# CONSENT SEARCHES OF MINORS

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ABSTRACT

Despite the imbalance of power between police officers and citizens, courts rarely find that a search by a police officer based upon consent was involuntary. Modern courts condone this legal fiction when dealing with adults, but it is less clear what the law requires when courts weigh the voluntariness of consent to a search against the risk of coercion inherent in police encounters with minors—however subtle or overt it may be.

When considering the voluntariness of a minor's consent to a search, courts are dramatically inconsistent about the role of a minor's age in that decision. Close analysis reveals that courts struggle to create a meaningful standard and, more often than not, appear to simply ignore minor status. That courts may consider age is not up for debate—the Supreme Court included age as a relevant factor in its seminal case addressing the standard for legality of consent searches. But as the consent search doctrine has developed, courts have shifted to a framework that frequently disregards individual characteristics of the accused in the consent analysis. Whether age can be as easily disregarded as part and parcel of this evolution, however, is a different question. Juxtaposed with the modern framework for consent searches are recent Supreme Court decisions addressing juveniles and criminal justice. These decisions reinforce and underscore that age is, in fact, different from other characteristics in the eyes of the Court.

As scholars explore the broader implications of the Supreme Court's recent attention to age in other criminal justice contexts, the role of age in the Court's consent search doctrine is even more relevant. These decisions have created an opportunity for a "second coming" of age in the consent context—a context where age has always been relevant but where courts have struggled to find a meaningful and consistent way to consider it.

This Article discusses the history of judicial treatment of consent searches and minors and the potential influence of recent Supreme Court decisions related to juveniles. The Court's consent search doctrine as a whole is at odds with scientific research; yet, the Court's recent cases about juveniles embrace such research, thus creating a tension between different strains of the Court's jurisprudence. This tension is particularly relevant now that courts arguably must

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meaningfully consider age in the consent context. The historical analysis reveals the challenges of incorporating age into the test for voluntariness, suggesting that additional protection for minors is warranted to address the current deficiencies in the doctrine. For example, this could include requiring a reasonable suspicion standard before law enforcement can request consent searches of minors. Finally, structural reform to aid the development and growth of better defined constitutional rights of juveniles in the criminal procedural setting is overdue.



## I.
## INTRODUCTION

Four police officers approached a fourteen-year-old girl and asked to search her purse; she said nothing but handed them the purse.[1] A sixteen-year-old girl, a passenger in a car, was frisked when two police officers pulled the car over and ordered her to get out of the vehicle. As she started crying, an officer asked to search a cigarette package that was in her pocket; she answered yes.[2] Two officers approached two fifteen-year-old boys on the street and asked for consent to search their pockets.[3] In all of these cases, police found incriminating

1. *In re* Daijah D., 927 N.Y.S.2d 342 (App. Div. 2011).
2. *In re* A.T., 691 S.E.2d 642, 645 (Ga. Ct. App. 2010).
3. *In re* D.H., 673 S.E. 191 (Ga. 2009).

evidence that the minor later sought to exclude from trial, arguing that the "consent" that formed the justification for the search was not voluntary.

In the first case, the appellate court suppressed the evidence, finding the minor did not voluntarily consent to the search.[4] The court in that case expressly considered and discussed the youth of the minor in its decision finding consent involuntary.[5] In the other two cases, however, the court determined that the exchange between the officer and the minors amounted to voluntary consent without discussing age and minor status.[6] The latter approach is more prevalent in decisions on motions to suppress evidence discovered during a search based upon a minor's consent.[7] It is less common to find modern decisions considering age when a minor seeks to suppress evidence obtained via a consent search, and even more rare is the articulation of a clear standard for adjudicating this issue. Indeed, appellate courts provide varying rules: some require trial courts to consider age, others merely *suggest* that age should be considered, and some appellate courts ignore it entirely. In short, there is no uniform standard.

In its seminal case on consent searches, *Schneckloth v. Bustamonte*,[8] the Supreme Court held that under the "totality of the circumstances" test, the age of an accused person is relevant to determining voluntariness.[9] It, therefore, seems surprising that courts so often ignore youth in evaluating consent.[10] Even when courts recognize the relevance of age, they have little case law to rely on for guidance. Furthermore, once a search occurs, juveniles are often unrepresented by counsel,[11] which leaves them without the tools to challenge the validity of the search. Additionally, appeals are rare in juvenile delinquency cases, further hindering development of the law surrounding age in this and other contexts.[12]

It is clear that courts may consider age in the context of a purported Fourth

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4. *In re* Daijah D., 927 N.Y.S.2d 342.

5. *Id.*

6. *In re* A.T., 691 S.E.2d at 646–647; *In re* D.H., 673 S.E. at 193.

7. *See infra* Part III.D.2.

8. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 223–226 (1973).

9. *Id.* (including age among the factors courts should consider in the totality of the circumstances to determine whether a defendant voluntarily consented to a search by police). Courts consider "personal characteristics of the defendant, such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention or questioning, the substance of any discussion between the defendant and police preceding the consent, whether the defendant was free to leave or was subject to restraint, and whether the defendant's contemporaneous reaction to the search was consistent with consent." United States v. Jones, 254 F.3d 692, 696 (8th Cir. 2001).

10. *See infra* Part III.D.2. (discussing several cases where the court ignores the suspect's age).

11. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts*, 54 FLA. L. REV. 577 (2002).

12. Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, Part III (2012) (discussing empirical data finding that the average rate of appeals in juvenile delinquency cases is five per 1,000 adjudications of guilt and, in one instance, less than one appeal out of 3,000 guilty adjudications). The article argues that the lack of appeals affects the development of the law, particularly criminal procedural issues relating to consideration of age. *Id.*

Amendment violation.[13] However, courts have shifted the consent analysis to a framework that frequently disregards so-called "subjective factors" or individual characteristics of the accused.[14] But the Supreme Court's recent decisions about juveniles place age in a different category.[15] Quite simply, the Court held that juvenile status, or age, is "different" from other individual characteristics of a defendant.[16] *J.D.B. v. North Carolina* and its sibling Supreme Court cases compel courts to examine age more closely in the consent search context.[17] The role of age is particularly critical now that the Court has held that age is a permissible consideration under an objective "reasonable person" standard for custody inquiries in the context of *Miranda* warnings.[18] That holding challenges the ability of courts to cast age aside as a mere subjective factor or "individual characteristic" in the context of consent searches, as well. Moreover, the Supreme Court's recent cases have animated considerable discussion of the Court's recognition that "age is different" and how that recognition will affect the landscape of juvenile justice as a whole.[19]

Consideration of age in the context of consent highlights another pressing

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13. *Schneckloth*, 412 U.S. at 226 (courts may consider age along with other factors such as education, prior experience with the law, and the accused's knowledge of the right to refuse).

14. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221–22 (2002); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 161 (2002); *see infra* notes 45–46 and accompanying text.

15. *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011). *See also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) ("*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because [t]he heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult.") (citations and internal quotation marks omitted).

16. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011). "A child's age, however, is different." *Id.* at 2404. In fact, when considering the rights of juveniles, "the Supreme Court has consistently recognized that a confession or waiver of rights by a juvenile is not the same as a confession or waiver by an adult." A.M. v. Butler, 360 F.3d 787, 799 (7th Cir. 2004) (citing both Fourth and Fifth Amendment cases). While *Schneckloth* distinguished between providing consent to search and waiving one's rights, some courts make this analogy in discussion. *Id.*

17. *J.D.B.* is most applicable in the consent context. The other three cases (*Roper*, *Graham*, and *Miller*) involved sentencing issues but remain relevant.

18. *J.D.B.*, 131 S. Ct. at 2399.

19. Though *J.D.B.* dealt with the custodial analysis rather than consent searches, this decision along with the Supreme Court's other recent opinions on juvenile issues has catalyzed scholarly discussion and renewed support for the argument that age and juveniles are different. *See* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 151 (2012) (describing how Justice Kennedy's opinion in *Roper v. Simmons* "delved deeply into the social scientific literature and found reason to view juveniles as categorically different from adults"). Guggenheim also discussed this concept in the context of *Graham* as "a case about how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice." Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 464 (2012).

contrast. The Court's consent doctrine and reasoning is at a point where it "must struggle against scientific findings" about coercion.[20] The doctrine has been and continues to be criticized for its conflict with social scientific research about consent and conformity with authority.[21] In contrast, the Court's decisions related to juvenile justice have overtly acknowledged science; psychological research and neuroscience influenced the Court's recent opinions dealing with the importance of age. The Court itself, in *Miller*, acknowledged outright the influence of science on its recent juvenile justice jurisprudence.[22] As a result, the Court's consent doctrine—which seems to eschew social science, compared with the development of modern juvenile justice jurisprudence—which has been explicitly influenced by scientific research—presents a compelling tension when age and consent searches come together.

It is unlikely that the Court would ever categorically exempt minors from the practice of consent searches. This is despite both limitations placed on minor capacity to make decisions in other areas of law, such as contracts, and psychological data about the coercion inherent in police encounters;[23] the value of consent searches to law enforcement is simply too high.[24] Therefore, even

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20. Nadler, *supra* note 14, at 156.

21. *Id.*

22. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (acknowledging the role of social science in the Court's decisions in *Roper*, *Graham*, and *J.D.B.*, particularly the first two). *See also* Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy* 43 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-324, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191711 ("In grounding its analysis in developmental knowledge, the Court created a special status of juveniles in the justice system on a firmer foundation than the traditional basis for paternalistic justice policies."); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 401 (2013) ("The revival of adolescence as a relevant and important period of behavioral development for juvenile and criminal law may have found its greatest support in the Supreme Court."). At least one scholar argues that the Court's findings about adolescent development in *Graham* are part of the holding and not dicta. *See* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

23. Nadler, *supra* note 14, discusses the psychology of coercion and its application to police encounters with citizens, concluding that adults do not feel free to refuse police requests to search. For an example of the Supreme Court's view of consent searches and minors in a slightly different but relevant context, see *Georgia v. Randolph*, 547 U.S. 103, 112 (2006), suggesting that even a young child can consent to search a parental home.

24. *See, e.g.*, Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 109 (2011) (discussing the utility of a minor's consent to search in a related context, the search of a parental home by police, and noting its significance to law enforcement). Professor Henning convincingly reasons that "in affirming the authority of minors to consent to a search of the parents' home, courts have recognized the legitimate need for consent in law enforcement tactics as a policy rationale that militates against a bright-line rule prohibiting minor consent." *Id.* at 105 (citing Lenz v. Winburn, 51 F.3d 1540, 1549 (11th Cir. 1995)). Henning concludes that in light of this use of minors' consent to search parental homes, courts must also recognize the rights of children to exclude officers from certain areas even in the presence of parental consent. *Id.* at 95–98. *See also* Brian R. Gallini, *Schneckloth v. Bustamonte: History's Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233 (2012) (recognizing that "it would be an understatement to suggest that officers rely

though these searches of minors remain permissible, the current state of the law leaves gaps and unanswered questions for law enforcement officials and courts about when and how age factors into the analysis.[25]

This article argues that, contrary to current practice, courts are required to meaningfully consider age when deciding whether a minor gave consent. In part, this requires recognition that age may be determinative in some cases and that the government must demonstrate that officer behavior was reasonable in light of the accused's status as a minor.[26] Other measures, if implemented by courts and policy makers, would also more fully account for the status of minors in police encounters under the Fourth Amendment.

The article discusses consent searches of minors in a changing legal landscape. It critically examines the failure of courts to develop and account for the proper role of, and weight to be given to, the age of the accused when a court determines the voluntariness of a minor's consent under the Fourth Amendment. Following this introduction, Part II of this article reviews the establishment and development of the voluntariness standard courts apply to resolve questions of consent under the Fourth Amendment. Part III discusses relevant scholarship on consent searches more broadly and then analyzes courts' variant treatment of youth when they determine whether a minor has voluntarily consented to a search. After tracing the historical development of minor consent search doctrine from the late 1960s to the 1990s, it comprehensively analyzes the published opinions on juvenile consent searches after 2000. Part IV discusses and compares the role age plays in the Supreme Court's jurisprudence under the *Fifth* Amendment. This analysis sheds light on the obstacles and opportunities for articulating a standard for consideration of age in the context of consent searches under the Fourth Amendment. Part V concludes that, as courts approach questions of consent in juvenile searches, they must give weight to research which is consistent with "common sense conclusions"—as the Court has—about age as part of the reasonableness inquiry to move toward a more coherent

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heavily on consent searches").

25. *See infra* Part III.C. (discussing the scarcity of opinions dealing with youth and the consent doctrine). *See also* Annitto, *Juvenile Justice on Appeal*, *supra* note 12 (discussing that few published opinions are produced by courts discussing the Fourth Amendment in the juvenile context and when they are, they are typically on school search standards). For a discussion about the importance of courts providing guidance to law enforcement generally, see Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, CATO SUP. CT. REV. 237, 256 (2011), noting that "[g]overnments employ about 870,000 law enforcement officers in the United States, and the Fourth Amendment regulates them together with many other government actors." *See also* Miranda v. Arizona, 384 U.S. 436, 441 (1967) (acknowledging that the Court accepted the case in part "to give concrete constitutional guidelines for law enforcement agencies to follow").

26. "Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children 'generally are less mature and responsible than adults'; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them' . . . ." J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (internal citations omitted).

doctrine. It also proposes a requirement of reasonable suspicion of criminal activity by law enforcement prior to a request to search a minor, along with measures of structural reform.

## II.
## CONSENT SEARCHES AND VOLUNTARINESS

The Supreme Court first articulated its "voluntariness" standard in *Schneckloth*.[27] The test for voluntariness, however, has not developed in a way that is consistent with the public's notion of "voluntary consent", and criticism of the doctrine is extensive. In addition, although the Court's early discussion acknowledged youth as a factor, courts have not successfully incorporated age into the analysis in a meaningful or consistent way. Therefore, this discussion begins by first identifying the origin and evolution of the voluntariness standard before moving to a specific discussion of youth.

The Fourth Amendment prohibits "unreasonable" searches and seizures, and requires probable cause and a warrant[28] for any search, except where the Court has ruled that certain exceptions apply. The most common exception used to conduct warrantless searches is that the suspect consented to the search—indeed, scholars have estimated that ninety percent of government searches are based on consent.[29] To determine whether consent was voluntary in *Schneckloth*,[30] the Court looked to the meaning of "voluntariness" in the context of confessions for guidance about its meaning in the context of searches.[31] The Court adopted the "traditional definition of voluntariness" used in the context of confessions.[32] Under this analysis, the voluntariness of a defendant's consent is based upon the "totality of the circumstances."[33] The inquiry involves both the individual characteristics of the defendant and the details of the exchange.[34] The Court

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

28. U.S. Const. amend. IV provides that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

29. *See* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 215–216 (2001); Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) (positing that "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment").

30. *Schneckloth*, 412 U.S. at 223–224 ("The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. . . . It is to that body of case law to which we turn for initial guidance on the meaning of 'voluntariness' in the present context.").

31. *Id.*

32. *Id.* at 229; WAYNE R. LA FAVE, 4 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2 (4th ed. 2004) (characterizing the Court's adoption of the voluntariness standard).

33. *Schneckloth*, 412 U.S. at 226–27, 229.

34. *Id.* at 226.

listed as relevant such individual characteristics as age, lack of education, low intelligence, and lack of information about constitutional rights.[35] These elements are now often referred to as "subjective factors" by courts and scholars alike.[36] The Court also listed objective factors that are related to the details of the exchange between the government and the suspect such as length of detention, and use of punishment such as withholding of food or sleep.[37] It stated that no one factor is determinative in the analysis.[38]

In the development of consent analysis since *Schneckloth*, courts frequently review a list of non-exhaustive and permissible factors and then focus on those that are most relevant to the facts of the case at hand to determine whether a situation was coercive.[39] The list in *Schneckloth* does not exclude additional factors, and later decisions expanded on the factors under the totality of the circumstances test. For example, courts have considered tone of voice by police officers, the time of day, the location of the encounter, the number of police officers present, and other factors that could amount to a lack of voluntariness.[40] The Court called for a "careful scrutiny of all the surrounding circumstance[s]" in the case.[41] That no one factor is determinative captures just one of the challenges for addressing age—namely, how courts should properly consider age without elevating it in a way that offends the totality of the circumstances doctrine.

*Schneckloth* allowed for consideration of subjective factors, looking at the mindset of the defendant.[42] Some opinions, as a result, discuss the mindset of the particular person who gave consent rather than a hypothetical "reasonable person" to decide whether consent was voluntary.[43] But scholars have argued that the Court's decision in *United States v. Mendenhall*[44] less than a decade

35. *Id.*

36. *See, e.g.*, Strauss, *supra* note 14; Simmons, *supra* note 29, at 778–79; Brian A. Sutherland, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2198 (2006) (discussing a statistical analysis listing age as a subjective factor in the inquiry).

37. *Schneckloth*, 412 U.S. at 226.

38. *Id.*

39. Sutherland, *supra* note 36 at 2197–98.

40. *Id.* at 2197.

41. *Schneckloth*, 412 U.S. at 226.

42. *Id.*

43. *See, e.g.*, United States v. Lewis, 921 F.2d 1294, 1301 (D.C. Cir. 1990); Sutherland, *supra* note 36, at 2215 (describing a statistical analysis wherein forty-eight out of 142 cases considered subjective factors of the defendant which he defined in his study as age, intelligence, education, level of intoxication, experience with the criminal justice system, or cultural expectations of police officers). *See also* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 71, 76 (2007) (arguing that an analysis of confession and search and seizure law supports the proposition that, rather than abandoning a subjective test, the Court actually "shifts opportunistically from case to case between subjective and objective tests, and between whose point of view—the police officer's or the defendant's—it views as controlling").

44. United States v. Mendenhall, 446 U.S. 544 (1980).

after *Schneckoth* marked its last opinion to focus on the subjective factors in a consent case.[45] Later decisions by the Supreme Court and lower courts have come to focus instead on whether police conduct is considered objectively reasonable.[46] If the police officer conducting the search "reasonably believed" that the defendant consented voluntarily in light of the totality of the circumstances, the search will be considered lawful.[47] For example, in *Ohio v. Robinette*,[48] the Court emphasized the objective nature of the inquiry: "the touchstone of the Fourth Amendment is reasonableness . . . [which is] measured in objective terms by examining the totality of the circumstances."[49]

As a result of this shift, some scholars conclude that the subjective inquiry by courts is "dead,"[50] or at the very least, is applied with such vagueness that defendants are unlikely to prevail even when courts do give some passing consideration to subjective factors.[51] Ultimately, most courts now rely on the objective reasonableness of officer behavior. Such analysis considers voluntariness in name only,[52] ignoring research demonstrating that people "interpret questions or suggestions as *orders* when they come from a person of authority."[53] Despite the underlying influence of the state's coercive power, courts will usually find searches to be consensual.[54] Professor Janice Nadler discusses how the shift away from consideration of subjective factors by courts has had a dramatic impact on case analysis and outcomes; essentially, analysis

45. Simmons, *supra* note 29, at 781; Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV 751, 760 (2013).

46. Illinois v. Rodriguez, 497 U.S. 177, 185–186 (1990); United States v. Sanchez, 156 F.3d 875, 878 (8th Cir. 1998). In the context of exigency, the Court engaged in a related discussion. *See* Kentucky v. King, 131 S. Ct. 1849, 1859 (2011) ("The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'"). *See also* Simmons, *supra* note 29, at 779. For an in-depth discussion about how the Supreme Court has focused on the mindset of the suspect at times, and at other times focused on the behavior of police, see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 76 (2007). Kinports discusses the use of objective and subjective factors under the Fourth, Fifth and Sixth Amendment settings, including consent searches as one area of analysis. *Id.* at 90–91.

47. *Rodriguez*, 491 U.S at 185–186.

48. 519 U.S. 33 (1996).

49. *Id.* at 39 (internal citations and quotation marks omitted).

50. Simmons, *supra* note 29, at 779.

51. Strauss, *supra* note 14, at 221–22; Sutherland, *supra* note 36, at 2215; Kinports, *supra* note 43, at 71.

52. Simmons, *supra* note 29.

53. Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 332 (2012) (emphasis added); *see also* Nadler, *supra* note 14.

54. "What is more, courts hold that 'consent' is valid in [this and other] contexts even when the State has used its coercive power to influence a suspect's choice." Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 104 (2011).

based upon reasonableness of officer conduct for both the initial seizure of the accused and the consent to search has merged into one test in the Court's recent consent cases involving both issues.[55] She concludes that now, "[t]he voluntariness of consent analysis is very similar to the seizure analysis and ultimately turns on similar (if not identical) facts."[56] This point is significant because the Court has explicitly held that seizure analysis, like the custodial analysis for Fifth Amendment purposes, is an objective test that looks only at reasonableness.[57]

*Schneckloth* discussed competing concerns between law enforcement and individual rights, stressing the value of consent searches to law enforcement while recognizing the inherent risks of coercion.[58] The opinion recognized the need to protect citizens against even subtle forms of coercion "by explicit or implicit means, by implied threat or covert force."[59] Therefore, the government has the burden to show that a defendant gave consent.[60] But the Court has moved toward requiring more overtly coercive behavior by police in order to find consent invalid.

Finally, a person's knowledge of the right to refuse to consent may be a factor under the totality of the circumstances, but like any other factor, it is not determinative.[61] The Court rejected the argument that a voluntary consent to a search must meet the same standard as a knowing and voluntary waiver of a constitutional right.[62] The Court adopted the test of voluntariness from its Due Process confession cases but distinguished the protections afforded to citizens under each. It stated that Fourth Amendment protections "are of a wholly different order" than protections under the Fifth Amendment because they do not affect the "fair ascertainment of truth."[63] Even though an unlawful search is an invasion of privacy, the fruits of an unlawful seizure are not made "unreliable" by the presence of coercion in the way that a confession could be made unreliable by illegal questioning.[64] The fact that the evidence remains reliable influences courts' reticence to exclude highly probative evidence of crimes.

Doctrinal application of the voluntariness test in general has received consistent—at times colorful—criticism from scholars, many of whom

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55. Nadler, *supra* note 14, at 162 (discussing *Florida v. Bostick* and *United States v. Drayton*); Simmons, *supra* note 29, at 782 (noting that by the time the Supreme Court heard *U.S. v. Drayton*, the merging of the doctrines was complete).

56. Nadler, *supra* note 14, at 161.

57. *Id.*

58. Schneckloth v. Bustamonte, 412 U.S. 218, 224–25 (1973).

59. *Id.* at 228.

60. Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Florida v. Royer, 460 U.S. 491, 497 (1983) (the government's burden cannot be satisfied by showing mere submission to a claim of lawful authority).

61. *Schneckloth*, 412 U.S. at 227.

62. *Id.* at 241–42.

63. *Id.* at 242.

64. *Id.*

characterize the doctrine as a "fiction."[65] Generally, commentators agree that the current legal standard "skew[s] the balance against the citizen."[66] Most average people are unaware when and if they are truly free to resist a search.[67] The doctrine is "at the point where the Court's reasoning must struggle against scientific findings about compliance" with authority.[68] Courts appear willing to accept this tension,[69] but it is less clear what our society does or should condone when police approach minors and request to search them absent some other legal justification apart from consent. Additionally, the Court's recent opinions involving juveniles create a curious juxtaposition when compared to developments under the consent doctrine; in its recent cases involving juveniles, the Court has issued decisions that are consistent with the contributions of science rather than straining against them.

## III.
## YOUTH AND CONSENT SEARCHES

Age has always been a relevant factor under the "totality of the circumstances" test for voluntariness. However, like other factors related to individual characteristics of a person that are deemed "subjective," courts have not uniformly applied or considered age under the Fourth Amendment.[70] Over the years, some appellate courts have required trial courts to consider age, noting that specific issues related to the age and status of a minor are a critical, if not a

65. *See, e.g.*, John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114 (2007) (characterizing the nature of the voluntariness test employed by courts as absurd); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 113 (2011); Sutherland, *supra* note 36, at 2199–20 (describing critiques of the judicial notion of voluntariness); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 545–49, 551–52 (2003) (critiquing *Schneckloth* and subsequent development of the doctrine and advocating for its abolition except in limited circumstances).

66. Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 553 (2002).

67. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 (1990) ("In the real world, however, few people are aware of their fourth amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear.").

68. Nadler, *supra* note 14, at 156.

69. Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH. L. REV. 1143, 1143 (2007) (arguing that "contemporary Fourth Amendment doctrine governing consent searches accepts—even encourages—ignorance among the people about their constitutional rights").

70. *Compare In re* J.M., 619 A.2d 497, 501–04 (D.C. 1992) (en banc) (remanding and requiring discussion about the role of age in a fourteen-year-old's ability to voluntarily consent to a search), *with* State *ex rel* R.A., 231 P.3d 808 (Utah Ct. App. 2010) (affirming the denial of motion to suppress evidence obtained after a search in *R.A.* without requiring consideration of age). In *R.A.*, the court found voluntary consent to search by a seventeen-year-old male and declined to require the trial court to expressly discuss the role of age in the police request to search. The court inferred that the trial court, which was a juvenile court, "could not have been unaware" of his age. *R.A.*, 231 P.3d at 814.

deciding factor,[71] while others appear to completely ignore it.[72] Courts and legislators have also made various attempts to account for youth by imposing different rules. For example, both Colorado and Arkansas impose a requirement of parental presence for voluntary consent to search by a minor in some circumstances.[73] In Florida, an intermediate appellate court attempted to elevate the state's burden by requiring it to prove voluntariness by "clear and convincing" evidence for cases involving minor consent.[74] The Court's renewed attention to age in recent cases and its recent categorization of age as part of an objective inquiry[75] provides cause to revisit the significance of age in the consent analysis.

While consent searches as a whole are widely studied, there is very little scholarship discussing youth and its relationship to consent searches. In addition, there is sparse case law and doctrinal analysis, leaving little guidance about how courts and police should deal with age in this context. To fill this gap, the next two parts provide background on the treatment of youth as a whole in various contexts, followed by a comprehensive analysis of the development of the case law on consent searches of minors from early opinions in the 1960s to modern court decisions.

### *A. Background on Consideration of Age and Consent*

Discussion of consent searches of minors is widely absent in legal literature on consent searches as a whole.[76] It is also absent in other related areas of inquiry, such as analyses of the Fourth Amendment rights of minors and adolescent decision making more broadly.

First, scholarship discussing consent searches more broadly contains almost no discussion of the role of age in determining the voluntariness of consent.[77]

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71. *See, e.g.*, *In re* J.M., 619 A.2d 497, 501–02; *In re* Daijah D., 927 N.Y.S.2d 342 (App. Div. 2011) (unanimously reversing on the law, granting motion to suppress, and dismissing petition; held that fourteen-year-old girl did not legally consent to search of her purse and noted the lower court's failure to consider age and other relevant subjective factors); E.J. v. State, 40 So.3d 922, 924 (Fla. Dist. Ct. App. 2010) (reversing trial court which failed to discuss age, prior experience with the law, and the fact that the child did not know that she could refuse a search in considering constitutionality of a search and whether child consented).

72. *See infra* Part III.D.2 (discussing cases where the opinions do not address the age of the juvenile when considering the totality of the circumstances).

73. People v. Reyes, 483 P.2d 1342, 1344 (Colo. 1971); ARK. R. CRIM. P. 11.2(a) (stating that consent to search a person under the age of fourteen must be obtained by the individual and a parent or person serving in loco parentis).

74. B.T. v. State, 702 So. 2d 248 (Fla. Dist. Ct. App. 1997) (requiring clear and convincing evidence for the search of a minor and finding involuntary consent by a juvenile) (declined to follow by *State v. T.L.W.*, 783 So. 2d 314 (Fla. Dist. Ct. App. 2001)).

75. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

76. For the few articles I encountered which treated consent searches of minors as one of the main focuses of the article, see *infra* notes 93–94 and accompanying text.

77. *See, e.g.*, Strauss, *supra* note 14. Strauss's leading article is frequently cited and discusses consent searches in great detail. But because the article's focus is on consent searches as a whole,

There is general agreement among scholars that courts have shifted the test away from "subjective factors," accompanied by a discontent with the fictional nature of the Court's test applied to the typical—or even atypical—defendant.[78] But analysis does not include specific attention to the plight of minors in these encounters. This inattention may be in part because courts and scholars have viewed age as among or akin to the "subjective factors" listed in *Schneckloth*, along with factors like intelligence and the state of mind of the defendant. Therefore, it appears that age has been implicitly subsumed into the general recognition of the Court's abandonment of any inquiry into "subjective factors" in determining voluntariness of consent.[79] In addition, there are few empirical studies of consent search cases and those that have been published tend to focus on federal court jurisprudence.[80] Juveniles, however, are more frequently tried in state courts; therefore, consent searches of minors arise less commonly in federal court opinions. When scholars do isolate subgroups, they have noted the inadequacies of the test as applied to minority, low-income, and immigrant communities.[81] Consent searches of motorists are also among the more widely discussed topics in consent searches[82] because of their consistent presence in

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age is not among the issues put forth, save for a footnote suggesting that courts appear more sympathetic to children in some situations. *Id. See also* Tracy Maclin, *The Good and the Bad News About Consent Searches and the Supreme Court*, 30 MCGEORGE L. REV. 27, 57 (2008) (providing an in-depth discussion of Supreme Court cases and consent searches). Furthermore, the Court has not squarely addressed a case applying the age factor to a consent search, which explains why the issue is not a focus of the article. *See also* Nadler, *supra* note 14; Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175 (1991); Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 451–452 (2004) (discussing the lack of empirical data about consent searches as a whole and discussing one of the few empirical studies done that focused on traffic stops). Chanenson does not focus on the role of age; however, in his recommendations he calls upon the legal and social science community to aggressively pursue more research into consent searches, noting that factors such as age, gender, and minority status deserve further inquiry. Chanenson, *Get the Facts, Jack!*, at 458.

78. *Supra* notes 50–55 and accompanying text.

79. *See e.g.*, Maclin, *supra* note 77, at 57, 62 (discussing the Supreme Court's shift from subjective factors to a model based upon reasonableness).

80. *See* Sutherland, *supra* note 36 (reporting results from a statistical analysis using federal district court decisions); Nancy Leong & Kira Suyeishi, *supra* note 45 (describing their empirical research about use of consent forms based upon a comprehensive analysis of Federal Appellate decisions from 2005–2009); *see also* Strauss, *supra* note 14 (discussing conclusions drawn from comprehensive analysis of hundreds of federal and state court decisions about consent searches which raised no discussion of age).

81. *See, e.g.*, Joshua Fitch, United States v. Drayton*: Reasonableness and Objectivity—A Discussion of Race, Class, and the Fourth Amendment*, 38 NEW ENG. L. REV. 97 (2003); David Rudovsky, *Law Enforcement by Stereotypes & Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001) (discussing race discrimination and its relationship to consent searches). Rudovsky's article acknowledges that juvenile minorities suffer disparate impacts in the criminal justice system as a whole. *Id.* at 316.

82. *See* Chanenson, *supra* note 77, at 458 (discussing the prevalence of consent search scholarship focusing on traffic stops and searches). *See also* Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*; Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

court opinions and controversial history. To the extent that consent searches enter public discourse, often it is searches conducted during traffic stops that capture the attention of the media and general public, who express concern that officers engage in racial profiling by utilizing this exception more often to search minorities.[83]

Scholars have also explored the relevance of psychology and social science to consent searches and the gulf between legal doctrine and science.[84] In part because of the disconnect between doctrine and empirical reality, as well as for other significant reasons, some courts, scholars and legislators have concluded that consent searches should be curtailed,[85] be accompanied by warnings,[86] revisited in a dramatic way, or even banned altogether,[87] despite their value to law enforcement.

Next, literature discussing juveniles and the Fourth Amendment typically focuses on school searches. The "reasonable suspicion" standard created under *New Jersey v. T.L.O.* has generated debate and analysis concerning what kind of information a school administrator must possess to search a student legally.[88]

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83. *See, e.g.*, Robert Schwanberger, *Minority Leaders Look for a Candidate Who'll End Consent Searches*, STAR-LEDGER, June 14, 2001, at 38, 2001 WLNR 10979903; Editorial, *Bias in Traffic Stops Is Just a Symptom*, CHICAGO SUN TIMES, July, 15, 2011, at 23, 2011 WLNR 14393565 (calling for reform in the use of consent searches and criticizing police practices that result in racial profiling); Reginald T. Jackson, *Uninformed Consent*, N.Y. TIMES, 2007 WLNR 18641877; James Ragland, *Are Police Agencies Profiling? Search Them*, DALL. MORNING NEWS, 2005 WLNR 24723685.

84. *See, e.g.*, Rotenberg, *supra* note 77, at 188; Nadler, *supra* note 14, at 175; Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 736 (2000) (discussing the Court's test in *Schneckloth* and positing that "greater attention to empirical and social science evidence is necessary precisely in order to shed better light on the normative judgments that we make in criminal procedure"); Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 331–40 (2012).

85. Maclin, *supra* note 77 (arguing for court application of the standard created in *Edwards v. Arizona*, 451 U.S. 477 (1981), once a person has refused to give consent).

86. *See* Gallini, *supra* note 24, at 233 (critiquing the Court's conclusion that police administration of warnings would be "impractical" and calling for the Supreme Court to reconsider its holding in *Schneckloth*). Professor Gallini argued that the Court was wrong in its failure to require warnings to citizens when it stated that warnings are "impractical." *Id.* He recognized that warnings would likely have little effect on consent rates; however, he provokes thoughtful discussion about why they are, nevertheless, constitutionally required. *Id.* at 274.

87. Strauss, *supra* note 14, at 252 (calling for an abolition of consent searches and arguing that "the determination of voluntariness is currently confused, misapplied, and based on a fiction").

88. New Jersey v. T.L.O., 469 U.S. 325 (1985). *See, e.g.*, Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003) (discussing standards for searches in public schools); Jessica Feierman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J.L. SOC'Y 301 (2011). Indeed, a recent symposium volume of the *Mississippi Law Journal* was dedicated to the Fourth Amendment rights of minors and focused mainly on provocative questions related to school searches. *See, e.g.*, Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011); Martin

This attention is logical given the Supreme Court's role and engagement in the debate over school searches,[89] the amount of time that children spend at school, and the controversies that arise over evidence that police or school officials find using the "reasonable suspicion" standard created in *T.L.O.* that applies to student searches. This attention is also warranted given the depth of the literature analyzing the "school-to-prison pipeline" problem where student misbehavior "increasingly results in criminal sanctions."[90] But, as a result, other youth encounters with police beyond the classroom that implicate the Fourth Amendment based upon consent are largely unexamined.

Finally, there is a significant and rich body of literature in the field of developmental psychology that analyzes minors' ability to make decisions or give consent in various contexts, but it has tended to focus on areas other than consent to law enforcement searches. These include, for example, minors' decisions about health care, their ability to consent to sex, and waiver of the rights to counsel and *Miranda*.[91] There is no question that the ability of minors

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R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955 (2011) (discussing school strip searches under one of *T.L.O.*'s progeny, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2637 (2009)); Victor Streib, *Protecting Preteens*, 80 MISS. L.J. 1095 (2011) (discussing preteens and the community caretaking function as it relates to young children and the Fourth Amendment).

89. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985) (addressing the proper standard for assessing the legality of searches conducted by public school officials).

90. *See, e.g.*, Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 (2012) (discussing the "school-to-prison pipeline," which results in the increased criminalization of students); Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 981 (2010).

91. *See, e.g.*, Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 131, 146 (Thomas Grisso & Robert G. Schwartz eds., 2000); Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1 (2011) (discussing juvenile decision making and consent to sex in the context of prosecution for prostitution and noting research that some situations are inherently coercive for minors); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65 (1999); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 285–363 (2006) (discussing controversies about the capacity of children to make decisions in differing legal contexts and identifying ways to treat them consistently); Jennifer Ann Drobac, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to "The Age of Consent,"* 20 J.L. & POL'Y 63, 65 (2011) (exploring adolescent consent to sex and questioning whether factual consent to sex should insulate alleged perpetrators of statutory rape from civil liability); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000) (providing an in depth discussion of the varying legal treatment of adolescent capacity but mentioning the Fourth Amendment only as to school officials initiating school searches); Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, Marie Banich, *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 586 (2009) (distinguishing between

to consent to search is a step-child in the broader conversation about adolescent capacity; this is likely because it is widely accepted that consent searches are a legal fiction as to minors and adults alike—unlike adolescent capacity to consent in the context of health care or contracts. This robust body of literature, while not focusing on consent search issues, is nonetheless a resource for doctrinal attention as courts are called to reconsider age in the context of consent searches.[92]

As a result, discussion of consent searches of minors remains scarce.[93] The late 1970s garnered some attention in light of *In re Gault*'s extension of constitutional protections to juveniles.[94] One article analyzed the recommendations first put forward by the Joint Commission on Juvenile Justice Standards in 1977 ("ABA Standards").[95] The ABA Standards suggest that juveniles should be warned of their right to refuse consent in order to make the encounter less intimidating, and that children in custody should be provided with the right to counsel during a custodial search.[96] In 1996, another article reviewing case law available in the early 1990s highlighted the role of age in Fourth Amendment doctrine and recommended a standard similar to informed consent from the health care setting when analyzing searches and seizures of juveniles in street encounters.[97] The article proposed that courts should view the consent test "through the lens of a minor,"[98] which parallels the Court's later reasoning in *J.D.B.*'s Fifth Amendment context. The article drew on the growing body of literature on adolescent developmental psychology to support a proposal

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consideration of age for informed consent related to health care decisions versus the way that age impacts adolescent criminal culpability); Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts*, 54 FLA. L. REV. 577 (2002).

92. *See, e.g.*, Elizabeth Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE (2008) (applying psychological research and adolescent development to juvenile justice and advancing its utility in informing policy); Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note 91 (exploring adolescent development and competence in the context of *Miranda* rights).

93. *See* Joseph Adnoff Levitt, *Preadjudicatory Confessions and Consent Searches: Placing the Juvenile on the Same Constitutional Footing as an Adult*, 57 B.U. L. REV. 778 (1977) (analyzing the recommendations put forth by the Institute of Judicial Administration & American Bar Association, Joint Commission on Juvenile Justice Standards [hereinafter IJA/ABA Standards] issued in 1977); Lourdes M. Rosado, *Minors and the Fourth Amendment: How Minor Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762 (1996).

94. Levitt, *supra* note 93; *see also* Larry T. Pleiss, *Beyond* Kent *and* Gault*: Consensual Searches and Juveniles*, 6 PEPP. L. REV. 801, 815 (1979) (examining consent searches in light of *In re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U.S. 541 (1966) and while acknowledging that courts are likely unwilling to abolish consent searches of minors, advocating for informed waiver or provision of counsel for custodial consent searches).

95. Levitt, *supra* note 93 (discussing the IJA/ABA Standards).

96. INST. OF JUDICIAL ADMIN. & AM. BAR ASSOC., JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS (1977), Standard 67.

97. Rosado, *supra* note 93.

98. *Id.* at 791.

to implement juvenile-specific warnings prior to a consent search request.[99]

More recently, scholars have analyzed searches of minors in the home when juvenile or adult children's rights must be reconciled with the parental right to consent to searches of specific areas.[100] Professor Kristin Henning points out that if the Court allows minors to consent to a search of the parental home, that decision must accompany recognition of the decisional capacity of children to exclude others from certain areas of the home.[101]

### *B. The Supreme Court and Youth*

The Supreme Court's cases involving minors and the Fourth Amendment primarily address school searches and the legal standards courts must apply when police or school administrators search a student.[102] The Court has not decided a case that squarely discusses age and the consent search of a minor; however, the Court has always held that age is relevant since it first announced the applicable test.[103] In the distinct but related context of third party consent in the home, the Court has stated in dicta that even a young child *may* be able to consent to entry into the parents' home.[104]

The Court has also considered a few cases dealing with seizures of juveniles. When the Court decided whether or not a juvenile defendant was "seized" under the Fourth Amendment when he fled from officers, the Court did not discuss his age.[105] More recently in 2003, the Court found that actions by law enforcement resulted in an illegal seizure and arrest when police officers awoke a juvenile defendant at home in his bedroom at three a.m. and placed him

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99. *Id.* at 792–793. *See also* Jonathan S. Carter, *You're Only as "Free to Leave" as You Feel: Police Encounters with Juveniles and the Trouble with Differential Standards for Investigatory Stops under In re:* I.R.T., 88 N.C. L. REV. 1389 (2010) (arguing in favor of applying dicta in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) where the Court had described how consideration of age might be impermissible without resolving the question).

100. *See* Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 109 (2011) (discussing a minor child's right to privacy within the home and its relationship with parental rights, and articulating the need to recognize the rights of the child). For a related but different inquiry about adult children's rights at home, see Hillary B. Farber, *A Parent's "Apparent" Authority: Why Intergenerational Coresidence Requires a Reassessment of Parental Consent to Search Adult Children's Bedrooms*, 21 CORNELL J.L. & PUB. POL'Y 39 (2011).

101. Henning, *supra* note 100, at 95.

102. New Jersey v. T.L.O., 469 U.S. 325 (1985); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009). The Court first acknowledged the application of the Bill of Rights to children in *In re Gault*, 387 U.S. 1, 13 (1967) (acknowledging that the Fourteenth Amendment and Bill of Rights are "not reserved for application to adults only").

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

104. Georgia v. Randolph, 547 U.S. 103, 112 (2006) (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.4(c), at 207 (4th ed. 2004)) (stating that even an eight-year-old may give consent to police to enter the threshold of the home but acknowledging potential limits to the scope of such consent).

105. California v. Hodari D., 499 U.S. 621 (1991).

in handcuffs.[106] It is likely the outcome would have been the same even if he had been an adult and, therefore, age was not highlighted in the discussion.[107] Finally, in 2011, the Supreme Court considered a civil rights claim which involved a potential illegal seizure of a minor for questioning as a witness at school. However, the Court did not reach the question of whether law enforcement actions involved an unreasonable seizure.[108]

The Court's view of age outside of the Fourth Amendment context and its recent cases discussing the importance of age, therefore, are informative. Historically, the Court has long acknowledged that consideration of youth is necessary where children interact with police, given the tendency of children to acquiesce to authority.[109] The Court has "time and time again" emphasized that age is an important factor when considering judgment and decision making by minors in the criminal justice context.[110] More recently, the Court differentiated age from other factors that are traditionally considered "subjective" in the context of *Miranda* warnings.[111]

While the Court has not directly addressed a case that discussed juvenile age and consent in the search context, it has decided four significant criminal cases related to juveniles in the last decade.[112] Three of the cases dealt with the sentencing of juveniles who committed serious crimes, resulting in prohibitions on capital punishment for juveniles, life without the possibility of parole for non-homicide offenders, and mandatory sentences of life in prison without parole under the Eighth Amendment.[113] The other case, *J.D.B. v. North Carolina*, is the one most relevant to the issue of consent. *J.D.B.* clarified that the age of a minor *must* be considered in the custodial analysis under the Fifth Amendment; the

106. One of the officers stated "we need to go and talk." Kaupp v. Texas, 538 U.S. 626, 631 (2003).

107. *Id.*

108. "The Court of Appeals first ruled that the interview violated S.G.'s rights because Camreta and Alford had 'seize[d] and interrogate[d] S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent.'" Camreta v. Greene, 131 S. Ct. 2020, 2027 (2011). There the minor was a complaining witness, as opposed to a minor suspect, at school. *Id.*

109. In cases from the mid-1900s, the Court acknowledged that youth are more susceptible to coercion and outside pressure. The Court has applied this principle to its analysis in cases involving coercion during police interrogations. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962).

110. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (internal citations omitted) (discussing historical recognition by the Supreme Court about taking greater care when dealing with minors and its recognition of age).

111. *Id.* at 2394.

112. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 130 S. Ct. 2011 (2010); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Miller v. Alabama, 132 S. Ct. 2455 (2012).

113. *Roper*, 543 U.S. 551 (holding that the death penalty is unconstitutional as applied to juveniles); *Graham*, 130 S. Ct. 2011 (holding that the Eighth Amendment prohibits life without the possibility of parole for juveniles who commit non homicide offenses); *Miller*, 132 S. Ct. 2455 (holding that the Eighth Amendment prohibits mandatory sentences of life in prison without the possibility of parole for juveniles who commit homicide offenses).

Court specifically differentiated age from subjective factors.[114]

Until *J.D.B.*, the status of age and its consideration for the purposes of custody or seizure analysis was unresolved. The Court itself muddied the waters in *Yarborough v. Alvarado* when it questioned whether age "might" be viewed as part of a subjective inquiry, and therefore, not a permissible factor in the context of *Miranda* custodial analysis.[115] But it did not reach the issue in the holding. Then, in 2011 the Court in *J.D.B.* resolved the question, setting age apart from subjective factors in the test for custody in a way that impacts analyses of consent.[116] The Court, while closely divided, ultimately rejected the notion that age is more closely aligned with personal characteristics that the Court has deemed irrelevant in the objective custody inquiry.[117] It found that age is relevant as part of an objective inquiry for purposes of whether an accused minor judges herself to be in custody.[118] Thus, it follows that even though the modern test for consent has evolved into a more objective standard, age is a critical factor.

### *C. Early Development of Doctrine on Consent Searches of Minors*

The effect of age on consent to search in the Fourth Amendment context is underdeveloped by the courts.[119] This is somewhat counter-intuitive considering that search and seizure issues—including the validity of consent searches—are among the more common issues that defendants raise in criminal appeals.[120] Indeed, consent searches are the most significant exception to the Fourth Amendment warrant requirement.[121] In addition, in 2009 alone, juvenile courts processed 1.5 million cases and over half of those cases involved children who

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114. *J.D.B.*, 131 S. Ct. at 2404. In other words, a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. *Id.*

115. Yarborough v. Alvarado, 541 U.S. 652, 668 (2004). *See also J.D.B.*, 131 S. Ct. at 2405. The Court, while discussing *Yarborough*, stated, "[W]e observed that accounting for a juvenile's age in the *Miranda* custody analysis 'could be viewed as creating a subjective inquiry.' We said nothing, however, of whether such a view would be correct under the law." *Id.* at 2405.

116. *J.D.B.*, 131 S. Ct. at 2404–2405.

117. *J.D.B.*, 131 S. Ct. at 2411–12 (Scalia, J., dissenting) ("Personal characteristics of suspects have consistently been rejected or ignored as irrelevant under a one-size-fits-all reasonable-person standard.") (citing Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam)).

118. *J.D.B.*, 131 S. Ct. at 2404–2405.

119. *See* Annitto, *supra* note 12, at 724–725; *see also* Terry Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 133 (2009) ("[W]hile age clearly matters to assertion of Fourth Amendment rights . . . courts have yet to reach any consensus over how this is so, and tend to use adult-like tests despite nods to the impact of youth.").

120. *See* Gregory D. Totten, Peter D. Kossoris & Ebbe B. Ebbesen, *The Exclusionary Rule: Fix It, But Fix It Right*, 26 PEPP. L. REV. 887, 910 (1999) (noting that the Fourth Amendment is one of the frequent bases of appeal in criminal cases).

121. Strauss, *supra* note 14, at 215–216.

were age fifteen and younger.[122] Thus, the issue is critically significant because age will always be a factor when police encounter youth and request to search.

Juvenile cases arise primarily in state courts. Beginning in the late 1960s, early cases indicated that courts were inclined to give weight to the status of a minor when deciding a question of consent. By the late 1990s, however, no clear standard had emerged and court opinions reveal that confusion was taking root: namely, the tension between considering age while at the same time using an "adult standard."[123]

One of the earliest published cases dealing with juvenile consent to search was decided in New York in 1966, before *Schneckloth* and *Gault*.[124] The case involved a question about evidence obtained by police after arresting and questioning a fifteen-year-old boy for a few hours.[125] The court concluded that the teen's consent to search was not voluntary, highlighting his age, the length of questioning that preceded the search, the late hour, and the absence of a parent.[126] Even though the case occurred before the *Schneckloth* test identified age as a factor, the court emphasized the youth of the defendant.[127]

Five years later, in 1971, the Colorado Supreme Court also emphasized the young age of the defendant in a consent search case. The case presented a question of first impression about whether to extend the state statute that required parental presence for custodial interrogations to Fourth Amendment consent searches of minors in custody.[128] The court issued a notable decision—noteworthy because it applied its juvenile interrogation statute to consent searches.[129] When it addressed the consent search of a minor, the court stated that the "same test is applicable to the validity of the search whether the consenting party is an adult or a juvenile," except with regard to the application of a relevant state code provision.[130] The court recognized that under state law, "the juvenile is entitled to comparable protection in connection with the waiver

122. Charles Puzzenchera, Benjamin Adams, Sarah Hockenberry, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2009, 1, 9 (2012).

123. *See infra* note 167 and accompanying text.

124. *In re* Williams, 49 Misc.2d 154, 167 N.Y.S.2d 91. (1966) *aff'd sub nom. ex rel.* Williams v. Comm'r of Correction, 30 A.D.2d 1051 (1968).

125. *Id.*

126. *Id.* at 169–170. The Court found protection from unreasonable searches and seizures under the due process clause for juveniles, similar to some of the early opinions, rather than the Fourth Amendment. *Id.* The Court wrote: "The consent of this fifteen-year-old boy given at 2 o'clock in the morning while in police custody under a charge of 3rd degree burglary and after he had been questioned for several hours without the presence of his parents or any other adult friend cannot be held to be a consent that was given freely and intelligently without any duress or coercion, express or implied." *Id.*

127. *Id.*

128. People v. Reyes, 483 P.2d 1342, 1344 (Colo. 1971) (discussing the state statute requiring presence of parents for custodial interrogations in C.R.S. § 22-2-2(3)(c)).

129. *Id.*

130. *Id.*

of his Fourth Amendment rights."[131] Therefore, when a minor is in custody in Colorado, consent to search will not be valid without a parent or adult present.[132]

The reach of the statute is limited to requests to search when a minor is in custody. Arguably, the statute may apply more broadly in the future given the holding in *J.D.B.* that age is relevant to the analysis of whether a minor is in custody. Although some other states require or prefer parental presence during custodial interrogations of some minors,[133] it does not appear that other courts have extended those statutes to consent searches in the way that Colorado has.[134]

After sparse consideration of juvenile status and consent in court opinions over the next two decades, the D.C. Court of Appeals, sitting en banc, issued one of the most thorough treatments of a defendant's youth in the consent search context in *In re J.M.*[135] And again, like the courts in Colorado and New York had, the court emphasized the importance of age to the analysis. In *In re J.M.*, police searched a fourteen-year-old boy on board a bus after asking for his consent. The *en banc* decision vacated the panel's decision suppressing the evidence and remanded the case. But the court agreed that the consideration of youth was essential to addressing the question of whether the child's consent to a search was voluntary.[136] The court rejected implementation of a rule to presumptively invalidate consent by juveniles,[137] but the court remanded the case and required lower courts to be express and thorough in their scrutiny of youth on the record when deciding voluntariness of consent.[138]

Because *Schneckloth* held that that no one factor is determinative, *J.M.* explained why it elevated youth, comparing it to consent searches that occur

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131. *Id.*

132. *Id. See also* People in Interest of S.J., 778 P.2d 1384 (Colo. 1989); People v. Lehmkuhl, 117 P.3d 98, 102 (Colo. App. 2004).

133. *See, e.g.*, N.C. GEN. STAT. § 7B-2101 (2007) (providing that when a child is less than fourteen years of age "no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission is made with a parent present"); MO. REV. STAT. § 211.059 (2000) (requiring the child to be instructed of the right to have a parent present); OKLA. STAT. tit. 10A, §2-2-301 (2010) (requiring parental presence for interrogation of a child under the age of sixteen and prohibiting admission of a statement made without a parent present).

134. The Montana Supreme Court has entertained similar reasoning ruling that youth under sixteen do not have the capacity or authority to relinquish parental privacy rights by providing consent to search of a home. State v. Schwarz, 136 P.3d 989 (2006). The Court was persuaded by the state statute that a child under age sixteen cannot waive *Miranda* rights without the advice of a parent or lawyer. *Id.* (citing M.C.A. §41-5-331(2)). The issue was raised by a juvenile defendant in New Jersey, but the court did not reach the issue in its opinion as the case was decided on other grounds. State v. Biancomano, 284 N.J. Super. 654 (App. Div. 1995).

135. *In re* J.M., 619 A.2d 497, 502–03 (D.C. 1992) (en banc). *See also* United States v. Doe, 801 F.Supp. 1562 (E.D. Tex. 1992) (discussing the application of the exclusionary rule in juvenile proceedings in a juvenile's challenge of the voluntariness of his consent). The Court did not analyze the effect of his age on voluntariness but found the consent involuntary. *Id.*

136. *In re* J.M., 619 A.2d 497, 502–03 (D.C. 1992) (en banc).

137. *Id.*

138. *Id.* at 504.

when a suspect is in custody.[139] The court likened youth to custodial status by pointing to the statement in *Schneckloth* that courts have been "particularly sensitive to the heightened possibilities for coercion when the 'consent' to search was given by a person in custody."[140] *J.M.* analogized the heightened potential for coercion in a custodial setting to cases involving police requests for consent from juveniles. It held that courts deciding juvenile consent search cases are required to "make explicit findings on the record concerning the effect of age and relative immaturity on the voluntariness of the defendant's consent."[141]

Shortly after *J.M.*, the Florida Court of Appeals issued a decision about a consent search that also demonstrated mindfulness of age. It held that a higher standard of proof applied to consent searches of juveniles, imposing upon the state a clear and convincing evidence standard instead of a preponderance of the evidence standard.[142] In Florida, voluntariness of consent may be proven by a preponderance of the evidence, which is similar to the approach of most states.[143] The appellate decision adopted the higher clear and convincing standard for searches of all minors.[144] It did so because the Florida Supreme Court imposed the higher standard in cases where a minor consents to search the parental home.[145] Ultimately, Florida's courts later declined to apply a higher standard of proof for all minor consent searches, retaining it only for searches of the parental home;[146] but like *J.M.* and courts in New York and Colorado, the decision demonstrated that courts were searching for a more protective standard for minors.

Other courts also wrestled with how to factor age into the analysis.[147] For

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139. *Id.*

140. *Id.* at 503 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 241 n.29 (1973)).

141. *Id.*

142. B.T. v. State, 702 So. 2d 248 (Fla. Dist. Ct. App. 1997) (requiring clear and convincing evidence for the search of a minor and finding involuntary consent by a juvenile) (declined to follow by *State v. T.L.W.*, 783 So. 2d 314 (Fla. Dist. Ct. App. 2001)). The *B.T.* court adopted the standard from the Supreme Court's standard for children consenting to a search of the parents' home. 702 So. 2d 248 (citing Saavadra v. State, 622 So. 2d 952 (Fla. 1993)).

143. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974); United States v. Perez–Montanez, 202 F.3d 434 (1st Cir. 2000); United States v. Raibley, 243 F.3d 1069 (7th Cir. 2001); People v. James, 561 P.2d 1135 (Cal. 1977); State v. Patterson, 571 P.2d 745 (Haw. 1977); State v. Howard, 509 N.W.2d 764 (Iowa 1993); State v. Hardyway, 958 P.2d 618 (Kan. 1998); State v. Kelly, 376 A.2d 840 (Me. 1977); State v. Akuba, 686 N.W.2d 406, 413 (S.D. 2004); People v. Robinson, 748 N.E.2d 739 (Ill. App. Ct. 2001).

144. *B.T.*, 702 So. 2d 248 (citing Saavadra v. State, 622 So. 2d 952 (Fla. 1993))

145. *Id.*

146. *See, e.g.*, State v. T.L.W., 783 So. 2d 314 (Fla. Dist. Ct. App. 2001).

147. *See* State v. Trader, 1993 WL 265173 (Del. Fam. Ct. 1993). The Delaware trial court decision acknowledged the relevance of age where it held that the consent by a sixteen-year-old boy was voluntary because, despite his young age, the officer was not coercive. *See State ex rel.* Juvenile Dep't of Multnomah County v. Fikes, 842 P.2d 807 (Or. Ct. App. 1992) (holding that despite the fact that defendant was a juvenile, he appeared mature and had familiarity with police searches), *abrogated by* State v. Ashbraugh, 200 P. 3d 149 (Or. App. Div. 2008) (en banc). "The [trial] court explained that it was relying on the child's maturity level and his familiarity and

example, the Court of Appeals in Massachusetts discussed age overtly in its analysis of whether there was consent to search a sixteen-year-old boy, but found that other factors outweighed the risk of coercion caused by his youth.[148] The court acknowledged that "factors suggesting coercion" were present when the police officer requested to search the juvenile.[149] Those factors were the minor's young age, the presence of four police offers at the police station where the search occurred, failure to inform the minor of the right to refuse, and defendant's testimony at the hearing that he did not think he had a choice.[150] However, the court found that other factors had mediated both his young age and presence at the police station with four officers.[151] The reasonableness of the officer's conduct outweighed, at least in the court's view, any threat posed by age and custody.

This kind of opinion cuts both ways. On the one hand, the court at least engaged in an analysis that considered age. The court appeared to find it necessary, in light of the juvenile's age and the presence of other coercive factors, to explicitly identify what other factors mitigated youth, rather than ignoring the question altogether.[152] On the other hand, given the number of coercive factors present, the outcome is fairly aligned with the development of confession law where age has often mattered very little except in extreme circumstances.[153]

Opinions also place great weight on the perceived reasonableness of officer behavior from the perspective of an adult interaction, consistent with the current emphasis in the consent doctrine. And yet, the courts express and recognize some dissatisfaction or unresolved conflict; one court, conflating the consent and seizure analysis into one question, analyzed reasonableness under an objective reasonable person standard. But it acknowledged the inherent difficulty of doing so, stating, "[T]he reasonable person standard is hard when it's a child."[154]

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experience dealing with the police." *Id.* at 624. In each case, the court appeared to recognize the relevance of juvenile status but again stated the age of the defendant was mediated by other factors, such as the officer's conduct, the fact that the court perceived this particular child as being "mature," and that the child had prior experience with police officers.

148. Com. v. Greenberg, 609 N.E. 2d 90 (Mass. App. Ct. 1993).

149. *Id.*

150. *Id.*

151. *Id.* These mediating factors were the presence of the minor's father, the minor's cooperation in the investigation up to that point, the absence of aggressiveness on the part of the officers, threats, or "trickery" by the police, and previous experience with the law. *Id.* The Court stated that "having been arrested before, [the minor] had some familiarity with criminal procedure." *Id.*

152. *Id.*

153. Regarding treatment of age by courts in the Fifth Amendment context, see Guggenheim & Hertz, *supra* note 19.

154. State *ex rel.* Juvenile Dep't of Multnomah County v. Fikes, 842 P.2d 807, 808 (Or. Ct. App. 1992), *abrogated by* State v. Ashbraugh, 200 P. 3d 149, 155 (Or. Ct. App. 2008) (en banc). The court was referring to its analysis about whether the child was illegally seized and whether he consented, conflating the two inquiries and using a reasonableness test. This analysis is in contrast

Finally, in the late 1990s, the Colorado Supreme Court issued another decision that illustrated this tension.[155] The court showed some concern for age; however, it did not set a clear standard for trial courts. The court emphasized that outside of a request to search while the child is in custody, a court may not elevate age in its analysis.[156] And it did so even though the same court previously recognized that stronger protections were desirable for consent searches of minors in custody because of the vulnerabilities that accompany age.[157]

The case involved whether a fourteen-year-old boy's consent to a search within his home was valid.[158] The boy was home alone when police arrived and he allegedly let them enter the home to search for a jacket.[159] On appeal, the court remanded the case, stating that the record was insufficient as to the basis of the suppression.[160] It stated that, "as with the custody determination [for issuance of *Miranda*]," the court *may* consider age—though it is not required to—along with whether or not the juvenile's parents were at home, as factors in deciding if the consent to search was involuntary.[161] But it also stated that those factors should not be accorded greater weight than any other factor.[162] It reminded lower courts that a juvenile's consent in a non-custodial setting "is determined by the same standard of voluntariness applicable to an adult."[163] This language imparts a confusing standard for lower courts. It recognizes the role of age on the one hand but simultaneously requires the application of an adult standard on the other hand.

Likely because of confusing appellate decisions, other court decisions in the 1990s did not discuss age, particularly where juveniles were above the age of fourteen. For example, appellate courts in Georgia and Washington considered suppression motions for searches premised on the consent of teenagers without discussing the relevance of their age and youth.[164] In fact, in one case, the court did not even state the precise age of the juvenile.[165] Unlike the previous cases in other states during this time period, the courts in Georgia and Washington did not engage in any deeper analysis about the possibility of coercion due to the

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to *In re J.M.*, 619 A.2d 497 (D.C. 1992) (en banc), which clearly separated the two inquiries, finding age irrelevant to seizure question and *required* for consent.

155. *In re* R.A., 937 P.2d 731, 734–35 (Colo. 1997).

156. *Id.* at 737.

157. People v. Reyes, 483 P.2d 1342 (Colo. 1971).

158. *In re* R.A., 937 P.2d at 734–35.

159. *Id.*

160. *Id.* at 739.

161. *Id.* at 738.

162. *Id.*

163. *Id.*

164. *In re* S.B., 427 S.E. 2d 52 (Ga. Ct. App. 1993); State v. McCrorey, 851 P. 2d 1234 (Wash. Ct. App. 1993) (overruled on other grounds).

165. *S.B.*, 427 S.E. 2d 52.

minor's age.[166]

In many ways, the Colorado Supreme Court opinion perfectly embodies the lack of clarity emerging in different courts around the country and continuing today: how does a court adequately consider the age of a fourteen-year-old and her consent to a search while still using the "same standard of voluntariness applicable to an adult"?[167] And in light of *J.D.B.*, it arguably should not use that same standard. State appellate courts at times appear to instruct the lower courts that they *may* consider age, but even when they do, they may not elevate that factor, even if—as in the Colorado Supreme Court case—a fourteen-year-old is home with no parents present. Instead of providing a coherent model for considering age, the language can be read to minimize age and emphasize a "reasonable person" standard instead. The decisions invite the question of whether the court must always point to something other than age *explicitly* in order to justify suppression, such as presence of multiple officers or a minor's inexperience with law enforcement. And if so, what are the other factors? Most importantly, this command is questionable now in light of *J.D.B.*'s holding that age may sometimes be determinative.

### *D. Current Treatment of Age*

Throughout the 1990s, appellate decisions considering the issue of consent searches of minors were not only infrequent, but were also inconsistent as to whether and to what extent age must be considered in the consent analysis. The failure to articulate a meaningful standard for age may be in part due to a retreat by the Supreme Court, and subsequently by lower courts, from subjective factors or individual characteristics and traits of the defendant in consent analysis.[168] But that explanation will become increasingly less satisfying as courts implement the Supreme Court's decision that age is part of an objective test in the context of custody for *Miranda* warnings. Tracing the development of minor

166. *See id.*; *McCrorey*, 851 P. 2d 1234. The Washington appellate court did not discuss the relevance of the juvenile's age in the voluntariness analysis of the consent to search by a seventeen-year-old. The court's analysis focused on a question of first impression for the state about whether to adopt the *Schneckloth* test or invoke greater protections under the state constitution. *McCrorey*, 851 P. 2d 1234, 1237. While it embraced the *Schneckloth* test without additional protections, *id.* at 1239, it did, however, suppress evidence that police officers uncovered in the juvenile's home, finding that the search by police in the juvenile's home exceeded the *scope* of his consent. *Id.* at 1237. In doing so, it discussed intelligence and education but did not focus on or mention his juvenile status. *Id.* at 1239.

167. *In re* R.A., 937 P.2d 731, 738 (Colo. 1977).

168. *Compare* United States v. Watson, 423 U.S. 411, 424–425 (1976), *and* United States v. Mendenhall, 446 U.S. 544, 556–557 (1980) (discussing subjective factors or characteristics of the defendant), *with* Florida v. Jimeno, 500 U.S. 248, 249–251 (1991) (stating that the appropriate inquiry is that of "objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" in the context of the scope of consent). *See* Maclin, *supra* note 77, at 61 (arguing that *Jimeno* "best illustrates the modern Court's abandonment of *Bustamonte*'s 'voluntariness' test and its substitution of a 'reasonableness' test that considers only objective facts or criteria").

consent search doctrine reveals tension around how a court can consider age without elevating it in an impermissible way. This conflict appears to have prevented progress toward a well-defined standard.

Age did not ever entirely vanish from court consideration of consent searches.[169] However, of the few cases dealing with the issue of minor consent searches after the year 2000, many of the cases failed to discuss age as a relevant factor, particularly those that were decided in the early 2000s.[170] After extensive searches, the author was only able to identify eleven opinions about consent searches of minors that include discussion of youth as a factor in the time period between 2000 and 2013.[171] It is reasonable to predict that this number will and should increase in the wake of *J.D.B.*, but as of 2013, there are two consent search cases that discuss the parallel reasoning in *J.D.B.*[172]

*1. Discussion of the Relevance of Age*

Of the eleven recent cases that squarely discuss or consider age in the consent analysis, six resulted in suppression, and the others found that consent was voluntary.[173] Courts discussed age in the three cases involving the youngest defendants, all of whom were fourteen-years-old; there appear to be no published opinions involving minors younger than fourteen where officers requested to search the minor as opposed to a parental residence. Other factors that courts discussed along with age included whether there was verbal consent, the number of officers present,[174] whether the juvenile appeared nervous,[175] and prior experience with the law.[176] But courts did not treat those factors consistently. Finally, the first opinion from a state's highest court to consider the voluntariness of a minor's consent after *J.D.B.* squarely engaged with the role of age and its relevance.[177]

First, in 2001, a Florida Court of Appeals considered whether to follow an

169. See *supra* Part III.C.

170. *See infra* Parts. III.D.1-2.

171. *See infra* Subpart III.D.1 (discussing each of the eleven cases).

172. *See, e.g.*, State v. Butler, 302 P.3d 609, 612–613 (Ariz. 2013) (en banc) (discussing *J.D.B.* and using it in support of the importance of age in the consent context and finding involuntary consent by sixteen-year-old); *In re* P.A., No. J1200273, 2013 WL 2898226, at *6 (Cal. Ct. App. June 14, 2013) (unpublished opinion) (citing *J.D.B.* but finding that "the evidence in this case did not identify anything in particular that would lead to the conclusion that P.A.'s maturity level was a factor in his consent"). The court in *P.A.* found the search of a minor was consensual despite that it was nighttime, during the encounter there were at least five officers, a police canine who barked, and police had weapons drawn towards the suspects. *Id.*

173. *See, e.g.*, Com. v. Guthrie G., 848 N.E.2d 787, 791 (Mass. App. Ct. 2006), *aff'd*, 869 N.E. 2d 585 (Mass. 2007).

174. *See, e.g.*, Guthrie G., 848 N.E.2d at 791 (discussing the number of officers present).

175. *In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776 (Az. Ct. App. Jan. 15, 2009).

176. *See, e.g.*, State *ex rel* R.A., 231 P.3d 808, 814 (Utah Ct. App. 2010).

177. *Butler*, 302 P.3d at 611 (upholding suppression of a blood draw from a minor absent voluntary consent in the presence of an implied-consent statute that applied to motorists).

earlier ruling to impose a higher burden of proof on the government when it sought to prove the voluntariness of consent to search a minor.[178] Requiring clear and convincing evidence of voluntariness would have been consistent with the court's decision that a minor's consent to search a parent's residence must be proven by this higher evidentiary standard.[179] But the court declined to extend a higher burden beyond the search of the parental home. Instead, it merely reiterated that courts should consider age under the "reasonable person" standard from *Florida v. Bostick*.[180]

Later, in 2007, in a case involving a fourteen-year-old boy, the Massachusetts Supreme Judicial Court upheld the appellate court's decision to deny suppression.[181] While it acknowledged the role of age in its discussion, the appellate court reversed the trial court and held the boy voluntarily consented to the search.[182] The juvenile was home alone when three uniformed police officers arrived after receiving information that he was in possession of a B.B. gun.[183] The appellate court stated that "[a]lthough the age of the juvenile was obviously a significant factor in determining whether that consent was freely and voluntarily given, it does not preclude such a finding."[184] Unlike earlier cases, the court did not explain what other factors, if any, mitigated the youth of the fourteen-year-old.[185] The majority cited an earlier decision about an eighteen-year-old male for its discussion of his age despite the significant difference between the two.[186]

A baffled dissent concluded that the state did not meet its burden to show that there was voluntary consent when the minor complied with the officer's

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178. State v. T.L.W., 783 So. 2d 314, 317 (Fla. Dist. Ct. App. 2001).

179. Saavadra v. State, 622 So. 2d 952, 954 (Fla. 1993).

180. *T.L.W.*, 783 So. 2d at 317 (citing Florida v. Bostick, 501 U.S. 429, 437 (1991)). The court stated that age should be a factor as to "whether the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id.*

181. Com. v. Guthrie G., 869 N.E. 2d 585 (Mass. 2007).

182. Com. v. Guthrie G., 848 N.E.2d 787, 791 (Mass. App. Ct. 2006), *aff'd*, 869 N.E. 2d 585.

183. *Id.* They asked him if he had a B.B. gun based upon a complaint and requested that he produce it. When he left the entry hall of the home and went to his room to get it, two police officers followed. *Id.*

184. *Id.*

185. *Compare Guthrie G.*, 848 N.E.2d 787, *with* Com. v. Greenberg, 609 N.E. 2d 90, 93 (Mass. App. Ct. 1993) (discussing factors weighing toward consent). *See also In re* Victor B., No. 2 CA-JV 2008-0073, 2009 WL 104776 (Az. Ct. App. Jan. 15, 2009) (acknowledging juvenile status but not persuaded by age alone due to lack of "evidence that [he] appeared nervous or distressed at any time").

186. *See Guthrie G.*, 848 N.E.2d at 791 (citing Com. v. Burgess, 749 N.E. 2d 112 (Mass. 2001)). The cited case involved a consent search during the police investigation of a brutal murder. *Burgess*, 749 N.E. 2d at 115–116. The court affirmed the denial of the suppression motion. *Id.* at 112. It was satisfied that the motion's judge "took into account the defendant's age and his level of education," which ended in eighth grade. *Id.* at 116. In *Burgess*, the court focused on the lack of "trickery and deceit." *Id.*

request to retrieve his B.B. gun.[187] It emphasized his young age, presence alone at home with three officers, and the lack of verbal consent.[188]

In three of the modern cases, courts suppressed the evidence found in cases involving older teens, but they found involuntariness, in large part, due to other factors.[189] For example, in two of those cases, the officers misrepresented their ability to get a warrant and asked for consent repeatedly after the minors had refused.[190] In one of those cases, the court was persuaded that consent was not voluntary because the officer would not let the juvenile have access to a phone inside of his bag and the officer represented that the juvenile would have to relinquish the bag if he wished to leave the area.[191] In the other case, the court was persuaded to suppress because of the officer's coercive conduct—he had made repeated requests to conduct a search and he made misrepresentations about his ability to obtain a warrant.[192] But without those coercive factors, the court was explicit that the presence of the juvenile's father and the fact that he was in his own neighborhood would have been enough to mitigate his juvenile status if the officer had acted reasonably.[193]

Later, in 2010, appellate courts in three states considered the role of age in consent search cases. Two of the cases, one in New York and the other in Florida, involved fourteen-year-old girls.[194] Both of those courts held that the girls did not voluntarily consent to the searches by police.[195] Like the earlier

187. *Guthrie G.*, 848 N.E.2d at 793 (Duffly, J., dissenting).

188. *Id.* at 797 (citing *Greenberg*, 609 N.E.2d 90, for *Greenberg*'s discussion of "factors suggesting coercion" such as age, the presence of four police offers at the police station where the search occurred, failure to inform of the right to refuse, and defendant's testimony that he did not think he had a choice). *Greenberg* involved a sixteen-year-old defendant who was transferred to adult court and convicted for arson and second-degree murder). *See supra* notes 148–153 and accompanying text.

189. *In re* Parks, No. 04AP-355, 2004 WL 2757852 (Ohio Ct. App. Dec. 2, 2004) (suppressing evidence obtained from a seventeen-year-old due to involuntary consent); *In re* R.J., No. 12-03-00380-CV, 2004 WL 2422954 (Tex. App. Oct. 29, 2004) (after a sixteen-year-old refused a search of his car, officer called the canine unit and indicated that a search would be imminent anyway); Washington v. K.C.S. O'Meara, 144 Wash. App. 1035 (2008) (suppressing consent to search a minor's backpack that occurred apart from the school setting and while acknowledging youth, did not provide his precise age).

190. *Parks*, 2004 WL 2757852; *R.J.*, 2004 WL 2422954 (after the juvenile refused to give consent, officer called canine unit and represented to the juvenile that he would not be able to leave and that the car would be searched anyway if the dogs gave a positive alert); *O'Meara*, 144 Wash. App. 1035 (officer repeatedly requested consent to search and stated that he would otherwise get a warrant when it was not clear that he could).

191. *O'Meara,* 144 Wash. App. at 1036.

192. *Parks*, 2004 WL 2757852.

193. *Id.*

194. E.J. v. State, 40 So. 3d 922, 924 (Fla. Dist. Ct. App. 2010) (court reversed a trial court's denial of a motion to suppress by a fourteen-year-old girl who was the passenger in a vehicle); *In re* Daijah D., 927 N.Y.S.2d 342, 342 (App. Div. 2011) (finding no consent to search the minor's purse even though there was not a factual dispute that she handed her purse to the police officer upon his request).

195. *E.J.*, 40 So. 3d at 924; *Daijah D.*, 927 N.Y.S.2d at 342.

decision by the D.C. Court of Appeals in *J.M.*, both courts stated that age and lack of prior experience with the law were factors that the lower courts *must* consider to determine whether a child gave consent to the search.[196] The courts also considered the juveniles' lack of knowledge that they could refuse the request by law enforcement, their lack of verbal consent,[197] the presence of more than one officer,[198] and the fact that one of the juveniles appeared to simply mimic an adult driver, which suggested mere acquiescence.[199]

In the third case, the Utah Court of Appeals acknowledged the relevant debate over the role of age when it considered a seventeen-year-old boy's consent.[200] But it did not require that the trial court discuss the role of age on the record as other courts have done;[201] instead, it concluded that the trial court could not have been "unaware" of the juvenile's age.[202] Therefore, it upheld the denial of the motion to suppress without requiring further consideration of age.[203] The appellate court acknowledged the role of youth under the totality of circumstances, but held that it was mitigated by the minor's prior experience with law enforcement.[204]

This decision is peculiar; it did not fully disregard age but neither did it require the lower court to consider it on the record. Still, the court acknowledged the inherent tension in the way that various state laws address age and discussed the state's legal treatment of the age of juveniles as an "anomaly."[205] It noted that it presumes the capability of juveniles above age fourteen to waive constitutional rights, while barring their ability to enter into contracts.[206] In

196. *E.J.*, 40 So. 3d at 924; *Daijah D.*, 927 N.Y.S.2d at 342.

197. *E.J.*, 40 So. 3d at 924; *Daijah D.*, 927 N.Y.S.2d at 342.

198. *Daijah D.*, 927 N.Y.S.2d at 342.

199. *E.J.*, 40 So. 3d. at 923. The Florida court concluded that the juvenile's actions—putting her hands on top of the car in compliance—appeared to simply copy the adult driver with whom she was riding when the police pulled them over. *Id.*

200. State *ex rel* R.A., 231 P.3d 808, 814 (Utah App. Div. 2010).

201. *E.J.*, 40 So. 3d at 924 (reversing in part due to failure to discuss age); *In re* J.M., 619 A.2d 497 (D.C. 1992) (en banc); *Daijah D.*, 927 N.Y.S.2d at 342.

202. *R.A.*, 231 P.3d at 814.

203. *Id.* Even though there was no evidence in the record that the trial court considered the effect of age, the court stated "[w]e are not persuaded that the juvenile court was unaware of R.A.'s juvenile status or that it erred in determining that R.A.'s consent was voluntary under 'the totality of the circumstances.'" *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 814 n.12 ("We do note the anomaly created by the statutory treatment of juveniles. While a seventeen year old cannot enter into an enforceable contract to make even an insubstantial purchase, *see* UTAH CODE ANN. § 15-2-2 (2009) (stating the legal capacity and liability of minors to enter contracts), that same juvenile is presumed competent to waive his constitutional rights, *see* UTAH R. JUV. P. 26(e) ('A minor 14 years of age and older is presumed capable of intelligently comprehending and waiving the minor's right to counsel . . . .'); *id.* at R. 27A(a)(2) ("If the minor is 14 years of age or older, the minor is presumed capable of knowingly and voluntarily waiving the minor's [Fifth Amendment] rights without the benefit of having a parent, guardian, or legal custodian present during questioning.").

practical terms, the opinion demonstrates the continued confusion among courts about whether and to what extent age is relevant when a law enforcement officer requests consent to search.

Finally, in 2013, the Arizona Supreme Court upheld the suppression of blood drawn from a sixteen-year-old.[207] It was a case of first impression about whether the state's implied-consent statute for blood testing of motorists who are under the influence falls under the Fourth Amendment.[208] The state argued that even if obtaining consent was necessary to draw blood, a juvenile's age should *not* be considered because the adult privilege of driving carries "adult responsibilities."[209] The court cited *J.D.B.* and *Roper* to support its conclusion that age is, in fact, relevant to consent, in part because juveniles are "'more vulnerable or susceptible to negative influences and outside pressures.'"[210] It stated that, "[c]ourts should not blind themselves to this reality when assessing the voluntariness of consent to [the search at issue]."[211] Even though police sought consent in a situation related to driving privileges, the relationship to this adult privilege did not change that legal conclusion.[212] The court noted that age, parental presence and the length of detention by law enforcement are all relevant factors, similar to the interrogation setting.[213] The court held that although consent might be voluntary under the Fourth Amendment in situations that would not pass muster under the Fifth Amendment, age remains relevant nonetheless, and was relevant in this case.[214]

The case is significant because it is one of the few cases where consent of a minor was deemed involuntary, particularly for a juvenile over the age of fourteen. It is also one of the only consent search opinions that have been published after *J.D.B.*[215] Therefore, it provides insight into how recent Supreme Court jurisprudence can shape the development of a consistent standard for consent going forward.

*2. Omission of Age Discussion*

In contrast to the cases above, in just as many of the recent Fourth Amendment juvenile consent cases, the court never analyzed the effect of age on

207. State v. Butler, 302 P.3d 609, 611 (Ariz. 2013) (en banc).

208. *Id.* at 612.

209. *Id.*

210. *Id.* at 612–13 (internal citation omitted).

211. *Id.* at 613.

212. *Id.*

213. *Id.* at 616.

214. "But, when the accused is a juvenile, factors such as age and the presence of parents are properly considered when assessing the voluntariness of consent to a search, just as they are relevant in assessing the voluntariness of a confession." *Id.* at 613.

215. *Id. See also In re* P.A., No. J1200273, 2013 WL 2898226 at *6 (Cal. Ct. App. June 14, 2013) (citing *J.D.B.* but affirming denial of suppression of evidence obtained during consent search of a sixteen-year-old despite presence of canine unit, five officers, and officer display of weapons).

the voluntariness of consent in the opinion. Instead, these courts used the voluntariness standard applied to adults and issued decisions with no acknowledgment of how age might have affected the juvenile's voluntary consent.[216] It is not surprising that in all of these remaining cases, the courts denied suppression, except for one where the court suppressed the evidence on the basis of an illegal seizure rather than based upon involuntary consent.[217] Some of these cases did not even state the specific age of the juvenile, though most appear to be cases involving juveniles age fifteen and above.

It is instructive to compare previous courts' age analyses with two recent appellate cases—both from Georgia—where the courts ignored it. In the first of these Georgia cases, police officers stopped and searched two fifteen-year-old males who were walking in a public place, asked them a few questions, and then requested to search their pockets.[218] The Georgia Supreme Court did not discuss their age and determined that the search was a lawful consensual one.[219]

Later, the Georgia Court of Appeals similarly upheld a trial court decision denying the juvenile's motion to suppress in a case with facts strikingly similar to the Florida case involving the fourteen-year-old passenger of a car.[220] The court listed age in its preliminary list of appropriate factors for courts to consider under the totality of the circumstances test, but never specifically discussed its relevance for the juvenile in its analysis.[221] Two police officers stopped a vehicle for a moving violation.[222] One officer then conducted a limited weapons frisk on the sixteen-year-old girl who was a passenger in the car. Additional officers arrived on the scene.[223] The police officer asked the girl, who had begun

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216. *See, e.g.*, *In re* Jessica M., No. A113311, 2007 WL 593609 at *4–5 (Cal. Ct. App. Feb. 2, 2007) (finding voluntary consent to search by seventeen-year-old girl with no age analysis); *In re* David S., 2206 WL 2979284 (Cal. Ct. App. Oct. 19, 2006) (with no discussion of age, upholding voluntariness of consent during brief detention); State v. R.H., 900 So. 2d 689, 691 (Fla. Dist. Ct. App. 2005) (with no discussion of age, reversing suppression of drugs found on juvenile and holding that consent to search by a teen was valid where the juvenile was approached by two officers at one a.m. in a parking lot "notorious" for narcotic and other crimes); State v. A.L., 956 So. 2d 1215, (Fla. Dist. Ct. App. 2007) (reversing suppression by trial court and finding voluntariness with no age analysis); *In re* D.H., 673 S.E.2d 191, 193 (Ga. 2009) (upholding consent to search based upon a reasonable person standard where two officers approached two fifteen-year-old juveniles after receiving a tip related to drug activity and requested to search their pockets).

217. State v. Hall, 115 P.3d 908, 926 (Or. 2005) (without discussing age, suppressing the evidence found on a minor after he was illegally subjected to a seizure by police).

218. *In re* D.H., 673 S.E. 191 (Ga. 2009).

219. *Id.* at 193.

220. *In re* A.T., 691 S.E.2d 642 (Ga. App. 2010).

221. *Id.* at 646 ("Application of the totality of the circumstances test requires consideration of several factors, including the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of the questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.") (citing State v. Tye, 580 S.E.2d 528 (Ga. 2003)).

222. *Id.*

223. *Id.*

to cry, for permission to look inside her cigarette pack and she answered affirmatively.[224] The officer found drugs inside.[225] The appellate court held that the presence of several officers did not rise to the level of threats or coercion.[226] The court never discussed her age and appeared unconcerned by the fact that she was distraught.[227]

Approaches to age and consent are not coherent even within a given state. For example, within Florida, one appellate decision stated that age "should" be considered.[228] A few years later in 2005, another Florida opinion revealed that neither the trial court nor the appellate court discussed age and, furthermore, did not even bother to state the juvenile's precise age.[229] But in 2010, yet another opinion—the most recent—required discussion of age.[230] The most recent opinion could indicate a shift back to recognition of a more protective standard for age that accounts for the effects of youth.

In the Florida opinion failing to consider age, the court only mentioned age when it discussed officer testimony that the juvenile appeared to be somewhere between sixteen to eighteen years of age.[231] The court primarily drew on case law discussing police encounters with adults.[232] The inattention to age by the court is particularly confounding given that when the government seeks to prove that a minor consented to the search of her parent's home, the Florida Supreme Court imposes a higher burden of proof—a "clear and convincing" standard.[233] And it does so, in part, because of the potential effect of youth on consent.[234]

The bulk of other recent appellate court decisions involving a minor's consent did not discuss age[235] even when the court considered individual traits of the defendant.[236] In each of the cases failing to analyze the effect of age, the juvenile was age fifteen or above, or the specific age of the minor was not identified in the opinion.[237]

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224. *Id.* at 647.

225. *Id.*

226. *Id.*

227. *Id.* at 646–48.

228. State v. T.L.W., 783 So. 2d 314, 316 (Fla. Dist. Ct. App. 2001).

229. State v. R.H., 900 So. 2d 689, 691 (Fla. Dist. Ct. App. 2005) (holding that the stop did not rise to the level of a seizure and that the officer's subsequent search of the juvenile was based upon valid consent when he answered "yes" to the officer's request to search him)

230. E.J. v. State, 40 So. 3d 922, 923–924 (Fla. Dist. Ct. App. 2010).

231. State v. R.H., 900 So. 2d 689, 691 (Fla. Dist. Ct. App. 2005).

232. *Id.* at 692–693 (citing a case involving a juvenile without discussing the effect of age, O.A. v. State, 754 So. 2d 717, 720 (Fla. Dist. Ct. App. 1998), and then including general case law involving adult consensual searches).

233. Saavedra v. State, 622 So. 2d. 952, 954 (Fla. 1993).

234. *Id.*

235. *Supra* note 216 and accompanying text.

236. *See, e.g., In re* L.C., No. 03-02-00070, 2003 WL 21241582 (Tex. Ct. App. May 30, 2003) (considering an individual trait, the juvenile's familiarity with law enforcement, but not his age).

237. *See, e.g.*, R.H, 900 So. 2d 689 (failing to include the juvenile's age).

In summary, the case law reveals that while age remains a consideration in some courts, many courts ignore it—particularly where a minor is over age fourteen.[238] On balance, the role of age in the courts' analyses continues to vary across states and even within them. This incoherent approach leaves significant questions about the correct application of the law, particularly what police officer protocol and conduct is required for consent searches of minors, and whether courts are *required* to discuss a minor's age, as some courts have held.[239] Because analysis of age and voluntariness of consent in the Fourth Amendment context is generally lacking and, at best, incoherent, it is instructive to turn to age in the Fifth Amendment context, as the Supreme Court has done, in order to develop a meaningful standard for consent searches.

## IV.
## YOUTH AND THE FIFTH AMENDMENT: CHALLENGES AND OPPORTUNITY

A full discussion of the voluntariness of consent by juveniles can be informed by a brief analysis of the way courts have dealt with age as a factor during interrogations.[240] After all, the "Supreme Court has decided more cases about interrogating youths than any other aspect of juvenile justice."[241] The Court originally adopted the totality of circumstances test from its confession cases, recognizing that the "most extensive exposition of the meaning of voluntariness" has been developed to decide whether confessions are voluntary.[242] Modern courts at times view cases or statutes in both the confession and consent contexts for guidance.[243] Courts have found age to be

238. *See, e.g.*, *In re* Eduardo L., No. H024007, 2002 WL 31378260 (Cal. App. Dist. Oct. 23, 2002) (upholding dismissal of motion to suppress and finding consent where seventeen-year-old male responded to a request to search by putting his hands behind his head, noting ability to consider age but without discussing the defendant's age). *See also In re* D.G., 96 S.W. 3d 465 (Tex. Ct. App. 2002) (finding consent to search was voluntary where a sixteen-year-old boy was approached by police officer in the day time at a gas station near his school); *In re* Clinton G., 669 N.W.2d 467 (Neb. App. 2003) (finding consent by a seventeen-year-old with no special focus on juvenile status); *In re* L.C., No. 03-02-00070-CV, 2003 WL 21241582, *3 (Tex. Ct. App. May 30, 2003) (failing to discuss age where fifteen-year-old was searched after repeated requests by officer, the court focused extensively on other factors instead: the fact that the encounter happened during the day; that there was an adult companion present, though not a guardian; that the juvenile had apparent "familiarity" with the pat-down procedure; and that the officer's conduct was not apparently coercive); State v. Hall, 115 P. 3d 908 (suppressing evidence found as a result of a consent search due to illegal seizure without discussing his age or its relevance to the analysis).

239. *See, e.g.*, *In re* J.M., 619 A.2d 497, 502–03 (D.C. 1992) (en banc); E.J. v. State, 40 So. 3d 922, 924 (Fla. Dist. Ct. App. 2010).

240. For example, in *R.A.*, the Colorado Supreme Court referred to the relationship between the custodial analysis and its discussion about age and voluntariness of consent. *R.A.*, 937 P.2d 731 (Colo. 1977).

241. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013).

242. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222–224 (1973).

243. *See In re* R.A., 937 P.2d 731; Lewis v. Miller, No. 2:11-CV-0423 LKK EFB P, 2012 WL 4469236 (E.D. Cal. Sept. 27, 2012). Before turning to the confession issue in the case, the

relevant to confession law at three stages: when courts determine whether a *Miranda* waiver is voluntary;[244] whether the confession itself is voluntary; and more recently, whether a minor is in custody such that *Miranda* warnings are required.[245] Judicial opinions weighing the role of age in confession settings demonstrate both the challenges and opportunities toward finding a more meaningful Fourth Amendment standard.

When courts decide the voluntariness of a minor's *Miranda* waiver or the confession itself, the law—in theory—recognizes that minors are more susceptible to coercive tactics that can lead to false confessions.[246] But often courts apply it in a way that seems artificial, and it can be difficult to tell whether an adult would be treated any differently. To decide the voluntariness of a confession, the Supreme Court established long ago that "the totality approach permits—indeed, mandates—inquiry into all the circumstances surrounding the interrogation," one of which is age.[247] However, court consideration of age in the confession context has been applied "in a haphazard manner,"[248] and sometimes appears perfunctory.

Courts generally find juvenile *Miranda* waivers and confessions voluntary under conditions that seem contrary to Supreme Court decisions that recognize their vulnerabilities.[249] As the doctrine has developed, courts have not fully

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court stated that "a criminal defendant's age is a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary." *Lewis*, at *2 (citing *Schneckloth*, 412 U.S. at 223–226 (internal citations omitted)).

244. Fare v. Michael C., 442 U.S. 707, 726–727 (1979) (stating that the totality of circumstances should include "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him").

245. J.D.B. v. North Carolina 131 S. Ct. 2394, 2397 (2011).

246. Haley v. State of Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49, 62 (1962); *J.D.B.* at 2401 (stating that the risk of false confessions caused by the inherent pressures of custodial interrogation "is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile"). *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1005 (2004) (discussing, for example, evidence that juvenile suspects are eager to comply with adult authority figures which places them at greater risk of false confessions); Feld, *Real Interrogation*, *supra* note 241, at 3 (concluding that "[d]espite the Court's repeated acknowledgment of developmental differences, most states do not provide safeguards to protect juveniles from their immature decisions and use adult standards to gauge their *Miranda* waivers"); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 19 (2010) (tracing the emergence of developmental psychology and discussing how "basic research has shown that children and adolescents are cognitively and psychosocially less mature than adults—and that this immaturity manifests in impulsive decision making, decreased ability to consider long-term consequences, engagement in risky behaviors, and increased susceptibility to negative influences").

247. Fare v. Michael C., 442 U.S. 707, 725 (1979).

248. Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 160–161 (2012).

249. Feld, *Real Interrogation*, *supra* note 241, at 3. *See e.g.*, *In re* Charles P., 134 Cal.App.3d 768 (Cal App. 1982) (holding that this particular twelve-year-old was "worldly" and, therefore, validly waived his *Miranda* rights and voluntarily confessed to a crime without access to

accounted for the susceptibilities of youth. This has spawned recommendations for, and in some cases implementation of, additional protections.[250] These protections include requiring that confessions be videotaped,[251] requiring access to counsel for children prior to interrogation,[252] and, in some states, requiring the presence of a parent during questioning.[253]

The development of a meaningful standard for age can be aided by the way in which the Supreme Court has recently approached questions about minors and decision making.[254] *J.D.B.* requires a more complete consideration of age in the confession setting as a whole and should enrich discussions of voluntary consent in a police encounter between a minor and an officer. When a court determines whether a minor judges herself to be in custody for purposes of the Fifth Amendment, it must consider age under the totality of the circumstances standard.[255] The Court stated, "[t]his is not to say that a child's age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore."[256] In turn, it may be that it *is* determinative and significant in many cases.

*J.D.B.*'s announcement of this rule is significant for many reasons; those most salient to the Fourth Amendment are considered here. First, the decision resolved an underlying dispute in the custodial context about whether age is improperly considered as a subjective factor, traditionally not relevant to the custody inquiry.[257] While "reasonableness" in the Fourth Amendment and Fifth Amendment are different in context, officer conduct is relevant to both. In its recent Fifth Amendment doctrine, the Supreme Court used a "reasonable

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counsel or a parent).

250. Guggenheim & Hertz, *supra* note 19. *See also*, Feld, *Real Interrogation*, *supra* note 241, at 29 (conducting the first naturalistic empirical study of juvenile confessions and calling for "more empirical research on interrogations practices in general, in a number of different settings, and with more knowledge about characteristics of suspects").

251. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police Induced Confessions: Risk Factors and Recommendations*, 34 L. HUM. BEHAV. 3 (2010).

252. Guggenheim & Hertz, *supra* note 19, at 169 (arguing for a bright-line rule providing children under eighteen the opportunity to consult with counsel before being interrogated by police).

253. *See, e.g.*, Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1287 n.66 (2004) (discussing various approaches by states that require presence of a parent or guardian).

254. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (acknowledging the role of social science in the Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), particularly the first two); *see also* Guggenheim & Hertz, *supra* note 19; Hillary B. Farber, J.D.B. v. North Carolina: *Ushering in A New "Age" of Custody Analysis Under Miranda*, 20 J.L. & POL'Y 117, 137 (2011) (discussing the potential impact of *J.D.B.*, *Roper*, and *Graham* in the confession setting and beyond).

255. *J.D.B.*, 131 S. Ct. at 2397.

256. *Id.* at 2406 (footnote omitted).

257. *Id.* at 2401.

juvenile" standard when it held that age is part of the objective inquiry into whether a child is in custody[258] and that officers and courts know what "any parent knows"—that youth as a class are more susceptible to outside pressures.[259] Second, the decision has already catalyzed a broad discussion about its potential impact beyond the Fifth Amendment.[260] The Court's statement in *J.D.B.* that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go"[261] is applicable in the Fourth Amendment arena as well. Notably, the same reasoning applies to determine whether a minor is "seized" by police during a stop. And determining whether a minor has been seized by a law enforcement officer before that officer requests consent to search is interconnected with the consent discussion. Additionally, because courts often merge the two analyses, the pressure that a child feels relates to whether the minor voluntarily consented to a search under the Fourth Amendment.[262]

Third, courts have already signified an understanding that under *J.D.B.*, a court *must* consider age to determine whether a young person was in custody for purposes of *Miranda*,[263] with only a few indicating it is merely something they "may" consider.[264] Within a short period of time after the Supreme Court's

258. "Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *J.D.B.*, 131 S. Ct. at 2406.

259. *Id.* at 2403.

260. *See, e.g.*, Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 511 (2012); Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL'Y 15, 50 (2011) (noting limitations but discussing, for example, that "*J.D.B.* could lead to a cultural shift in the approach of police officers towards young suspects" in the way that they consider age at various stages of interrogation).

261. *J.D.B.*, 131 S. Ct. at 2403.

262. For a discussion of the way that courts now merge the inquiries about whether a person has been seized and whether consent is voluntary, see *supra* notes 55–56 and accompanying text.

263. *See, e.g.*, *In re* Juan S., No. G043262, 2012 WL 1005027 (Cal. Ct. App. Mar. 26, 2012) (concluding that the trial court was required to, but did not, consider the juvenile's age as a factor in determining whether his initial interview with the investigating officers was a custodial interrogation. The court reversed the trial court decision on this ground and remanded "for reevaluation of this issue"). *See also In re* R.P., 718 S.E.2d 423 (N.C. App. 2011) (remanding because of the appellate court's inability to "discern whether the trial court considered the juvenile's age in accordance with the United States Supreme Court's mandate in *In re J.D.B.*," asserting that the issue "must be remanded to the trial court for entry of a written order containing findings of fact and conclusions of law, specifically addressing the concerns set forth in *In re J.D.B.*"); United States v. FNU LNU, 653 F. 3d 144, 153 (2d Cir. 2011). "Imagining oneself in 'the suspect's position' necessarily involves considering the circumstances surrounding the encounter with authorities." *Id.* The court included in the list of necessary circumstances: "a juvenile suspect's age, if known to the officer or readily apparent." *Id. See also*, Guggenheim & Hertz, *supra* note 19, at 109 (concluding that after *J.D.B.*, courts *must* take age into account when determining whether a minor is "in custody" for *Miranda* purposes).

264. *See In re* J.S., No. CA2011-09-067, 2012 WL 31571492 (Ohio Ct. App. Aug. 6, 2012)

decision in *J.D.B.*, appellate courts remanded cases and rebuked lower courts for failing to consider age on the record.[265] It is difficult, then, to find a rational reason for why courts should not be required to discuss age for consent to search.

Two pronounced obstacles remain. First, critiques of courts' inadequate consideration of age in the Fifth Amendment arena are legitimate and well supported.[266] Therefore, the same challenges are present in the context of consent searches. Second, courts tend to omit consideration of age in consent to search discussions or to apply it in a perfunctory way.[267] These realities provoke legitimate concerns about whether it is realistic to expect a meaningful discussion of age by courts in the context of consent going forward.

## V.
## THE SECOND COMING OF AGE: TOWARD A MEANINGFUL STANDARD

Courts must discuss and acknowledge juvenile status when considering voluntariness of consent searches, but finding a meaningful standard has proven to be a challenge. After *J.D.B.*, just as the Supreme Court held that courts cannot ignore age in the test for custodial analysis—previously based only on a "one size fits all" reasonable person status[268]—it is not rational for a court to ignore age in consent search cases, where doing so has always been clearly permissible. Second, recent Supreme Court decisions grappling with age dictate a recalibration of the way courts treat the government's burden for searches of minors.

Next, concrete change in the application of the voluntariness test may be difficult to realize, so courts and legislators should consider imposing a reasonable suspicion requirement prior to requesting consent from a juvenile. Finally, structural changes in the way juvenile defense is delivered could aid the development of legal doctrine, which would provide guidance for institutional players, and promote the development of the law regarding the constitutional rights of minors in the criminal procedural context.

There are two issues worth addressing before proceeding with these recommendations. First, scholars have previously considered the effect of the

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(citing *J.D.B.*'s assertion that "in cases involving a juvenile, the juvenile suspect's age may be analyzed as part of the court's determination on whether a custodial interrogation occurred," leaving an open question about whether age is merely permissible versus required). *See also In re* A.G., No. G044949, 2012 WL 2950382, (Cal. Ct. App. Jul. 20, 2012) (stating that under *J.D.B.*, courts may consider age in the custodial analysis).

265. *See, e.g.*, *In re* Juan S., 2012 WL 1005027; *In re R.P.*, 718 S.E.2d 423.

266. *See* Guggenheim & Hertz, *supra* note 19, at 160–161. *See also* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 222 (2006) ("Despite youths' vulnerability in the interrogation room, courts treat them as the functional equivalents of adults and use the adult legal standard—'knowing, intelligent, and voluntary under the totality of the circumstances'—to gauge their waivers of Miranda rights and the voluntariness of confessions.").

267. *See supra* Part II.

268. *J.D.B.*, 131 S. Ct. at 2411–12 (Scalia, J., dissenting).

issuance of warnings by police in consent searches as a means toward evening the power imbalance.[269] But experts have concluded that such warnings are ultimately futile as a protective measure.[270] Professor Nadler reasons convincingly that they are "something of a red herring" as a means toward equalizing the playing field and should ultimately be set aside in terms of a remedy for protection from coercion.[271] A recent empirical study of the use of written consent forms in the Fourth Amendment context demonstrated that such forms, which include warnings, have only minimal effects, and in fact, can have negative consequences on the assessment of voluntariness.[272] The study concludes that the use of consent forms does not reduce the coercive effects of the encounter.[273]

It follows that the protective effect of warnings, even if they were required, would be even more diminished for juveniles given that juveniles are more susceptible to coercion and outside pressures.[274] In the Fifth Amendment context, leading juvenile law scholars have argued that administration of warnings to juveniles is often inadequate to protect against the vulnerabilities of youth.[275] Several studies have reached the conclusion that warnings are similarly ineffective for adults.[276] Empirical studies have found that juveniles frequently waive their *Miranda* rights even after receiving warnings[277] and that they frequently do not comprehend what their rights are.[278] By analogy, in the Fourth Amendment context, implementation of warnings alone is similarly unlikely to be an adequate remedy that will resolve the effects of coercion and age.

The current tests, if applied in a manner more consistent with research-based understandings of adolescence, can move doctrine toward a more uniform application. Based upon the challenges of the voluntariness framework shown in

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269. Nadler, *supra* note 14, at 205.

270. *Id. But see* Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1203–10 (2008) (arguing that there may be other desirable reasons to include warnings).

271. Nadler, *supra* note 14, at 205.

272. Nancy Leong & Kira Suyeishi, *supra* note 45, at 753, 782–790.

273. *Id.*

274. *See, e.g.*, Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police Induced Confessions: Risk Factors and Recommendations*, 34 L. HUM. BEHAV. 3 (2010).

275. *See, e.g.*, Guggenheim & Hertz, *supra* note 19; Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note 91; Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515 (2006).

276. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959 (2004).

277. Eighty percent of the juveniles waived their Miranda rights in Feld's study, which was consistent with findings by others, such as Thomas Grisso. Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note 91, at 82.

278. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1161 (1980).

the Fourth and Fifth Amendment contexts, however, the implementation of a modest protective measure for consent searches of minors, along with deeper structural reforms, are necessary.

### *A. Considering Age and the Government's Burden*

#### *1. Required Court Consideration of Youth*

After *J.D.B.*, trial courts are now required to consider age to determine whether a minor is in custody under the totality of the circumstances. In the same way, courts should also be required to discuss age when they address juvenile consent under the Fourth Amendment. This consideration should reflect the specific circumstances of the case and the age of the child rather than assuming consent based on an adult standard. Some courts and scholars have framed the proper inquiry in both Fourth and Fifth Amendment contexts as a "reasonable juvenile" test.[279] They have done so both before and especially after *J.D.B.*[280]

While some state courts have required consideration of age in evaluating consent searches of minors, even those courts have struggled to find a consistently applicable standard.[281] Courts have not been clear either about whether trial courts *must* consider age in consent to search cases[282] or in what way they should weigh it when they do. It is noteworthy that both federal and state courts often note the precise age of adults when considering the totality of circumstances in a voluntariness analysis.[283] It does not follow that one should

279. "When assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." People v. Lopez, 892 N.E.2d 1047, 1061 (Ill. 2008). *See also* United States v. Erving L., 147 F.3d 1240, 1248 (10th Cir. 1998) ("[A] reasonable juvenile in [defendant's] position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest."); *In re* A.A.M., 684 N.W.2d 925, 927 (Minn. Ct. App. 2004) ("[C]ourts have asked whether, given the circumstances, a reasonable juvenile would have believed that he was not at liberty to terminate an interrogation and leave."); Rosado, *supra* note 93, at 794 (advancing, as an early proponent, the reasonable juvenile standard in the Fourth Amendment seizure context).

280. *See, e.g.*, Levick & Tierney, *supra* note 260; Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 105 (2013).

281. *See infra* Parts III.C–D.

282. *Compare In Re* R.A., 937 P. 2d 731, 738 (Colo. 1997) (stating that courts may consider age but are not required and comparing it to the standard involved in the custodial analysis pre-*J.D.B.*), *with In re* J.M., 619 A.2d 497, 502–03 (D.C. 1992) (en banc) (remanding case and requiring proper consideration of age on the record in a consent to search case); *see also supra* Part III.D.2. (discussing the majority of modern cases which do not include any discussion of age).

283. Cases dealing with adults often do acknowledge the precise age of the defendant—whether twenty-nine or thirty-nine—when discussing the totality of the circumstances to determine whether consent to search was valid. *See, e.g.*, U.S. v. Correa, 641 F. 3d 961, 967 (8th Cir. 2011) (stating that "keeping in mind the factors" discussed in the totality of the circumstances, the defendant was twenty-nine years old and "the record contains no evidence that he was of less than average intelligence and education"); U.S. v. Block, 378 Fed. Appx. 547 (6th Cir. 2010) (noting that defendant's age, at twenty-seven, and high school education weighed in favor of valid consent in a warrantless search of his home); U.S. v. Barnum, 564 F. 3d 964, 971 (8th Cir. 2009)

be left to wonder about the precise age of a minor where a consent search is at issue since that is arguably when age actually matters.[284]

Increased consideration of age and the impact of youth on voluntariness to consent would provide more instruction from courts about the parameters within which police must operate when interacting with minors. In addition, discussion of age will forge exploration of the relationship between a minor's youth and other relevant factors that likely increase or decrease coercion.

*Roper*, *Graham*, *J.D.B.*, and *Miller* were influenced by scientific research and, ultimately, "common sense," indicating that children function differently from adults.[285] But the influence of science, particularly brain science, on individual and categorical decisions about juveniles on any given issue has important limitations;[286] these limitations include recognition of the importance of nuanced application.[287] However, scholars note that the Supreme Court has utilized scientific evidence about children as "legislative fact" in ways that can at least contribute to the law's development.[288] This has played out not only in juvenile justice cases, but in recent cases affecting children in the First Amendment realm.[289] Legislative facts are "established truths, facts, or pronouncements that do not change from case to case but apply universally."[290]

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(discussing how the "personal and environmental factors" such as the defendant's age of thirty-nine and partial college education resulted in voluntary consent).

284. *Compare Barnum*, 564 F. 3d at 971, *with* State v. R.H., 900 So. 2d 689 (Fla. Dist. Ct. App. 2005) (failing to ever mention the age of the juvenile in its discussion about whether he consented to a search).

285. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) ("Our decisions [in *Roper* and *Graham*] rested not only on common sense—on what 'any parent knows'—but on science and social science as well."); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, [the] parts of the brain involved in behavior control . . . .").

286. *See, e.g.*, Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, *supra* note 119. Professor Maroney notes the limitations of brain science, but she also points out that "legislatures and courts may regard that science as one source among many upon which to draw when basing policy choices on assumptions about juveniles as a group." *Id.* at 89. *See also* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009). Professor Buss cautions that "a more sophisticated understanding of child development counsels against an approach to children's law that treats children's capacities at certain ages as ascertainable and fixed." *Id.* at 13. As to *Roper*, she critiques the Court's "suggestion that a categorical line of eighteen accurately divides the mature from the immature," and explains the limitations of line drawing based on developmental research, pointing out that "age eighteen may not even be the right place to draw the line for the most typical child." *Id.* at 39.

287. *See supra* note 286.

288. *See* Guggenheim & Hertz, *supra* note 19, at 155–157; Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777 (2011) (arguing that in *Roper*, along with two recent First Amendment decisions affecting children, the Court used social science research and "common sense" about children as legislative fact).

289. *Id.*

290. Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 203 (2005) (quoting Hagelstein v. Swift-Eckrich Div., 597 N.W.2d 394, 399 (Neb. 1999)).

Notably, *Roper* cited "scientific and sociological studies" for the proposition that juveniles have a heightened susceptibility to outside pressures—a statement that has influenced subsequent opinions.[291] Similarly, scholars and courts have discussed the special vulnerability of juveniles to police coercion and increased willingness to comply with authority, [292] a willingness that is consistent with research about adolescent development.

In light of the Supreme Court's cognizance of science in juvenile justice cases recently[293]—however modest it may be—it will be difficult in turn for the Court to disregard research about the differences between minors and adults in ways that affect consent to search. This is true despite the Court's record of resistance to scientific research on coercion in consent jurisprudence in the past.[294]

Court consideration of age can reduce confusion both on the streets and in the courts.[295] As stated in *J.D.B.*, "ignoring a juvenile defendant's age will often make the [custodial] inquiry more artificial . . . and thus only add confusion."[296] This is also true for consent searches.[297] In addition, *J.D.B.* states what seems all too clear in the consent context: courts struggle to find a standard for juveniles

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291. Roper v. Simmons, 543 U.S. 551, 569–70 (2005). *See also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (citing Roper v. Simmons).

292. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (acknowledging that a child can feel pressured to submit to police when a reasonable adult would feel free to go). *See, e.g.*, Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 413–416 (2008) (noting the vulnerability of youth to typical police interrogation tactics); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944, 1004–05 (2004); Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 51 (2012); Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–57 (2003) (conducting a study finding that juveniles were more likely than adults to accept hypothetical plea offers, and attributing such finding at least in part to a tendency to comply with authority).

293. *Miller*, 132 S. Ct. at 2464 (2012) (discussing the influence of science on its recent juvenile justice decisions).

294. *See* Nadler, *supra* note 14, at 156. For a discussion about the role of empirical research to inform constitutional criminal procedural doctrine in general and doctrinal shortcomings in that regard, see also Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735, 739 (2000). The authors describe how "constitutional criminal procedure decisions are often marred by spotty or inconsistent application of balancing tests and by pseudo-empirical statements about the importance of law enforcement and the sanctity of individual liberty." *Id.* at 739.

295. *J.D.B.*, 131 S. Ct. at 2407 (noting that courts would have to strain to try to consider whether a child was in custody at school if they could not consider the child's age).

296. *Id.*

297. *See, e.g.*, State *ex rel.* Juvenile Dep't of Multnomah County v. Fikes, 842 P.2d 807, 808 (Or. Ct. App. 1992) (noting that the reasonable person standard is hard to apply to children under the Fourth Amendment), *abrogated by* State v. Ashbraugh, 200 P. 3d 149, 155 (Or. Ct. App. 2008) (en banc).

when they are confined to the structure or standard used for adults.[298]

After *J.D.B.*, courts are not hampered by the fact that the consent search test has become "so inextricably linked to the objective Fourth Amendment test for seizure."[299] Given the Court's decision that age is relevant to the objective custody inquiry,[300] age is now more readily incorporated into the analysis. And, secondarily, *J.D.B.* evidences the way in which courts and legislators can modestly draw upon science to support policies and decisions reflecting the "special legal status of youth."[301]

Courts have proven able to engage in analysis to distinguish minors and account for age in the health care setting, in tort law, and in contracts.[302] Recognition of age does not bear the stigma of supporting a sweeping argument or assumption that a minor can never consent in other arenas nor does it argue for a fixed concept of development. Increasingly, literature supports the development of nuanced understandings of how science can best inform the law around adolescence to create the most appropriate framework.[303]

*2. Adherence to the Government's Burden*

Although the burden is on the government to show that a defendant consented to a search voluntarily, in reality, courts increasingly place a burden on the defendant to show that she did not. The "modern court has transformed [the *Schneckloth* standard] to a ruling that adopts a presumption of valid consent whenever police ask for consent and there is assent . . . ."[304] Thus, courts now look for reasonable behavior by the officer instead of focusing the inquiry on the defendant.[305] Consideration of age as a factor still fits within a framework that focuses on police behavior rather than on that of the accused.

The Court has made it clear that age is an "unambiguous fact"[306] that

298. *See, e.g.*, *Fikes*, 842 P.2d at 808 (noting that the reasonable person standard was "hard to apply" when deciding a challenge to a search and seizure of a juvenile); *In re* R.A., 937 P.2d 731, 731–738 (Colo. 1997) (on remand, instructing that age may be one factor considered by a court for determining whether consent of a minor was valid, but only within the framework of the standard of voluntariness applied to adults); State *ex rel* R.A., 231 P.3d 808, 814 n.12 (Utah App. Div. 2010) (acknowledging that court treatment of age is an "anomaly" and has inconsistent results).

299. Simmons, *supra* note 29, at 782.

300. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2394 (2011).

301. *See, e.g.*, Terry A. Maroney, *Adolescent Brain Science after* Graham, 86 NOTRE DAME L. REV. 765, 767 (2011) ("[*Graham*] therefore provides welcome support for legal policy-makers—whether in courts or legislatures—who seek to draw modestly on such science in reinforcing commitments to the special legal status of youth."). The Court, in *J.D.B.*, demonstrated Maroney's observation.

302. *See generally* ELIZABETH S. SCOTT & LAWRENCE STEINBERG, RETHINKING JUVENILE JUSTICE 109 (2008); Buss, *supra* note 286, at 18–21.

303. *See generally* SCOTT & STEINBERG, *supra* note 302, at 109.

304. Maclin, *supra* note 77, at 57.

305. Maclin, *supra* note 77, at 62–63.

306. Levick & Tierney, *supra* note 260, at 511.

"generates common sense conclusions about behavior and perception."[307] These conclusions are "self-evident to anyone who was a child once himself, including any police officer or judge."[308] Therefore, the government must present evidence that overcomes the Court's acknowledgment that a minor in many situations is more likely to have acquiesced to police officers than to have voluntarily consented, given her vulnerabilities to environmental pressures.[309] Some appellate opinions discussing consent and age have recognized the same reality.[310] The Court itself demonstrated how age fits into an objective test: "Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so, too, are they competent to evaluate the effect of relative age."[311] This is applicable to reasonableness of officer behavior when they seek consent for searches of minors. The "common-sense conclusions" by officers cannot be devoid of age considerations.[312]

In the Fourth Amendment context, "[t]he bottom line is whether a reasonable officer in the situation at issue would have known he or she was violating constitutional rights."[313] For example, most specifically, when the officer has relied on the child's actions alone without receiving verbal consent from the minor, repeatedly asked the minor for consent, or if the minor appears to be influenced by adult behavior or exhibits signs of distress, it is unreasonable to assume that the encounter remains consensual. Consider a recent decision by a California appellate court that stated that the sixteen-year-old defendant failed to prove consent was involuntary: the facts proved were that the encounter was at night, there were at least five officers, a barking canine dog was on the scene, and police had weapons drawn at some point during the stop.[314] In contrast, if the government's burden of proof were meaningfully imposed, the facts of that case would more correctly prompt a presumption that a reasonable sixteen-year-old would not be able to provide voluntary consent under such conditions.

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307. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

308. *Id.*

309. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (discussing acknowledgment of environmental vulnerabilities of juveniles in *Roper* and *Graham*).

310. *See, e.g.*, *In re* J.M., 619 A.2d 497, 502–03 (D.C. 1992) (en banc); Com. v. Guthrie G., 848 N.E.2d 787 (Mass. App. Ct. 2006) (Duffly, J., dissenting); *In re* Daijah D., 927 N.Y.S.2d 342 (App. Div. 2011); People v. Reyes, 483 P.2d 1342 (Colo. 1971).

311. *J.D.B.*, 131 S. Ct. at 2407.

312. Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's* Miranda *and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1496 n.74 (2010) (discussing *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983) and its conclusions that "law enforcement officers are permitted to form common-sense conclusions about human behavior and asserting that the evidence 'must be seen and weighed . . . as understood by those versed in the field of law enforcement'"). *See also* Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 378 (2009) (defining the reasonableness of a search "in light of the age and sex of the student . . .").

313. Mandiberg, *supra* note 312, at 1498–99.

314. *In re* P.A., No. A135422, 2013 WL 2898226 (Cal. Ct. App. Jun. 14, 2013).

In the context of Fourth Amendment consent questions, courts ask whether a defendant reasonably felt free to refuse police requests;[315] moreover, after *J.D.B.*, the Supreme Court presumes that a reasonable juvenile would at times "feel pressured to submit when a reasonable adult would feel free to go."[316] Thus, the relevance of age should not be confined to extreme situations. Traditionally, "little effort is made institutionally to prepare the police for interactions with teens or young suspects."[317] And they have little incentive to do so if court decisions fail to require different behavior. The government's burden under the Fourth Amendment should include proving that the encounter demonstrates reasonableness not in the eyes of how an adult responds to an interaction but in those of a juvenile.

### *B. Reasonable Suspicion*

*J.D.B.* reinforces the need for coherent doctrinal consideration of age moving forward. The decision and its sibling cases provide some guidance about how courts may account for youth in the Fourth Amendment consent context going forward. There are two main reasons, however, to advance a more stringent standard in order to realize the Fourth Amendment rights of juveniles in street encounters with police. First, despite the recent developments in juvenile justice jurisprudence, there are well-recognized deficiencies in the application of youth status in the voluntariness test by lower courts.[318] Opinions in both the Fourth and Fifth Amendment context demonstrate that consideration of age has been difficult for courts and that it is often either cursory or merely perfunctory.[319] Second, while renewed attention to the special status of youth compels more consistent court decisions as demonstrated in Part A., it also supports imposing an additional safeguard for consent searches of minors,[320] just as courts and legislators have implemented in other inherently coercive

315. Ohio v. Robinette, 519 U.S. 33, 40 (1996); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 225 (2012).

316. *J.D.B.*, 131 S. Ct. at 2403. *See also* Rosado, *supra* note 93, at 791 (proposing that courts should view the totality of circumstances in juvenile consent cases "through the lens of a minor").

317. Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 80 (2012).

318. See *supra* Part III (discussing case law and lack of uniform consideration of age in the consent search context). *Cf.* Guggenheim & Hertz, *supra* note 19, at 168 (acknowledging the limits of court implementation of the principles of *J.D.B.* in the custodial interrogation setting and proposing that more dramatic changes are necessary to adequately regulate the Fifth Amendment rights of minors via the provision of counsel for all interrogations).

319. *See generally* Guggenheim & Hertz, *supra* note 19 (discussing challenges for a meaningful consideration of age in court discussions in the Fifth Amendment context); *supra* Part III(C)–(D) (providing examples of such cases in the Fourth Amendment context).

320. *See, e.g.*, Rosado, *supra* note 93, at 775–776, 791 (proposing the implementation of additional safeguards, such as juvenile specific warnings, in order to provide minors with the same level of Fourth Amendment protection as adults).

situations, such as traffic stops.[321] Reliance on "common sense," though it does not possess the same evidentiary challenges as developments in science, presents its own challenges when left to doctrinal application.[322]

For these reasons, an approach that better comports with the Fourth Amendment is to require reasonable suspicion *before* law enforcement personnel request consent to search a minor. This proposed requirement mirrors the standard created by some courts and legislators in the context of consent searches of motorists.[323] Decision makers in some states have recognized that situations where the risk of coercion is increased, such as for motorists, justify a different rule.[324] Those decisions illustrate the central importance of balancing state and citizen interests under the Fourth Amendment.[325] Such a standard moves toward a more balanced doctrine as applied to juveniles.

The New Jersey Supreme Court held that "law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle."[326] A detention extending beyond the ordinary traffic stop is an investigatory stop that must satisfy the reasonable suspicion standard.[327] In order to extend the stop and ask for consent to search, law enforcement personnel in New Jersey must have reasonable suspicion of criminal activity.[328] The Minnesota Supreme Court similarly requires police to have a reasonable, articulable suspicion of criminal

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321. *See infra* note 335 (discussing consent searches during traffic stops).

322. *See, e.g.*, Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, *supra* note 119, at 96 (discussing some of the pitfalls of reliance on perceptions of common sense in juvenile justice policy). *See generally* Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009) (discussing the limitations of applying emotional common sense to constitutional jurisprudence).

323. Rhode Island prohibits law enforcement officers from requesting consent to search motorists who are stopped solely for a traffic violation in the absence of reasonable suspicion or probable cause. Racial Profiling Prevention Act of 2004, R.I. GEN. LAWS § 31-21.2-5(b) (2004). Hawaii's Supreme Court limits consent to search during certain encounters by broadening the scope of encounters it considers to be unlawful seizures. State v. Quino, 840 P.2d 358 (Haw. 1992). *See also* State v. Carty, 790 A.2d 903 (N.J. 2002); State v. Fort, 660 N.W.2d 415 (Minn. 2003).

324. *Carty*, 790 A.2d at 912. The New Jersey Supreme Court's reasoning is based upon its prior decisions requiring a higher level of protection under the Fourth Amendment, employing the knowing waiver approach to Fourth Amendment rights in *State v. Johnson*, 68 N.J. 349 (1975).

325. Professor Slobogin discusses the overriding influence of balancing state and individual interests relating to the Fourth Amendment. "The most fundamental guideline [in Fourth Amendment jurisprudence] is that, in determining whether a search or seizure is 'reasonable,' competing state and individual interests must be balanced." Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 2 (1991). *See also* State v. George, 557 N.W.2d 575, 579 (Minn. 1997) ("We have repeatedly noted that the evaluation of the constitutionality of a search is a complex calculation, requiring careful balancing of the competing interests inherent in a police-citizen encounter.").

326. *Carty*, 790 A.2d at 905.

327. *See id.* For articulation of the reasonable suspicion standard, see Terry v. Ohio, 392 U.S. 1, 27 (1968) (requiring a two prong analysis).

328. *Carty*, 790 A.2d at 905.

activity before they may request consent to search during a traffic stop;[329] the defendant in the case involved an eighteen-year-old African American male passenger in the car. Finally, in Rhode Island, a similar requirement was legislatively imposed as to motorist searches to eliminate or reduce racial profiling by law enforcement.[330]

The court in New Jersey focused on the risk of coercion when it imposed this protection for motorists: "[W]here the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent."[331] The court rejected the sufficiency of its own previous requirement of informed consent, a doctrine developed twenty-five years prior.[332] It determined that informed consent inadequately protected the interests of motorists—acknowledging a new understanding of the increased pressures inherent in the roadside stop.[333] The court's reasoning requiring a safeguard in the traffic context parallels court decisions which recognize the increased power imbalance present in police encounters with juveniles. Additionally, just as protections for motorists arose due to racial disparities, street encounters between law enforcement and youth also tend to affect minority youth disproportionately.[334] Studies in various states revealed data demonstrating that law enforcement use the consent exception more often to search minorities than to search whites during traffic stops, resulting in racial profiling.[335] These

329. State v. Fort, 660 N.W.2d 415 (Minn. 2003) (holding that defendant was seized and that police request for a consent to search was unwarranted absent a reasonable, articulable suspicion of criminal activity).

330. Racial Profiling Prevention Act of 2004, R.I. GEN. LAWS § 31-21.2-5 (2004).

331. *Carty*, 790 A.2d at 910.

332. *Id.* at 911.

333. *Id.*

334. *See, e.g.*, Second Supplemental Report of Jeffrey Fagan, Floyd v. City of New York, No. 08 Civ. 01034 (SAS), at 11 (finding twenty-six percent of stops under the New York City stop and frisk program involved defendants age ten to sixteen and presenting analysis supporting conclusions of disparate treatment of minorities). *See generally* Jeff Armour & Sarah Hammond, *Minority Youth in the Juvenile Justice System: Disproportionate Minority Contact*, NAT'L CONFERENCE OF STATE LEGISLATURES 4 (2009), http://www.ncsl.org/print/cj/minoritiesinjj.pdf (providing data on the disproportionate arrest, charging, and confinement of minority juveniles).

335. *See, e.g.*, Northwestern University Center for Public Safety, Illinois Traffic Stops Statistics Act Report for the Year of 2004, 8 (describing data collection of traffic stops and characterizing use of consent searches as the "most troublesome area" of the study), *available at* http://www.dot.il.gov/trafficstop/2004summary.pdf; David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 289 (1999) (discussing in depth the first statistical study performed in New Jersey as a result of litigation); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 244 (2001) (discussing studies in three states and their impact on state policy); Jenna K. Perrin, *Towards Eradicating the Pervasive Problem of Racial Profiling in Minnesota:* State v. Fort, *660 N.W.2d 415 (Minn. 2003)*, 27 HAMLINE L. REV. 63, 64 (2004) (discussing statewide data documenting the racial disparities in stops of motorists in Minnesota prior to *Fort*); Editorial, *Bias in Traffic stops Is Just a Symptom*, CHI. SUN TIMES, Jul. 15, 2011, at 23 (noting the annual state studies of police practices in a call for reform in the use of consent

findings led to a push for reforms in police practices in states across the country.[336]

In a few states that uncovered patterns of traffic stops affecting minorities disproportionately, courts and at least one legislature curtailed the use of consent searches in traffic stops.[337] These courts relied on their state constitutions to protect citizens from the inherent coercion involved in these stops.[338] A stricter approach to consent searches in the traffic context has been met with approval from those critical of the "routine" traffic stop that too frequently turns into an excuse to search.[339] Though questions of racial profiling have permeated public discourse about consent searches of motorists in many states,[340] they are rarely mentioned directly in the judicial opinions imposing the stricter motorist standards.

Recently, at least one state, Rhode Island, proposed legislation that would require reasonable suspicion of criminal activity before law enforcement may request consent to search a juvenile.[341] Thus, it mirrors its requirement in the traffic setting. The proposal was driven by the recognition that without such a rule, youth were left vulnerable in the face of police requests to search and that the practice disproportionately affected minority youth. Although the bill ultimately did not pass, policy makers and courts alike can put forward evidence about the deficiencies in current application of the law to support such a safeguard going forward. Additionally, this practice could advance state efforts to comply with the Juvenile Justice Delinquency Prevention Act's goal to reduce disproportionate minority contact and confinement of minorities—a goal with

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searches and criticizing police practices that result in racial profiling); Reginald T. Jackson, *Uninformed Consent*, N.Y. TIMES, Sep. 23, 2007, at 15; James Ragland, *Are Police Agencies Profiling? Search Them*, DALL. MORNING NEWS, Feb. 28, 2005, at 1B.

336. *See supra* note 320.

337. *See, e.g.*, *Carty*, 790 A.2d at 912; Racial Profiling Prevention Act of 2004, R.I. GEN. LAWS § 31-21.2-5 (2004).

338. State v. Quino, 840 P. 2d 358 (Haw. 1992); *Carty*, 790 A.2d 903; State v. Fort, 660 N.W.2d 415 (Minn. 2003).

339. LaFave, *supra* note 82, at 1893 (expressing approval of the approach by Minnesota and New Jersey's supreme courts); George C. Thomas III, *Terrorism, Race and A New Approach to Consent Searches*, 73 MISS. L.J. 525, 550 (2003) (characterizing *Carty* as "a bold, innovative step in the right direction" but noting that more restrictions on use of consent searches are desirable).

340. For example, in 1999, the State of New Jersey entered into a consent decree with the Department of Justice based upon evidence of racial profiling of motorists. *See* John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script*, 32 SETON HALL L. REV. 769, 797 (2003); Harris, *supra* note 335, at 289 (discussing statistics related to police stops motivated by race); Perrin, *supra* note 335, at 64 (discussing statewide data documenting the racial disparities in stops of motorists in Minnesota prior to *Fort*).

341. *See, e.g.*, Comprehensive Racial Profiling Prevention Act, H.B. 7256, Jan. Sess. (R.I. 2012). The Act would have also extended the reasonable suspicion requirement beyond motorists so that police must have reasonable suspicion before requesting consent to search the motor vehicles of pedestrians. The Act's provision for juveniles provided that police could not request consent to search without reasonable suspicion and would have required police to provide warnings if a warrant would otherwise be required for the search.

which states struggle.[342]

The implementation of a rule requiring reasonable suspicion for encounters with juveniles is desirable for three reasons. First, such a rule better comports with the reasonableness requirement for intrusions under the Fourth Amendment and balances state and individual interests. Just as a motorist is affected by the pressures involved in a seizure during a traffic stop, so is a juvenile more susceptible as a matter of course. Without reasonable suspicion of criminal activity, the state's interest in searching is diminished and competes with the state interest in effectuating the Fourth Amendment rights of minors. Yet the rule still recognizes the state interest in utilizing consent searches and, therefore, continues to afford to law enforcement the use of consent searches, albeit in more limited circumstances.

Courts and legislators alike recognize and struggle with the special vulnerability of youth in the consent search context and have explicitly searched for a more reasonable standard, but to no avail. Some approaches include requiring judicial consideration of age by likening it to a request to search when someone is in custody;[343] requiring parental presence in certain instances, such as when the child is in custody[344] or younger than fourteen;[345] and imposing a higher standard of proof to show voluntariness.[346] Just as some states have chosen to recognize the reality that motorists will not feel free to leave an encounter, there is now additional support for extending this measure to juveniles.

Second, implementing this protection confines the difficulty of importing the effect of youthfulness into the consent analysis to a smaller universe of cases.[347] Thus, it limits the risk of involuntary consent to situations where the

342. *See* 42 U.S.C. § 5633 (2006) (requiring states to submit reports including information about any system improvements made to reduce disproportionate minority contact and confinement, as a pre-condition to receiving 25% of each state's grant allocation under the statute). For continued struggles by states, see JAMES BELL, ET AL, W. HAYWOOD BURNS INST., THE KEEPER AND THE KEPT: REFLECTIONS ON LOCAL OBSTACLES TO DISPARITIES REDUCTION IN JUVENILE JUSTICE SYSTEMS AND A PATH TO CHANGE (2009).

343. *In re* J.M., 619 A.2d 497, 504 (D.C. 1992) (en banc).

344. C.R.S. § 22-2-2(3)(c).

345. ARK. R. CRIM. P. 11.2(a).

346. Saavadra v. State, 622 So. 2d 952 (Fla. 1993) (requiring clear and convincing evidence of voluntary consent when a child consents to search of parental home); B.T. v. State, 702 So. 2d. 248 (1997) (requiring clear and convincing evidence for the search of a minor and finding involuntary consent by a juvenile) (declined to follow by *State v. T.L.W.*, 783 So. 2d. 314 (2001)).

347. For discussion about this challenge as it relates to scientific research, see Maroney, *Adolescent Brain Science after* Graham, *supra* note 301, at 769 ("Because the [scientific] data support conclusions only at the aggregate level, they shed little light on the developmental status of any given young person, except insofar as she is a member of the group."). Regardless of whether a court overtly struggles with the developmental science or the "common sense" arguments put forward by Justice Sotomayor's opinion in *J.D.B.*, Maroney's discussion is relevant to the difficulties in any individual juvenile case where the Court has not yet articulated a bright line test that applies to all juveniles. For example, the Court excludes all juveniles from the death penalty in *Roper,* thereby eliminating the challenge of importing youth into each specific case. But in

government interest in seeking consent is higher. Imposing consent searches on minors would be limited only to the group of cases where the officer had a reasonable suspicion of criminal activity to justify approaching the minor and temporarily stopping her to request a search. The third reason—largely a policy matter—is also related to broader concerns about societal norms when there is a tension between the rights of juveniles and the state's interest in preventing crime. Youths not only are more likely to merely conform to a request to consent to search from an authority figure, but also are less likely to have proper legal representation to subsequently test the validity of the search.[348]

### *C. Structural Reform and Law Development*

The lack of a consistent standard for consent searches of juveniles relates in part to the lack of robust judicial discussion of age and consent searches. The courts can only foster the growth of the doctrine if the issues are brought before them. Developing the law of juvenile consent searches and other inquiries that consider age requires an adversarial process—one that includes appeals.[349] This advancement will occur in the juvenile justice setting more frequently if two obstacles for juveniles are addressed.

First, there is ample evidence of obstacles to adequate legal representation for juveniles. These obstacles include court systems that encourage waiver of counsel by juveniles, delayed appointment of counsel, inadequate funding, and lack of zealous advocacy due to role confusion among defense attorneys.[350] Without counsel, it is unlikely that juveniles will be able to put forward the kinds

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situations such as waiver of the right to counsel, waiver of *Miranda* or voluntariness of consent, decision makers still wrestle with how to account for youth.

348. State assessments performed by the National Juvenile Defender Center routinely observe the lack of representation for juveniles in practice. *See, e.g.*, PATRICIA PURITZ & CATHRYN CRAWFORD, NAT'L JUVENILE DEFENDER CENTER, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 2 (2006) (observing that young children were observed waiving counsel, which often occurs "with a wink and a nod—or even encouragement—from judges"); PATRICIA PURITZ, MARY ANN SCALI & ILONA PICOU, AMERICAN BAR ASS'N & JUVENILE JUSTICE CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23–24 (2002) (estimating that in Virginia "50% of youth waived counsel regardless of the seriousness of the offense"); Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV 125, 144 (2007).

349. Annitto, *supra* note 12 at 726–728, 735. *See also* David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. & CRIMINOLOGY, 518 (1990) (discussing the importance of the "law giving" function of appeals). With regard to the adversarial process and the development of the law, see Nancy Leong, *Gideon's Law Protective Function*, 122 YALE L.J. 2460 (2013) (discussing how the courts' reliance on adversarialism in adjudicating cases affects not only individual rights but the development of the law). Professor Leong also posits that the adversarial process serves to facilitate societal acceptance of the results disputed before the court. *Id.*

350. *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts*, 54 FLA. L. REV. 577 (2002); PURITZ & CRAWFORD, *supra* note 348.

of critical arguments that surround suppression issues. Second, and relatedly, appeals are rare in juvenile delinquency cases even when counsel is present.[351] A more robust juvenile appellate practice provides opportunity for judicial consideration about age, including the consent doctrine and minor status, and is necessary in order to develop the law in a way that moves toward a standard suggested in Part V.A.[352] Without appeals, it follows that juveniles' Fourth Amendment rights will be impeded. "If there are no fairly clear rules telling a police [officer] what he may or may not do, courts are seldom going to say that what he did was unreasonable."[353] Policy makers and other state stakeholders must seriously address both of these structural problems in order for bold, and even humble, reform to occur surrounding Fourth Amendment rights of juveniles.

## VI.
## CONCLUSION

The Supreme Court's treatment of youth and age during the last decade recalls what the Court has said repeatedly: that age must be considered when minors' rights are at issue, whether for punishment purposes or in the criminal procedure context. And yet, at present, there is no established or meaningful standard that courts follow to consider consent by minors in the context of police searches. This is true despite acknowledgment that consent searches are a frequently utilized tool of law enforcement. Recent rulings by the Supreme Court raise pointed questions about what this standard should look like and they undeniably point toward a reality where age can no longer be cast aside. They also challenge the ability of courts to cast aside social scientific research when analyzing juvenile consent despite the struggle against its incorporation to the consent doctrine as a whole. The currently evolving status of age provides courts and legislators an opportunity to develop notions of reasonableness in light of societal norms when applying the Fourth Amendment to minors' encounters with law enforcement.

351. Annitto, *supra* note 12, at 672.

352. *See generally* Annitto, *supra* note 12 (arguing for reforms to create more access to appeals for juveniles and discussing the interaction between the lack of appeals and the development of the law in the juvenile justice setting). *See also* Chad Oldfather, *Universal De Novo*, 77 GEO. WASH. L. REV. 308, 316–318 (2009); Casandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013) (arguing that both the federal and state judicial systems have increasingly relied on appellate remedies to protect essential rights during the last century).

353. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 358 MINN. L. REV. 349, 394 (1974).