longest-living laws in American legal jurisprudence.[218] Every state in the U.S. has some form of statutory rape in its criminal code.[219] These laws essentially prohibit juveniles from giving consent for sexual acts under certain circumstances—they effectively state that these juveniles inherently cannot grant consent.[220] States have largely rationalized these

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214. *See* TEX. TRANSP. CODE ANN. § 521.204 (West, Westlaw current through 2019 Reg. Sess. of 86th Legis.) (prohibiting issuance of driver's license to persons under the age of 16, and those under the age of 18 must hold a learner license or hardship license for six months prior to application for a driver's license); ARIZ. REV. STAT. ANN. §§ 28-3156, -3160 (Westlaw current through First Reg. Sess. of Fifty-Fourth Legis. (2019)) (allowing a person to apply for a learner permit once they turn 15 years and 6 months, but only with consent from a parent or guardian); WASH. REV. CODE ANN. § 46.20.100 (West, Westlaw current with IM 976 (Ch. 1) of the 2020 Reg. Sess. of Wash. Legis.) (requiring a person under the age of 18 to obtain consent from a parent, guardian, or employer before applying for a driver's license, and requiring applicant to meet driver-education requirements).

215. *See, e.g.*, KY. REV. STAT. ANN. § 244.085 (West, Westlaw current through the end of the 2019 Reg. and First Extraordinary Sess.) (prohibiting persons under 21 to "possess for personal use," purchase, or receive alcoholic beverages).

216. *See* 35 PA. CONS. STAT. ANN. § 10101 (West, Westlaw current through 2019 Reg. Sess. Act 118) (stating that minors may give consent for their own medical care if they have either: (1) graduated from high school; (2) married; or (3) been pregnant); 410 ILL. COMP. STAT. ANN. 210/1 (West, Westlaw current through P.A. 101-628) (allowing married minors, minor parents, pregnant minors, and persons 18 or older to give medical consent); *see also* Andrew Newman, *Adolescent Consent to Routine Medical and Surgical Treatment: A Proposal to Simplify the Law of Teenage Medical Decision-Making*, 22 J. LEGAL MED. 501, 502 (2001) (stating that most states require adolescents be age 18 before they can give valid medical consent, and questioning how a judge has the competence to declare someone a "mature minor" without any experience in psychology).

217. *See* Woodman *ex rel.* Woodman v. Kera LLC, 785 N.W.2d 1, 15 (Mich. 2010) (stating that minors have no contractual authority); Deville v. Fed. Sav. Bank of Evangeline Parish, 635 So.2d 195, 197 (La. 1994) ("Contracts with minors are relatively null and may be rescinded at the minor's request, unless the purpose of the contract was to provide the minor with necessities for support or education, or was for a purpose related to his business.").

218. *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 754 (2000) (stating that England first codified statutory rape in 1275); Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 506 (2012) (stating statutory-rape laws date back to Colonial America).

219. *See* Eugene Volokh, *Statutory Rape Laws and Ages of Consent in the U.S.*, WASH. POST. (May 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.6c3698b6ae63 (explaining that thirty states set the age of consent at 16; eight set it at 17; and twelve set it at 18).

220. *See* GA. CODE ANN. § 16-6-3 (West, Westlaw current through acts passed during the 2019 Sess. of the Gen. Assembly) (defining statutory rape as sexual intercourse with a person under the age of 16 and not the actor's spouse); MISS. CODE ANN. § 97-3-65 (West, Westlaw current through 2019 Reg. Sess.); Phillipson v. State, 943 So.2d 670, 672, ¶ 9 (Miss. 2006) ("At the heart of the statutory-rape statute is the core concern that children

laws as preventing teenage pregnancies,[221] but this is not the only reason they exist. Statutory-rape laws are legislatures' acknowledgement that juveniles do not have the same mental capacity as adults do and thus are subject to coercion, especially in situations that make them vulnerable.[222] Statutory-rape laws recognize that when a younger juvenile is contemplating sexual acts with an older partner, there is a major imbalance of power.[223] This same power imbalance exists when juveniles are faced with a police officer's request to search.[224] If the law recognizes that certain juveniles inherently cannot consent to sexual acts due to the coercive nature of the relationship, then it makes little sense that they suddenly gain the requisite mental capacity to grant consent for a search.

States also provide protections to juveniles in the context of marriage.[225] Attempting to prevent the abuses that occurred when older men commonly married young, teenage girls,[226] states have raised the age of consent for marriage.[227] They have reasoned that a "person under the age of eighteen lacks the capacity to contract

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should not be exploited for sexual purposes regardless of their consent, as they simply cannot appreciate the significance or the consequences of their actions.") (internal quotations omitted).

221. *See* Oberman, *supra* note 218, at 704–05 (stating that federal and state governments began to encourage enforcement of statutory-rape laws in the 1990s on the belief that such enforcement would prevent teenage pregnancy).

222. *Id.* at 704 (stating that there are a "myriad of ways in which minors, because of their inexperience, are vulnerable to exploitation and coercion in their sexual interactions.").

223. Heather Price-Wright, *Torrington Rape Case: This is Why We Need Statutory Rape Laws*, MIC (Apr. 26, 2013), https://mic.com/articles/38117/torrington-rape-case-this-is-why-we-need-statutory-rape-laws#.SYp6mFolG.

224. *See* Rosado, *supra* note 152, at 764 (discussing the uniqueness of juveniles, especially in their interactions with police, courts, and the law in general); Kate Schuyler, *Right-to-Refuse Warnings: A Minority's Crusade for Justice*, 38 U. TOL. L. REV. 769, 769–70 (2007) (discussing the coercive nature of "knock-and-talk" procedures police departments use to obtain consent for home searches).

225. WIS. STAT. ANN. § 765.02 (West, Westlaw current through 2019 Act 29) (allowing persons under 18 to marry only with written consent of the parent or guardian); N.H. REV. STAT. ANN. § 457:5 (Westlaw current through Chapter 346 of the 2019 Reg. Sess.) (giving superior court the discretion to annul marriages of persons below 18 if a party, or a party's parent or guardian, petitions for an annulment); OKLA. STAT. ANN. tit. 43, § 3 (West, Westlaw current with enacted legislation of the First Reg. Sess. of the 57th Legis.) (setting age of consent for marriage at 18).

226. For a discussion of the consequences of child marriage, see Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644, 1644 (Nov. 2006), https://wwwnc.cdc.gov/eid/article/12/11/06-0510_article; see Loretta Dolan, *Child Marriage in Early Modern England*, AUSTRALIAN WOMEN'S HISTORY NETWORK (Jan. 3, 2018), http://www.auswhn.org.au/blog/child-marriage/ (stating that child marriages were arranged with the good of the family in mind, not the couple's happiness).

227. *See* WIS. STAT. ANN. § 765.02 (West, Westlaw current through 2019 Act 29); N.H. REV. STAT. ANN. § 457:5 (Westlaw current through Chapter 346 of the 2019 Reg. Sess.); OKLA. STAT. ANN. tit. 43, § 3 (West, Westlaw current with enacted legislation of the First Reg. Sess. of the 57th Legis.).

a marriage."[228] If a person under the age of 18 wishes to marry, they may be required to obtain their parents' consent, or in some instances the court's consent.[229] If juveniles lack the capacity to marry, then surely they must also lack the capacity to grant a consent to search.

Many areas of the law recognize the juvenile's uniqueness, so granting added protections under the Fourth Amendment would not be unprecedented. In fact, it should be expected, and it makes little logical sense to believe that juveniles lack mental capacity when it comes to sexual acts, marriage, and medical decisions, while simultaneously under most of the current Fourth Amendment jurisprudence, juveniles suddenly gain the capacity to grant consent for a search that may have drastic implications on their future.[230]

CONCLUSION

Although the U.S. Supreme Court has made impressive advances toward juvenile-justice reform in the way of sentencing,[231] the Court still has room for improvement. By continuing to ignore the defendant's age under the Fourth Amendment in the context of consent searches, the Court—and other federal and state courts—does a great disservice to juvenile justice.[232] The Court willingly accepted the science behind juvenile brain development in rendering its decisions in *Roper*, *Graham*, and *Miller*.[233] Yet it largely ignores that same science when analyzing voluntary consent given by juveniles[234]—consent that officers rely upon to conduct searches that would otherwise be unlawful.[235] The Court could give the "kids are different" language even greater meaning by finding that juveniles are truly different for Fourth Amendment purposes.[236]

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228. W. VA. CODE ANN. § 48-2-301 (West, Westlaw current with legislation of the Second Extraordinary Sess.).

229. *Id.*

230. *See supra* notes 26–30 and accompanying text.

231. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding that the death penalty as imposed against offenders who were under age 18 at the time the offense was committed violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 75 (2010) (holding that life-without-parole sentences imposed against juvenile nonhomicide offenders violates the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 465 (2012) (holding that mandatory life-without-parole sentencing schemes against juveniles violates the Eighth Amendment, even when the convicted offense is homicide).

232. *See supra* notes 24–30 and accompanying text.

233. *See supra* notes 141–44 and accompanying text.

234. Many courts only treat age as a factor in determining voluntariness of the consent given. *See, e.g.*, United States v. Quintero, 648 F.3d 660, 667 (8th Cir. 2011).

235. Warrantless searches occurring outside the judicial process are per se unreasonable. Mincey v. Arizona, 437 U.S. 385, 390 (1978). One exception to the warrant requirement is consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

236. The courts' consistent view that age is only a factor in determining voluntariness demonstrates that juveniles are still very much the same as adults for Fourth Amendment contexts. *See, e.g.*, *Quintero*, 648 F.3d at 667; *In re* S.J., 778 P.2d 1384, 1388 (Colo. 1989).

Although the Court may be reluctant to extend its reasoning from *Roper*, *Graham*, and *Miller* to its Fourth Amendment decisions, state courts need not wait.[237] Alternatively, state legislatures can and should take it upon themselves to enact legislation that would provide greater protections for juveniles.[238] At the end of the day, juveniles are our future, so why not provide us with a better chance at a brighter one?

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237. Examples of this are discussed more thoroughly in Section III.C. *See* People v. K.N., 87 N.Y.S.3d 862, 869–73 (N.Y. City Crim. Ct. 2018); State v. Butler, 302 P.3d 609, 612–14 (Ariz. 2013); State v. Jones, 591 P.2d 796, 799 (Wash. Ct. App. 1979).

238. *See* MONT. CODE ANN. § 41-5-331 (West, Westlaw current through the 2019 Sess.).