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The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far

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THE FOURTH AMENDMENT RIGHTS OF CHILDREN AT HOME: WHEN PARENTAL AUTHORITY GOES TOO FAR

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ABSTRACT

Although it is virtually undisputed that children have some Fourth Amendment rights independent of their parents, it is equally clear that youth generally receive less constitutional protection than adults. In a search for continuity and coherence in Fourth Amendment jurisprudence involving minors, Professor Henning identifies three guiding principles—context, parental authority, and the minor's capacity—that weave together children's rights cases. She argues that parental authority too often prevails over children's rights, even when context and demonstrated capacity would support affirmation of those rights. Context involves both the physical setting in which Fourth Amendment protections are sought and the nature of the privacy interest at stake. Capacity considers the minors' maturity and judgment to safeguard their own rights without undue parental authority and direction.

Recognizing third-party consent as a useful lens through which to analyze the Fourth Amendment rights of minors in conflict with their parents, this Article critiques the Supreme Court's recent dicta in Georgia v. Randolph*, which significantly undermines the authority of minors to resist State intrusion into their most intimate space within the family home—often their bedrooms. Notwithstanding the relatively narrow context in which* Randolph *applies, its dicta has broad implications for the validity of third-party consent in a variety of parent-child scenarios, including parental consent to a police*

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search of computer files, social networking sites, e-mail exchanges, Internet searches, and closed containers or locked spaces belonging to the minor.

As Professor Henning argues, the dicta in Randolph *oversimplifies, and maybe even mischaracterizes, the Court's own analysis of children's rights in previous cases. As a result, that dicta will continue to distort the analysis by state and federal courts called upon to mediate the rights of children in competition with the rights and duties of their parents. Although parental authority serves a valuable function in society, this Article contends that absolute, unreviewable parental authority is rarely, if ever, necessary. Instead, it advocates for a more faithful and nuanced application of the guiding principles identified by Professor Henning across cases. Considering the psychological importance of privacy to minors, the heightened protection generally afforded to the sanctity of the home, and the societal benefits of preparing mature minors to serve as trustees of their own rights, the State's interest in preserving parental authority does not provide a sufficiently compelling basis upon which to abrogate the right of a mature minor to refuse State examination of his private space or property.*

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INTRODUCTION

Imagine a fifteen-year-old boy walking down the street with his mother. A police officer suspects the minor has drugs but does not have enough information to support probable cause, or even reasonable articulable suspicion, for a search without a warrant. The officer seeks the minor's consent to search. Although the minor immediately declines, his mother responds, "This is my son. Go right ahead. I want to make sure he is not involved with drugs." In this scenario, most would assume that parental consent is no substitute for a warrant or consent by the child, and any police search thereafter would constitute a clear Fourth Amendment violation. However, courts contemplating the Supreme Court's recent dicta in *Georgia v. Randolph,* coupled with the Court's long-standing deference to the authority and responsibility of parents to monitor and control their children, may not find the fifteen-year-old's inability to resist State intrusion either egregious or unreasonable.

In 2006, the Court held in *Randolph* that police could not reasonably rely on a wife's consent to the warrantless search of her home when her co-tenant husband was physically present and objecting to the police intrusion.[1] The Court based its decision in large part on "widely shared social expectations" regarding the marital relationship and the dynamics of co-occupancy.[2] Since the wife "ha[d] no recognized authority in law or social practice to prevail over [her husband], [her] disputed invitation, without more, [gave] a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."[3] In dicta, the Court went on to say that absent "some recognized hierarchy, like a household of parent and child ... there is no societal understanding of superior and inferior," and "[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other

1. Georgia v. Randolph, 547 U.S. 103, 122-23 (2006).
2. *Id.* at 111.
3. *Id.* at 114.

cotenants."[4] States are just now beginning to interpret and apply the dicta in *Randolph*. Some states have already concluded that the unique nature of the parent-child relationship justifies a "carve out" to the *Randolph* rule and relieves the police from deference to a minor's objection when there is consent from the parent.[5]

Given the paucity of Supreme Court analysis on the Fourth Amendment rights of children in a traditional criminal context, the dicta in *Randolph* has heightened significance. Notwithstanding the relatively narrow context in which *Georgia v. Randolph* applies, its language has broad implications for the validity of third-party consent in a variety of parent-child scenarios, including parental consent to a police search of computer files, social networking sites, e-mail exchanges, Internet searches, and closed containers or locked spaces belonging to the child.[6] Although it is virtually undisputed that children have some Fourth Amendment rights independent of their parents, it is equally clear that in some circumstances youth will receive less constitutional protection than adults. The primary inquiry in this Article is the extent to which parental authority should be allowed to override the Fourth Amendment rights of minors to resist State intrusion. This Article contends that the Court's dicta in *Georgia v. Randolph* oversimplifies, and maybe even mischaracterizes, the Court's own analysis of children's rights in previous cases, and as a result has and will continue to distort the analysis of lower courts called upon to mediate the rights of children in competition with the rights and duties of their parents.

This Article begins in Part I with a recognition that the Supreme Court has articulated no singular analytic framework for evaluating the constitutional rights of minors. Instead, the Court has resolved these cases in a piecemeal fashion, determining on a case-by-case basis which procedural rights should be extended to children.[7] Notwithstanding the lack of total coherence, the Court's piecemeal

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4. *Id.*

5. *See, e.g.*, *In re* D.C., 115 Cal. Rptr. 3d 837, 839 (Ct. App. 2010).

6. A number of jurisdictions have launched special initiatives that send police officers door to door, without warrants, in high-crime neighborhoods, requesting permission from parents and grandparents to search children's bedrooms. *See, e.g.*, Allison Klein, *D.C. Seeks Consent To Search for Guns*, WASH. POST, Mar. 13, 2008, at B01.

7. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 355.

approach fairly consistently distinguishes the rights of minors and adults along one of three guiding principles: context, parental authority, and the minor's capacity. That is, in some cases, the minor's rights and protections will be modified to accommodate the special needs of a given context, while in other cases, the minor's rights will be modified to either accommodate the heightened authority of parents to raise and regulate children as they deem appropriate or the presumptive diminished capacity of youth to make decisions for themselves. For purposes of this discussion, the Article accepts the guiding principles as accurate but seeks greater fidelity and coherence in their application across cases.

Part I then looks more closely at the import of context, authority, and capacity in Fourth Amendment jurisprudence involving minors. Part I.A lays the foundation for this inquiry by examining the Fourth Amendment rights of children in various criminal justice contexts, including traditional on-the-street encounters with police, State searches in the school, and the minor's expectation of privacy in the home without parental interference. Part I.B considers more generally the limiting effect of parental responsibility and authority on the constitutional rights of children. Recognizing that parental authority is not absolute, this Section also reviews the limits of parents' rights and identifies the Court's analytic principles for reconciling the competing interests of parents, the State, and the child. Part I.C considers the relevance of child and adolescent capacity in the evaluation of the minor's Fourth Amendment liberty interests in abortion and other medical cases and discusses the evolution of the mature minor doctrine.

Part II returns to the narrow paradigm of third-party consent in *Georgia v. Randolph*, which presents a useful lens through which to explore the parent-child relationship and the Fourth Amendment rights of children. Drawing from the guiding principles articulated in previous Supreme Court cases involving minors, Part II contends that there is no principled and coherent justification for a departure from the *Randolph* rule when mature minors are at home with their parents. Part II.A evaluates the nature of the privacy interest at stake when officers search the child's private or quasi-private space at home by considering the heightened protection generally afforded to the sanctity of the home, the psychological importance of privacy

to minors, and the societal benefits of preparing minors to serve as trustees of their own rights.

Part II.B considers whether parental authority and the diminished capacity of minors provide a fair and appropriate justification for denying youth equal enforcement of Fourth Amendment rights at home. Although this Article recognizes a compelling need for parental regulation of children's behavior, this Section asserts that parents may secure the assistance of the State to help troubled youth through other legal and judicial mechanisms designed to preserve the child's right to due process. This Section also contends that parents may not be equipped to act in the best interest of the child in the context of delinquency and challenges the presumption that all children lack the capacity and judgment to regulate their interactions with police. In Part II.C, a brief survey of third-party consent cases involving minors reveals that courts have found minors as young as eight or nine to have the capacity to consent to a search of the family home.

Ultimately, by critiquing the narrow dicta of *Georgia v. Randolph* and the cases that have followed, this Article hopes to move courts away from overbroad deference to parental authority and advocates for a more nuanced and faithful analysis of children's Fourth Amendment rights. The Article encourages use of an analysis that is guided by the key principles that have elucidated the Supreme Court's thinking in other rights-based cases involving minors.

I. DISCERNING AN ANALYTICAL FRAMEWORK FOR THE FOURTH AMENDMENT RIGHTS OF MINORS

The Supreme Court has long recognized that the Fourth Amendment applies to children as well as adults.[8] As the Court

8. *See* New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials); *see also* California v. Hodari D., 499 U.S. 621, 626-27 (1991) (implicitly recognizing Fourth Amendment rights of minors but finding no violation). For lower courts recognizing the Fourth Amendment rights of children, see United States v. Doe, 801 F. Supp. 1562, 1567 (E.D. Tex. 1992) (holding that the exclusionary rule applies to federal juvenile delinquency adjudications); Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988) (holding policy of routinely subjecting juveniles detained for violation of immigration laws to strip searches violated Fourth Amendment), *rev'd on other grounds*, Reno v. Flores, 507 U.S. 292 (1993).

noted in *In re Gault*, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[9] Although there is little dispute that minors are entitled to the protection of the Fourth Amendment, the Court has never articulated a coherent and uniform framework for analyzing the scope of Fourth Amendment rights of children. Instead, Fourth Amendment jurisprudence involving minors has developed piecemeal, with three broad principles at play: context, parental authority, and the minor's capacity. Context involves not only the physical context in which Fourth Amendment protections are sought but also the nature of the privacy interest at stake for the minor. Parental authority invokes the Court's long-standing deference to the rights and duties of parents to raise and control children as they deem appropriate, whereas capacity speaks of the minor's cognitive and psychosocial ability to act as gatekeeper of his or her own rights.

In some children's rights and parents' rights cases, the Court's analysis turns almost entirely on one of these principles.[10] In other cases, the analysis involves a more complicated consideration of more than one principle, such as parental authority and capacity.[11] This Section briefly surveys the development and application of these principles in a few seminal Supreme Court cases.

A. Context Matters

Context clearly matters in any Fourth Amendment analysis, whether it involves a minor or an adult. The scope of the Fourth Amendment protection is measured by the individual's "'legitimate expectation' of privacy" in a given place, object, or context.[12] The greatest protections are typically granted in the private space of the home, whereas seemingly lesser protections are granted in heavily

9. 387 U.S. 1, 13 (1967). The Court has recognized a due process right against compulsory self-incrimination for juveniles. *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 601 (1948).

10. *See, e.g.*, *T.L.O.*, 469 U.S. at 339-41 (recognizing special needs context of school).

11. Parham v. J.R., 442 U.S. 584, 603-04 (1979) (recognizing both authority of parents to support youth and diminished capacity of minors to make decision as to the commitment of minors to a mental health facility); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 73-75 (1976) (discussing capacity of youth to make important decision to abort and societal need to encourage minors to seek parental guidance).

12. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

traveled spaces where the State has a significant public safety interest at stake.[13]

1. Traditional On-the-Street Encounters with the Police

The individual's right to move about public streets unencumbered by state intrusion is a generally well-protected right absent probable cause to believe criminal activity is afoot. In evaluating on-the-street encounters involving children and the police, the Supreme Court has assumed, without discussion, that children have the same Fourth Amendment rights as adults.[14] In 1991, in *California v. Hodari D.*, the Court affirmed a trial court's denial of a minor's motion to suppress drugs based on evidence that the child had never been seized within the meaning of the Fourth Amendment and had abandoned the contraband at issue.[15] The appellant's status as a minor had no bearing on the Court's reasoning and analysis.[16] In 2000, in *Florida v. J.L.*, the Court held that a fifteen-year-old's motion to suppress evidence as fruit of an unreasonable stop and frisk should have been granted.[17] There, the Court's analysis dealt entirely with the unreasonableness of the officer's reliance on an anonymous tip and made no distinction between the rights of a minor and those of an adult.[18] In fact, in a footnote, the

13. *Compare* Kyllo v. United States, 533 U.S. 27, 33 (2001) (discussing the sanctity of the home), *and* Payton v. New York, 445 U.S. 573, 589 (1980) ("In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."), *with* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding State's interest in preventing drunk driving outweighed the degree of intrusion on individual motorists who are briefly stopped at sobriety checkpoints), *T.L.O.*, 469 U.S. at 339-41 (holding that the legality of a search in schools requires only a reasonableness standard because of the school's interest in creating a proper learning environment for students), Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam) (discussing the significantly lesser magnitude of reasonable privacy expectations in an airport because of government safety initiatives), *and* Bell v. Wolfish, 441 U.S. 520, 560 (1979) (finding jail's interest in maintaining institutional security and preserving internal order and discipline outweighed the inmates' interests in avoiding strip searches).

14. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 270 (2000); California v. Hodari D., 499 U.S. 621, 624 (1991).

15. 499 U.S. at 629.

16. *Id.* at 626-29.

17. 529 U.S. at 269.

18. *Id.* at 270-71.

Court commented that "the fact that J.L. was under 21 in no way made the gun tip more reliable than if he had been an adult."[19]

Few state and federal courts have explicitly addressed the question of whether the Fourth Amendment applies to children in on-the-street encounters with the police, but virtually all have assumed as much.[20] The Texas Court of Criminal Appeals is one of the few courts to have expressly identified the basis for a child's Fourth Amendment rights in delinquency proceedings.[21] Relying on both the state constitution and the Federal Constitution to apply the probable cause requirement with full force to juvenile arrests, the court discussed the evolution of juvenile courts from a purely rehabilitative model to a hybrid model that incorporates due process.[22] The Texas court considered the importance of the Fourth Amendment in ensuring privacy and security of individuals against arbitrary government invasion and examined the nature and scope of other constitutional protections afforded to juveniles in *In re Gault* and the series of cases that followed.[23] The court ultimately concluded that the probable cause requirement is necessary to protect the privacy rights of children and opined that absent this protection, unreasonable searches were likely to undermine the rehabilitative goals of juvenile courts by fostering resentment in the violated child.[24]

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19. *Id.* at 273 (unnumbered footnote).

20. *See, e.g.*, *In re* D.T.B., 726 A.2d 1233, 1236 (D.C. 1999) (holding that defendant's fidgeting and nervousness upon seeing police did not alone warrant a *Terry* stop); *In re* A.S., 614 A.2d 534, 538, 542 (D.C. 1992) (holding that there was no reasonable suspicion for on-street stop when descriptions of suspects on which stop was based described "potentially staggering numbers of youths").

21. Lanes v. State, 767 S.W.2d 789, 800-01 (Tex. Crim. App. 1989).

22. *Id.* at 792-94.

23. *Id.* at 791-95 (discussing history of the juvenile system and eight foundational cases granting constitutional protections to juveniles: *T.L.O.*, 469 U.S. 325, 341 (1985) (applying diminished Fourth Amendment standard to school searches); Schall v. Martin, 467 U.S. 253, 281 (1984) (establishing the validity of pretrial detention); Breed v. Jones, 421 U.S. 519, 541 (1975) (establishing double jeopardy protections); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) (holding that a jury trial is not required for juveniles); *In re* Winship, 397 U.S. 358, 367-68 (1970) (establishing proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1, 55-56 (1967) (establishing the rights of notice, counsel, confrontation, cross-examination, and protection against self-incrimination); Kent v. United States, 383 U.S. 541, 561-65 (1966) (establishing procedural requirements for certification hearings); and Haley v. Ohio, 332 U.S. 596, 606-07 (1948) (establishing protections against coerced confessions)).

24. *Lanes*, 767 S.W.2d at 795-96.

Other state and federal courts have joined Texas in relying on *Gault* and concluding that the civil and rehabilitative nature of juvenile proceedings cannot deprive children of the fundamental constitutional rights to which adults are entitled in criminal proceedings.[25] These courts have recognized the punitive and quasi-criminal nature of the proceedings and expressed concerns about the failure of the juvenile court to fully achieve its parens patriae rehabilitive goals.[26] In acknowledging the importance of the Fourth Amendment exclusionary rule in deterring illegal search and seizures of juveniles, the courts have concluded that a child who encounters an officer on the street has a legitimate expectation of privacy in his person and property.[27] Thus, police generally cannot stop or search the child without a warrant unless the circumstances justify an exception to the warrant requirement.

2. Fourth Amendment Rights of Children in School

Notwithstanding the general consensus that children are entitled to the benefit of Fourth Amendment protections in juvenile proceedings, the Fourth Amendment rights of children have been modified in certain "special needs" contexts—most notably schools, where state officials are responsible for the care and safety of a large number of youth. Context factored heavily in the Court's analysis and ultimate departure from its traditional Fourth Amendment jurisprudence in *New Jersey v. T.L.O.*[28] In *T.L.O.*, the Court held that the Fourth Amendment prohibition against unrea-

25. *See* Brown v. Fauntleroy, 442 F.2d 838, 840-41 (D.C. Cir. 1971) (holding that even if juvenile was not deprived of his freedom and was left in the custody of his mother, he was still entitled to Fourth Amendment protections); United States v. Doe, 801 F. Supp. 1562, 1572 (E.D. Tex. 1992) (holding that exclusionary rule applies to juvenile delinquency adjudications); Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988) (holding policy of routinely subjecting juveniles detained for violation of immigration laws to strip search violates Fourth Amendment), *rev'd on other grounds*, Reno v. Flores, 507 U.S. 292 (1993); Alfredo A. v. Super. Ct., 865 P.2d 56, 68-69 (Cal. 1994) (holding that *Gerstein*'s constitutional requirement of prompt judicial determination of probable cause for extended pretrial detention of any person arrested without warrant applies to juveniles as well as adults); *In re* A.L.J., 836 P.2d 307, 311 (Wyo. 1992) (assuming that Fourth Amendment protections apply to juveniles in adjudicatory proceedings).

26. *Fauntleroy*, 442 F.2d at 841; *Lanes*, 767 S.W.2d at 792.

27. *Doe*, 801 F. Supp. at 1570-73.

28. 469 U.S. at 339-41.

sonable searches and seizures applies to searches conducted by teachers and other school administrators at public schools and school-related functions, but upheld a principal's search of a child's purse at school without a warrant or probable cause.[29] As the Court noted, "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[30] In balancing the privacy interests of the child and the needs of the teachers and administrators, the Court concluded that the substantial need for "swift and informal" discipline to maintain order on the school grounds justified imposition of a reasonableness standard and departure from the warrant and probable cause requirements.[31]

In delineating the scope of students' Fourth Amendment rights in school and evaluating the reasonableness of the State action, the Court considered the nature of the intrusion, the importance of the government's interests, and the scope of the child's expectation of privacy.[32] The Court concluded that a school's search of a student will be upheld without a warrant if the search is "reasonable" under all of the circumstances.[33] The Court stopped short of requiring an individualized reasonable, articulable suspicion to justify the inception of a school search but noted that under ordinary circumstances, a search will be justified where there are reasonable grounds to suspect that the student has violated or is violating the law or a school rule.[34]

T.L.O. was not the first or the last case in which the Supreme Court limited the constitutional rights of children in the school context. Although the Court acknowledged in *Tinker v. Des Moines* that "students ... [do not] shed their constitutional rights ... at the schoolhouse gate,"[35] the Court made clear in cases that followed that children have a reduced expectation of privacy in school and school-

29. *Id.* at 340-48.
30. *Id.* at 340.
31. *Id.* at 337-42.
32. *Id.*
33. *Id.*
34. *Id.* at 341-42 & n.8.
35. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

related activities,[36] and that schools may need to exercise restraint over students.[37]

In 1995, in *Vernonia v. Acton*, the Court held that random drug testing of student athletes was reasonable by applying a balancing test that again took into account the nature and legitimacy of the child's privacy interest, the degree of the State's intrusion, and the State's interests in the intrusion.[38] The Court considered the school's interest to be significant in light of extensive drug use among its athletes, concerns that drug use would lead to injury while playing sports, and the Court's view that student athletes were seen as leaders among their peers.[39] By contrast, the Court viewed the student's interest as much less significant because all students have a lowered expectation of privacy while at school. In fact, from the Court's perspective, student athletes have an even lower expectation of privacy because they routinely submit to a physical examination to join the team, and in this case, were only asked to submit to testing conditions that were little different from those always present in a school restroom or locker room.[40] The Court further emphasized that drug test results were not shared with law enforcement officials but with only the school administrators who needed the information.[41] In 2002, the Court reaffirmed the principles articulated in *Vernonia* when it upheld the school's drug testing policy in *Board of Education v. Earls*, which required all middle and high school students seeking to participate in any extracurricular activity to consent to drug testing.[42]

As in *T.L.O.*, the school context was critical in the Court's evaluation of the child's expectation of privacy in both *Acton* and *Earls*.[43] In *Acton*, the Court concluded that the warrant requirement is unnecessary "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement

36. *See* Bd. of Educ. of Ind. Sch. Dist. v. Earls, 536 U.S. 822, 830-32 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657 (1995).

37. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding school's exercise of prior restraint over student newspaper did not violate the First Amendment).

38. 515 U.S. at 664-65.

39. *Id.* at 649, 662.

40. *Id.* at 657-58.

41. *Id.* at 658.

42. Bd. of Educ. of Ind. Sch. Dist. v. Earls, 536 U.S. 822, 838 (2002).

43. *Id.* at 830; *Acton*, 515 U.S. at 654.

impracticable."[44] Such special needs, the Court reasoned, exist in the public school context because "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,'" and strict adherence to the probable cause requirement "would undercut 'the substantial need of the teachers and administrators for freedom to maintain order in the schools.'"[45] In *Earls*, the Court recognized the schools' special need to prevent and deter drug use among school children and reiterated the view that children's Fourth Amendment rights are different in public schools than elsewhere given the "schools' custodial and tutelary responsibility for children."[46]

The prominence of context in the Court's rationale for recognizing reduced privacy protections in schools suggests that neither *T.L.O.* nor the cases that followed support a principle of reduced Fourth Amendment protections for all youth in all contexts. In fact, even adults may have a reduced protection in "special needs" spaces like airports, immigration borders, automobile checkpoints, and jails, where the reasonable expectation of Fourth Amendment privacy is diminished.[47] Moreover, although the Court identified age as one of the factors to consider in determining the reasonableness of a search in *T.L.O.*, the Court was concerned that the scope of the search not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[48] Thus, in *T.L.O.* and other cases

44. *Acton*, 515 U.S. at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

45. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985)).

46. *Earls*, 536 U.S. at 829-30.

47. *See T.L.O.*, 469 U.S. at 338 (discussing Fourth Amendment limitations in jails); *see also Acton*, 515 U.S. at 653-54 (discussing special needs leading to reduced protections in schools and in drug testing of railroad personnel in train accidents in Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 617 (1989); random drug testing of federal customs officers who carry arms or who are involved in drug extradition in Treasury Emps. v. Von Raab, 489 U.S. 656, 665 (1989); automobile checkpoints for illegal immigrants and contraband in United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); and checkpoints for drunk drivers in Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 465 (1990)); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (citing Florida v. Royer, 460 U.S. 491, 515 (1983)) (discussing less protection under the Fourth Amendment in airports because of the increased public interest in safety); Bell v. Wolfish, 441 U.S. 520, 557-60 (1979) (discussing limitation of Fourth Amendment rights in jails due to legitimate security interests).

48. *T.L.O.*, 469 U.S. at 342.

involving the search of a minor, age seems to support greater protection against invasive State actions rather than less protection.[49]

As further evidence that the school cases are fundamentally about context and not about the diminished capacity of youth or the inherent authority of adults to intervene in the lives of children, the Court expressly declined to recognize any implicit voluntary delegation of the parents' own authority to search a child to school officials.[50] Although the Court acknowledged that schools act *in loco parentis* as supervisors and caretakers for the minor during school hours, the Court held that in carrying out searches and other disciplinary functions, the school was not merely acting as a "surrogate for the parents," but was a clear state actor.[51]

3. Children's Fourth Amendment Rights in the Home

Like an adult, a child has a legitimate expectation of privacy to be free from unreasonable searches of his person, house, papers, or effects.[52] An expectation of privacy is legitimate and protected if the person claiming the interest has a "subjective expectation of privacy"[53] in the thing or area searched or seized, and the expectation is "one that society is prepared to recognize as 'reasonable.'"[54] As the Eleventh Circuit recognized, "privacy is an intuitive interest, and legal sophistication is not required" for adults or minors to understand subjectively the importance of privacy.[55] The child's expectation of privacy exists not only in on-the-street encounters with the police but also in his personal living space. In fact, police entry into

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49. *See, e.g.*, Safford Unified Sch. Dist. v. Redding No. 1, 129 S. Ct. 2633, 2641-43 (2009) (holding that strip search of thirteen-year-old was unreasonable given child's age and absence of suspicion that drugs were in child's underwear).

50. *T.L.O.*, 469 U.S. at 336-37 (rejecting idea that school officials could claim "the parents' immunity from the strictures of the Fourth Amendment").

51. *Id.*

52. U.S. CONST. amend. IV.

53. Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978); *see also* Minnesota v. Olson, 495 U.S. 91, 95-96 (1990); Hudson v. Palmer, 468 U.S. 517, 526 (1984); Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980).

54. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also Olson*, 495 U.S. at 95-96*; Hudson*, 468 U.S. at 526; *Rawlings*, 448 U.S. at 104-06; *Rakas*, 439 U.S. at 143-44 n.12.

55. Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995) (discussing a minor's capacity to give valid, knowing consent to enter his parents' home).

a home represents the greatest governmental intrusion into an individual's privacy.[56] Thus, absent a warrant or exigent circumstances, the child may deny the police entry into and examination of his home, bedroom, or personal property within. Further, if a minor lives alone, society recognizes that even a child reserves the right to exclude the State absent some exigent circumstances justifying entry without consent. Even when the child resides with a parent or guardian, neither police nor society would think it reasonable for the State to enter the family home, without a warrant or exigent circumstances, over the express objection of the one person who is home alone—whether that person is the child or parent.[57]

While it is largely beyond dispute that children have a legitimate expectation of privacy and security from government intrusion when they are alone, the reality is that most children do not live by themselves and are rarely alone.[58] As a result, a child's expectation of privacy in his living space can rarely be examined in a vacuum, and children seldom exercise their Fourth Amendment rights in the home without some involvement or reference to a parent or guardian. Further, a child obviously has no protection against the intrusion of his parents into his bedroom because the provision is meant only to protect the privacy of the individual against state actors or private actors working in concert with the State.[59] Thus, the child has no recourse in the Fourth Amendment to exclude evidence at trial obtained by a parent who enters the child's room, removes contraband, and delivers it to the police.[60] The question remains, however, whether, and to what extent, the unique nature of the parent-child relationship should undermine the fundamental

56. *See* Payton v. New York, 445 U.S. 573, 585 (1980); *see also* Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970).

57. As one can imagine, there are few or no cases in which the police enter and retrieve evidence over the child's objection when the police find a child home alone and have not obtained consent from the parent in advance.

58. Kristin Smith & Lynne Casper, *Self-Care: Why Do Parents Leave Their Children Unsupervised?* 41 DEMOGRAPHY 285, 292 tbl.1 (2004).

59. United States v. Jacobsen, 466 U.S. 109, 113 (1984); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

60. *E.g.*, Commonwealth v. Leone, 435 N.E.2d 1036, 1039 (Mass. 1982) ("Evidence discovered and seized by private parties is admissible without regard to the methods used, unless State officials have instigated or participated in the search.").

principle that children have a legitimate expectation of privacy from State intrusion into their personal property and private living space.

Context alone does not seem to justify departure from traditional Fourth Amendment analysis for minors in the home. The reasonableness of an individual's expectation of privacy in his living space is not diminished by a lack of property interest or even by severe restrictions imposed on use of the space by an owner or others who control the property.[61] Thus, hotel patrons, boarding house tenants, and overnight guests all have been found to have reasonable expectations of privacy in their temporary sleeping quarters.[62] In 2008, the Ninth Circuit reiterated the Supreme Court's long-established understanding that authority to exclude or admit the State for the purposes of the Fourth Amendment is not equivalent to technical property rights.[63] Because the privacy interest that is relevant for the Fourth Amendment is broader than the rights accorded in property law,[64] a resident need not even pay rent to have an expectation of privacy in a place.[65] Thus, "[t]he important question is not who possesses a property right, but rather what are the dictates of 'widely shared social expectations.'"[66]

The Supreme Court's examination of the privacy rights of an overnight guest are instructive. A guest obviously has no legal or proprietary interest in a home, but a guest does have a legitimate expectation of privacy in his or her temporary quarters.[67] In *Minnesota v. Olson*, the Court held that Olson's status as an overnight guest was, alone, reasonable and sufficient to give him

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61. *See, e.g.*, Commonwealth v. Porter, 923 N.E.2d 36, 45 (Mass. 2010) (holding that juvenile had legitimate expectation of privacy in room in homeless shelter even though not allowed in room between 9 a.m. and 3 p.m.; had to abide by strict curfew; the director had a master key; and director had the right to enter the room for professional purposes).

62. *See* Minnesota v. Olson, 495 U.S. 91, 99-100 (1990) (finding overnight guests entitled to Fourth Amendment protections in the home in which they stay); Stoner v. California, 376 U.S. 483, 490 (1964) (finding hotel patron entitled to Fourth Amendment protections against unreasonable searches and seizures); McDonald v. United States, 335 U.S. 451, 452, 456 (1948) (finding boarding house tenant entitled to Fourth Amendment protections in room he rented).

63. United States v. Murphy, 516 F.3d 1117, 1123 (9th Cir. 2008) (citing Georgia v. Randolph, 547 U.S. 103, 110 (2006)).

64. *Id.*

65. *Id.*

66. *Id.* (citing *Randolph*, 547 U.S. at 111).

67. *Olson*, 495 U.S. at 99-100.

standing to challenge the legality of the warrantless search of his host's home without exigent circumstances or consent by any of the residents.[68] The Court found no significance in the fact that Olson had never been left alone in his guest's house and had never been given a key.[69]

Few courts have had an opportunity to evaluate a minor's expectation of privacy at home without the involvement or consent of parents. The courts that have addressed the question have recognized the minor's right to Fourth Amendment protections.[70] Appellate courts in both Massachusetts and California have relied on the principles articulated in *Minnesota v. Olson* to conclude that minors have a legitimate expectation of privacy in the space identified as their home.[71] In *Commonwealth v. Porter*, the Massachusetts Appeals Court held that a minor had a legitimate expectation of privacy in a room he shared with his mother in a transitional family shelter and the police could not enter and search without a warrant.[72] Likewise, in affirming a minor's right to challenge the admissibility of evidence recovered from his sister's bedroom against him in trial, a California Court of Appeal reasoned in *Rudy F.* that all family members who regularly live in a house have standing to challenge state intrusion for the same reasons an overnight guest would if he were visiting the residence. The court concluded that

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68. *Id.*; *see also* Rakas v. Illinois, 439 U.S. 128, 142-43 (1978); *cf.* Jones v. United States, 362 U.S. 257, 261-64 (1960) (holding that conviction for possession of narcotics sufficed to grant petitioner standing to challenge legality of search), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

69. *Olson*, 495 U.S. at 98.

70. *See, e.g.*, *In re* Rudy F., 12 Cal. Rptr. 3d 483, 490 (Ct. App. 2004) (holding that minor had standing to challenge search of room in home that he shared with his sister); Commonwealth v. Porter, 923 N.E.2d 36, 45 (Mass. 2010); *see also In re* Welfare of B.R.K., 658 N.W.2d 565, 574-76 (Minn. 2003) (holding minor who was social guest in host's home had reasonable expectation of privacy in home to invoke Fourth Amendment protections to challenge warrantless search of host's home).

71. *Rudy F.*, 12 Cal. Rptr. 3d at 490 (holding minor had reasonable expectation of privacy in his sister's bedroom when he had access to the entire home and was not excluded from his sister's bedroom); *Porter*, 923 N.E.2d at 45 (holding minor had reasonable expectation of privacy in his room in a shelter although he was limited in his use of the room, and shelter staff members had master key and could enter the room for professional business purposes).

72. 923 N.E.2d at 44-47 (holding that consent of shelter's director could not justify search of the minor's room).

> all family members who reside in a home have a reasonable expectation of privacy from government intrusion in all areas of the home, even if internal familial rules restrict their use or access to certain areas. That some parts of a home may be the predominant domain of a particular family member does not diminish the expectation of privacy of other family members from government intrusion anywhere in the home. Family members do not ordinarily intend their internal rules and restrictions to set forth the bounds of privacy from government intervention.[73]

If the context of home calls for heightened—not reduced—protection for minors who have little or no property interest in the home, then further exploration of "widely held social expectations" about the parent-child relationship, parental authority, and diminished capacity of youth is required to understand the Supreme Court's proposed departure from Fourth Amendment protections for minors at home in the dicta in *Georgia v. Randolph*. The next sections explore the unique authority of parents to monitor and regulate the behavior of children as they deem appropriate and the presumption that minors need adult intervention because they lack the capacity and judgment to make good decisions on their own.

B. Parental Authority: Constitutional Rights and Obligations

1. Constitutional Right to Parental Autonomy

The notion of parental autonomy is so deeply embedded in American society that courts have recognized a constitutionally protected interest in parents' right to raise children as they deem appropriate with minimal government interference.[74] In a series of cases from the early twentieth century until now, the Supreme

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73. *Rudy F.*, 12 Cal. Rptr. 3d at 491-92 (quoting 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.3(a) (3d ed. 1996)).

74. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that Fourteenth Amendment Due Process protection of "liberty" includes right to "establish a home and bring up children").

Court has identified a fundamental right of parents to make decisions regarding the care, custody, and control of their children.[75] As the Court held in *Meyer v. Nebraska*, "the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children.'"[76] Thus, it is no surprise that the Supreme Court is in the habit of staying out of the affairs of the family and affords great deference to the parents' ability to act in the child's best interest.[77]

In *Troxel v. Granville*, the Court recently reiterated the importance of allowing parents to decide what is in their child's best interests, including the right to decide when and whether to permit visitation by others.[78] In concluding that a grandparent's visitation order imposed by the state court was an unconstitutional infringement on the mother's fundamental right to make decisions concerning the care and control of her two daughters, the Court explicitly accepted the historical presumption that the "natural bonds of affection lead parents to act in the best interests of their children."[79] The Court further acknowledged the absence of any finding or even allegation that the mother in *Troxel* was unfit.[80] As the Court stated, "so long as a parent adequately cares for his or her children ... there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[81]

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75. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest ... of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court." (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); *Meyer*, 262 U.S. at 399 (1923))).

76. *Troxel*, 530 U.S. at 65 (quoting *Meyer*, 262 U.S. at 399).

77. *See* Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) (Stevens, J., writing for himself and O'Connor, J.) (discussing parents' rights to give their children religious schooling and children's rights to receive schooling in another language as examples of "the private realm of family life which the state cannot enter" (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944))).

78. 530 U.S. at 68 (holding that Washington statute allowing court to award visitation to any person when visitation may serve best interest of child violated substantive due process rights of mother).

79. *Id.*

80. *Id.* (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

81. *Id.* at 68-69.

Rationales in support of parents' rights include the parents' personal fulfillment in raising a child in accord with their own values, interests, and morals, society's interest in having parents guide and instruct children, and society's interest in diversity that would be achieved by having each family raise children without monolithic dictates of the State on moral, religious, and political views.[82] As the Supreme Court noted in *Bellotti v. Baird*, "[t]he child is not the mere creature of the State," but is instead shaped and influenced by those who care for and nurture him.[83] Because society relies on parents to inculcate values, religious beliefs, and standards of good citizenship that help children grow into mature, socially responsible citizens,[84] "parents and others ... who have ... primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[85] Laws that require parental consent or parental involvement in important decisions by minors or that limit or restrict the child's right to make certain decisions, such as the right to marry, vote, and view sexually explicit materials, not only aid parents in childrearing but also protect youth from adverse governmental action and from their own immaturity.[86] Again, as the Court noted in *Bellotti*, "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in free society meaningful and rewarding."[87] Thus, both legislative and judicial deference to parental control and instruction prepares children to live independently and advances individual freedoms and liberty in society.

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82. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 637-38 (1979) (plurality opinion).

83. *Id.* at 637 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

84. *Id.* at 637-38; Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

85. Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding prohibition on sale of obscene materials to children under seventeen).

86. *Bellotti*, 443 U.S. at 635-37; *see also Ginsberg*, 390 U.S. at 638-39; *In re* Hildebrant, 548 N.W.2d 715, 716 (Mich. Ct. App. 1996) (discussing the presumption that children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct as the basis of statutory rape laws). For statutory examples, see, for example, MASS. GEN. LAWS ANN. ch. 207, §§ 7, 24, 25, 33A (West 1958 & Supp. 1979) (requiring parental consent for marriage of person under eighteen).

87. *Bellotti*, 443 U.S. at 638-39.

Notions of parental authority include both a right and a duty—that is, a duty to control the conduct of their children.[88] States depend on parents to ensure that children do not interfere with the right of others to live freely and safely in society.[89] Parental liability laws impose a legal obligation on parents to "exercise reasonable care, supervision, protection, and control" and are intended to "safeguard children from those influences which would tend to cause them to become delinquent."[90] Parents who do not fulfill this obligation may be held financially or criminally responsible for a child's misconduct.[91]

Recognition that parents have a duty to monitor and control children's behavior may provide some justification for the authority of parents to consent to a search of the child's bedroom or other private or quasi-private space set aside for the child in the home. In the few state cases that have evaluated the parents' authority to consent in the child's absence, courts generally presume that the parents' authority as head of the household gives them full access to the entire space, including bedrooms, clothes, and closets set aside for the child.[92] Thus, when a child is not home to object, police may reasonably assume that parents have common authority to permit a search of any part of the home or property within. For example, in validating a mother's consent to search her son's bedroom, an Illinois court noted that "implicit in the rights and

88. *See, e.g.*, CAL. PENAL CODE § 272(a)(2) (West 2011); CAL. FAM. CODE § 3900 (West 2011).

89. *See* sources cited *supra* note 88.

90. *E.g.*, Brekke v. Wills, 23 Cal. Rptr. 3d 609, 618 (Ct. App. 2005) (quoting People v. Calkins, 119 P.2d 142, 144 (Cal. Dist. Ct. App. 1941)).

91. *See, e.g.*, CAL. PEN. CODE § 490.5(b) (West 2011) (theft); CAL. CIV. CODE § 1714.1 (West 2011) (willful torts); CAL. GOV. CODE § 38772(b) (West 2011) (graffiti); CAL. EDUC. CODE § 48904 (West 2011) (school injuries and property damage).

92. *See, e.g.*, Wimberly v. State, 934 So. 2d 411, 430 (Ala. Crim. App. 2005) (holding that a mother can consent to a search of her minor son's room because her rights are superior to those of a child); Speagle v. State, 458 S.E.2d 852, 854 (Ga. Ct. App. 1995) (finding in dicta that officers reasonably relied on mother's consent to search adult son's room because she appeared to have reasonable control of property); *In re* Salyer, 358 N.E.2d 1333, 1334-35, 1337 (Ill. App. Ct. 1977) (upholding a mother's consent to search her fifteen-year-old son's bedroom even though he kept it locked); *In re* Tariq A-R-Y, 701 A.2d 691, 696 (Md. 1997) (holding that mother had authority to consent to search of minor son's vest in common area of house); Jacobs v. State, 681 S.W.2d 119, 122 (Tex. App. 1984) (holding that minor had no reasonable expectation of privacy in his bedroom because his mother had a right to be in his bedroom and could consent to the search).

duties imposed upon a parent [is] the right to exert parental authority and control over a minor son's surroundings and that such implied right to control obviously includes a room in the home of the mother ... [including] the room occupied by her 15-year-old child."[93] In Maryland, the court of appeals held that a mother had authority to consent to the search of her son's vest left in the common area of the house because she was the head of the household, or in the alternative, a co-tenant or common resident of jointly occupied property.[94] Courts also presume that children assume the risk that parents will have access to all rooms and property within the family home. Thus, in Arizona, the court of appeals concluded that parents gave valid consent to search a child's detached bedroom because the child assumed the risk that the parents would exercise full authority over their home.[95]

Each of the rationales in favor of parental authority may explain or justify a child's reduced expectation of privacy in the home, but all of the rationales have limits. Thus, although many state courts have held that the role of parents within the home gives them greater authority to consent to a search of the child's private space in the child's absence, at least one state court has held that parents have no special or unique authority to consent to a search of a minor's property that is locked and wholly inaccessible to the parent.[96] In *Scott K*, the California Supreme Court held that a father could not validly consent to a search of his minor son's locked toolbox because he had no shared authority over or access to the toolbox and therefore did not meet the *Matlock* common authority standard.[97] The toolbox unequivocally belonged to the son; the box was locked; the son had the key; and the father did not buy the box for the son.[98] Further, although the father had borrowed tools, he had never opened the box himself, but had always received the tools

93. *Salyer*, 358 N.E.2d at 1336.

94. *Tariq*, 701 A.2d at 695-97.

95. State v. Maximo, 821 P.2d 1379, 1383 (Ariz. Ct. App. 1991).

96. *See In re* Scott K., 595 P.2d 105, 107, 110 (Cal. 1979); *see also In re* Joe R., 612 P.2d 927, 936-37 (Cal. 1980) (acknowledging the rule set forth in *Scott* but holding that the rule did not apply retroactively).

97. *Scott K.*, 595 P.2d at 110-11 (discussing United States v. Matlock, 415 U.S. 164, 171 (1974)).

98. *Id.* at 107, 111.

directly from the son.[99] In affirming the rights of children in the home, the California court stated that "[j]uveniles are entitled to 'acquire and hold property, real and personal' ... and 'a minor child's property is his own ... not that of his parents.'"[100] The court's analysis reveals at least some support for limiting the scope of parental authority and recognizing the minor's right to shield property from State inspection. The U.S. Supreme Court has also had occasion to articulate more general limits on the breadth of parental authority as discussed below.

2. Limits on Parental Rights

Parents' constitutional rights have been largely carved out in education, religion, and foreign language cases that attempt to resolve a conflict between the parent and the State. In each of these cases, the child appears to be in agreement with the parent or at least does not articulate an objection to the parent's view.[101] In *Troxel*, for example, there was no indication that the daughters disagreed with their mother's objection to the visitation order sought by the grandparents.[102] Likewise, there was no apparent conflict between the parent and the child in *Pierce v. Society of Sisters*, which struck down a statute requiring all children to attend public schools,[103] or in *Meyer v. Nebraska*, which struck down a statute that prohibited teaching the German language to minors as an unreasonable interference with the "liberty of parents and guardians to direct the upbringing and education of children under their control."[104] Similarly, in *Wisconsin v. Yoder*, the Court overturned the convictions of Amish parents who violated the State's

99. *Id.* at 109 n.7.

100. *Id.* at 111 (quoting Emery v. Emery, 289 P.2d 218, 225 (Cal. 1955); *In re* Tetsubumi Yano's Estate, 206 P. 995, 997 (Cal. 1922)).

101. Wisconsin v. Yoder, 406 U.S. 205, 231 n.21 (1972) (considering Amish child explicitly in agreement with home schooling); Prince v. Massachusetts, 321 U.S. 158, 162 (1944) (considering nine-year-old voluntarily distributing leaflets).

102. Troxel v. Granville, 530 U.S. 57 (2000).

103. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925). *But see* Parham v. J.R., 442 U.S. 584, 603-04 (1979) ("We cannot assume that the result in *Meyer v. Nebraska* ... and *Pierce v. Society of Sisters* ... would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church school.").

104. *Pierce*, 268 U.S. at 534-35; Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

compulsory school attendance law when they allowed Amish youth to stop attending school after eighth grade.[105] The *Yoder* Court affirmed the rights of parents under the Free Exercise Clause of the First Amendment and explicitly noted that the children had not expressed a desire to attend school when their parents wanted them to drop out.[106] The Court made clear that the "holding in no way determines the proper resolution of possible competing interests" among the parent, the child, and the State.[107]

Although parents' rights often prevail in competition with the State, parents' rights are not without limits and must be weighed against the rights and well-being of the minor.[108] To the extent that deference to parental authority is rooted in a presumption that parents know what is best and will act in the best interest of their children,[109] that presumption may be overcome by evidence of harm to the child,[110] the risk of error in the parents' judgment, or conflicts in the home that likely undermine the ability of parents to act in their child's best interest. In *Prince v. Massachusetts*, for example, the Supreme Court found a reasonable restriction in a child labor statute prohibiting young Jehovah's Witness children from preaching and distributing leaflets in the street.[111] The Court concluded that the parents' freedom of religion and right to raise children as they desire were superseded by society's general interest in the well-being of the child.[112] In *Parham v. J.R.*, concerns about the risk of error in a parent's decision to commit a child to a mental institution

105. 406 U.S. 205, 234 (1972).

106. *Id.* at 213-31.

107. *Id.* at 231.

108. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 632 (1979) (plurality opinion) (discussing the district court's framing of the abortion legislation as a competition of parents' rights and children's rights and not as one of the best interests of the child in Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[F]amily itself is not beyond regulation in the public interest ... [a]nd neither rights of religion nor rights of parenthood are beyond limitation."); *see also* Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955, 977-81 (2010).

109. *See* Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 149 (2000).

110. Ouellette, *supra* note 108, at 978-99 (discussing medical cases regulating parents' imposition of unnecessary or harmful medical care on children to serve the parents' own interests).

111. 321 U.S. at 170.

112. *Id.* at 166-70.

prevented the Court from endorsing unfettered discretion for parents.[113]

Interestingly, the debate at issue in *Parham* came to the Court's attention not as a claim by the parents but instead at the behest of a class of minors who claimed that Georgia laws allowing parents to admit a minor child voluntarily to a mental hospital deprived them of their liberty without due process.[114] As in many of the parental rights cases, the Court readily endorsed a presumption that parents act in the best interests of their children.[115] The Court cited "[w]estern civilization concepts of the family as a unit with broad parental authority over minor children" and reiterated its mantra that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."[116] Thus, although the Court acknowledged that children have a substantial and protectable liberty interest in avoiding unnecessary confinement in a mental institution and erroneous stigma associated with that confinement, the Court concluded that parents retain a "substantial, if not dominant, role in the decision [to commit], absent a finding of neglect or abuse."[117]

Notwithstanding its deference to parental authority and duty, the Court recognized that the risk of error inherent in the parents' decision to institutionalize a child is sufficiently great that some kind of inquiry should be made by a neutral and detached factfinder to determine whether admission and commitment are warranted.[118] The Court explicitly declined to give parents an absolute and unreviewable discretion to institutionalize a child for mental health care.[119] In deciding what process was due to protect the child from an erroneous admission decision, the Court sought to avoid procedures that would impose high administrative costs for the state or that would discourage families from seeking needed mental health services, exacerbate tensions between the child and the parent, and

113. 442 U.S. 584, 598-617 (1979).

114. *Id.* at 587-88.

115. *Id.* at 602.

116. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); *Prince*, 321 U.S. at 166; Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

117. *Parham*, 442 U.S. at 600-01, 604.

118. *Id.* at 606, 616.

119. *Id.* at 603-04 (discussing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)).

impair the parent's ability to help the child complete treatment.[120] Ultimately, the Court upheld the Georgia statute and was unwilling to require more involved judicial procedures when the child disagreed with the parents' decision.[121] The Court was satisfied that Georgia's procedures authorized admission only after "careful diagnostic medical inquiry," independent judgment by an admitting physician, and periodic review of the child's continuing need for commitment.[122] On the other hand, the Court was not swayed by the appellee's arguments that the likelihood of parental abuse and the magnitude of the child's constitutional rights are such that a full adversarial hearing prior to voluntary commitment was warranted.[123]

The Court was more willing to impose more comprehensive judicial procedures to protect the fundamental rights of minors in the abortion context. Acknowledging a greater risk of conflict and tension in the family relationship when abortion is considered, the Court concluded in *Bellotti v. Baird* that society's interest in safeguarding parental authority and preserving family unity was outweighed by the rights of mature minors to obtain an abortion without their parents' consent.[124] In *Planned Parenthood of Central Missouri v. Danforth*, the Court reasoned that affirming parental authority would do little to reestablish unity in the house when the family is already in crisis.[125] The Court noted:

> It is difficult ... to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the

120. *Id.* at 605-10.

121. *Id.* at 603-04.

122. *Id.* at 606-07, 613 (noting that at admission a doctor must inquire into the child's background using all available sources, including the parents, schools, other social agencies, and the child).

123. *Id.* at 602.

124. 443 U.S. 622, 647 (1979) (plurality opinion); *see also* Troxel v. Granville, 530 U.S. 57 at 90-91 (2000) (Stevens, J., dissenting) ("[W]e have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.").

125. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976).

> minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.[126]

As is evident from this discussion, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[127] Although the Court has opined in dicta on more than one occasion that "a child, by virtue of his age, has no right to freedom but only a right to custody since he is presumably under constant parental control,"[128] the Court has not always subordinated the rights of children to those of the parents and has never granted parents absolute, unfettered authority to expose children to harm or completely abrogate their fundamental rights. In mediating conflict between the rights and interests of children and their parents, the Court has often imposed procedural safeguards that vary with the nature of the interest at stake and has recognized the maturity of some minors to make their own decisions and protect their own interests. The next Section considers the relevance of child and adolescent capacity in the evaluation of minors' rights.

C. Capacity and the Mature Minor Doctrine

Parental authority cannot be easily disentangled from concerns about the diminished capacity of youth in many children's rights and parents' rights cases. The Supreme Court's deference to parental authority grows not only out of respect for the individual autonomy and liberty interests of parents to raise children in accord with their own beliefs and morals but also out of a recognition that because minors often lack the capacity to make thoughtful and informed decisions for themselves, they need the guidance or direction of an experienced and mature adult. Thus, in *Parham v. J.R.*,

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126. *Id.*

127. *Bellotti*, 443 U.S. at 633; *see also In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

128. Lanes v. State, 767 S.W.2d 789, 797 (Tex. Crim. App. 1989); *see also* Schall v. Martin, 467 U.S. 253, 265 (1984); *Gault*, 387 U.S. at 17.

the Court noted that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[129] The Court further concluded that because "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment," parents must make those decisions for them.[130]

Given its concerns about diminished capacity of youth, the Court has consistently recognized the State's need to adjust its legal system to account for the unique role of the family and the vulnerability and special needs of the minor.[131] In evaluating the rights of pregnant minors to secure an abortion, the Court in *Bellotti v. Baird* acknowledged a need for flexibility in the application of constitutional principles and identified three justifications for concluding that the constitutional rights of children cannot be equated with adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[132] Because immature minors often "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them" and the capacity to make informed decisions that take into account short- and long-term consequences,[133] the Court concluded that states have a constitutionally permissible interest in encouraging an unmarried pregnant minor to seek the help and advice of her parents through parental notification and consent statutes.[134]

Notwithstanding the Court's repeated affirmation of the need for parental guidance, that need was easily overshadowed by the fundamental nature and gravity of the liberty interest at stake in the minor's decision to abort a pregnancy. Expressing concern about

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129. 442 U.S. 584, 602 (1979).

130. *Id.* at 603.

131. *See Bellotti*, 443 U.S. at 633-35 (plurality opinion); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) (holding that jury trial is not required for a juvenile); *Gault*, 387 U.S. at 30 (recognizing that juvenile courts do not have to "conform with all of the requirements of a criminal trial").

132. 443 U.S. at 634.

133. *Id.* at 635.

134. *Id.* at 639-41.

the finality and temporal urgency of the abortion decision, the Court ultimately concluded that although

> deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[135]

The Court held that if a state does require a pregnant minor to obtain consent from a parent, it must also provide an alternative procedure whereby a competent and mature minor can obtain approval for the abortion from a juvenile court judge or an administrative agency or officer.[136] This approach ensures the minor will talk with a parent or other adult, but does not give the parent ultimate authority or veto over the minor's decision.

The minor's maturity clearly weighed heavily in the Court's attempt to mediate the conflict between parents' rights and children's rights in the abortion context. Presumably as the child matures, the child's need for adult guidance decreases. As the Court noted in *Danforth*, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[137] Thus, if the child shows that she is "mature enough and well enough informed" to understand the procedure and to make an intelligent assessment of her circumstances, she is entitled to exercise her right to an abortion without interference by her parents.[138] This "mature minor" doctrine reflects a developmental model of children's rights that accounts for the evolving capacity of minors to exercise their own rights.

Emily Buss has referred to the right of minors to make important decisions that affect them as a decisional or "autonomy right."[139] In

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135. *Id.* at 642-43 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

136. *Id.* at 643 & n.22.

137. 428 U.S. at 74.

138. *Bellotti*, 443 U.S. at 643.

139. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 36 (defining autonomy rights as "rights to make decisions for oneself").

an attempt to resolve the competition among the State, parent, and child over the developmental control of minors, Professor Buss argues that a child's decisional autonomy should prevail when the minor demonstrates a capacity to initiate choice and the potential harm arising from the available choices is minimal.[140] In the abortion context, for example, a minor who initiates an abortion by seeking out a medical facility on her own has clearly exhibited the basic competence and capacity to make decisions for herself.[141] Given the minor's understanding of her own developmental needs and likely recognition of the long-term consequences of teen motherhood, the minor's self-initiated decision to abort is due considerable respect by society. Buss contends that allowing children to make choices in childhood will facilitate their development of decision-making skills, enhance their sense of identity, and increase their competence as rights-holders in the future.[142] Ultimately society benefits when children are allowed to exercise rights and choices that enhance their development, especially when the risk of harm is low.[143]

Child and adolescent capacity is an important consideration in any examination of the Fourth Amendment protections owed to minors. Children are not mere automatons, subject to the will and authority of their parents. When important liberty interests are at stake, parental authority should be considered in context and weighed against the capacity of minors to safeguard their own rights and interests. The next Part of this Article returns to an examination of the competition between parental rights and adolescent autonomy in the home and draws upon the principles of context, parental authority, and capacity.

II. *GEORGIA V. RANDOLPH*: WHERE PARENTAL AUTHORITY MEETS CONTEXT AND CAPACITY

The doctrine of third-party consent provides a useful lens through which to analyze the Fourth Amendment rights of minors at home and in conflict with the authority and duty of their parents. Consent

140. *Id.* at 34-45.
141. *Id.* at 37.
142. *Id.* at 35.
143. *Id.* at 35-36.

is a well-established exception to both the warrant and probable cause requirements of the Fourth Amendment.[144] As long as consent is freely given by a lawful occupant, the police may enter even the sacred space of the home.[145] The third-party consent doctrine allows an occupant who shares mutual use or control of the home to grant consent when other occupants are not present.[146] Thus, when two people choose to live together, each occupant is presumed to have common authority "in his own right" to invite others onto the property, and each is presumed to have "assumed the risk" that his co-tenants will admit visitors, including the State, in his absence.[147] *Georgia v. Randolph* modifies that doctrine to recognize that an occupant can no longer be said to have assumed the risk that his co-tenants will allow others to enter when he is physically present and objecting.[148]

As is common in other Fourth Amendment cases, the *Randolph* Court recognized the reasonableness of the officers' conduct as the linchpin of any Fourth Amendment inquiry.[149] When the police rely on third-party consent, the Court will consider not only the owner's subjective expectation of privacy in the place or property searched but also society's willingness to accept that expectation as reasonable.[150] In holding that a wife could not validly consent to the warrantless search of her home when her co-tenant husband was physically present and objecting, the Court concluded that the officers' reliance on the consent of one tenant in direct opposition to another, presumptively equal, co-tenant was unreasonable.[151] The Court's respect for the rights of the objecting tenant in *Randolph* was rooted in a belief that members of the household should work out disagreements on their own and that consent is only valid when all tenants standing before the officer are in accord.[152] As the Court stated, "when people living together disagree over the use of their

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

145. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

146. United States v. Matlock, 415 U.S. 164, 171 (1974).

147. *Id.* at 171 n.7.

148. *See* 547 U.S. 103, 113-14 (2006).

149. *Id.* at 111; *see also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1995); California v. Ciraolo, 476 U.S. 207, 211 (1986).

150. *Randolph*, 547 U.S. at 111.

151. *Id.* at 114-15.

152. *Id.* at 113-14.

common quarters, a resolution must come through voluntary accommodation."[153] A categorical rule like the one in *Randolph* prevents police from having to resolve disputes between the husband and wife and renders the officer's entry and search presumptively unreasonable when one spouse is physically present and objecting.[154]

Most germane to the inquiry here, however, is the Court's dicta in *Randolph,* which suggests that the Court would not extend the *Randolph* rule when the occupants have the relationship of parent and minor child.[155] Again, as is common in other Fourth Amendment analyses, the *Randolph* Court looked outside of the constitutional text in its evaluation of social expectations regarding the privacy of adult occupants in the home.[156] However, because it reflected on the status of minors only in passing, the Court did not identify a source for what it refers to as the "recognized hierarchy" of superior and inferior in a household of parent and child.[157]

This Article assumes that the Court's understanding of "widely shared social expectations" in the parent-child dyad emanates from the guiding principles articulated in the children's rights and parents' rights cases discussed in Part I.[158] Yet Part II contends that the application of those principles to the narrow context of *Georgia v. Randolph* provides no principled or coherent justification for denying the benefits of the *Randolph* rule to mature minors. In reaching this conclusion, this Part offers a more nuanced view of the nature and importance of the child's privacy interest in the home by drawing upon research in developmental psychology, examining parents' evolving respect for the privacy of minors as they mature, and considering how society benefits from respecting the privacy of minors at home. Part II also recognizes that because parental authority may be affirmed and supported in other ways, there is relatively little justification for undermining the important interests and benefits that are gained by protecting the rights of mature

153. *Id.*

154. *Id.* at 106.

155. *Id.* at 114.

156. *Id.* at 114-16; *see also* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 107 (2008) (citing Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)).

157. *Randolph*, 547 U.S. at 114.

158. *Id.* at 111.

minors. Part II goes on to challenge the presumption that minors lack the capacity to regulate their interactions with the police.

A. The Randolph *Context: Nature of the Privacy Interest*

1. Freedom from State Intrusion

The purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against unreasonable or arbitrary governmental invasions.[159] This provision, which "protects people, not places,"[160] confers on the individual a right to be left alone—at least by the government.[161] At its core, a police search into the private or even quasi-private space set aside for children in the home constitutes State action, even when the search is invited or facilitated by a parent. Thus, although the parent's consent to search over the child's express objection clearly evokes a competition between the will and the rights of family members, it would not be wholly accurate to cast this debate as one of parent versus child. As the Court recognized in the mental health context, although it is the parent who voluntarily admits a child to a mental institution, the procedures that make the admission possible clearly invoke State action or "constitutional control" over parental discretion.[162] Likewise, in the school context, the Court in *New Jersey v. T.L.O.* declined to characterize school administrators as mere surrogates acting pursuant to a delegation of rights and authority by the parent.[163] The principal in *T.L.O.* was indisputably a State actor when he facilitated the search of the student's purse.[164]

Home is a sacred space for both children and adults. Like adults, children need a place to retreat from the public and to avoid

159. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (citing Camera v. Mun. Ct., 387 U.S. 523, 528 (1967)).

160. Katz v. United States, 389 U.S. 347, 351 (1967) (holding wiretapping of public phone booth unconstitutional absent probable cause).

161. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz*, 389 U.S. 347 *and* Berger v. New York, 388 U.S. 41 (1967).

162. Parham v. J.R., 442 U.S. 584, 590-91, 603 (1979).

163. 469 U.S. at 336-37 (rejecting the idea that school officials could claim "the parents' immunity from the strictures of the Fourth Amendment").

164. *Id.* at 336.

scrutiny by others.[165] As noted in Part I, the entry of police into a home, for whatever purpose, represents the greatest governmental intrusion into an individual's privacy and "is the chief evil against which the wording of the Fourth Amendment is directed."[166] Because privacy in the home is accorded such special deference, generally the State may not enter a home without a warrant, even if there is probable cause to believe a crime is being committed or a criminal is hiding within.[167] The level of intrusion into the private living space is no less severe for a minor than an adult. The child's bedroom, closet, and other locked space in the home make up the child's only zone of privacy. Developmental psychologists have identified this zone as important in fostering personal identity, encouraging competence, and promoting security and trust by the child.[168]

In the *Georgia v. Randolph* paradigm, the child's need for privacy and desire to exclude the State from his private space is not diminished by the parents' need to regulate the child's behavior or the authority of parents to set rules within the home. The distinction between the parent's right to enter and regulate the child's room and the State's right to enter cannot be missed. As the Court noted in *Minnesota v. Olson*, the overnight guest "seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside."[169] Although acknowl-

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165. *See* Kyllo v. United States, 533 U.S. 27, 37 (2001) (asserting that in view of the "sanctity of the home ... *all* details [in the home] are intimate details, because the entire area is held safe from prying government eyes"); United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting) (stating that the home is a "shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle" (citing Max Radin, *The Rivalry of Common-Law and Civil Law Ideas in American Colonies*, *in* 2 LAW: A CENTURY OF PROGRESS, 1835-1935, 404 at 423-27 (Jean B. Barr & David Silve eds., 1937) (referencing the history of the phrase "an Englishman's house is his castle"))).

166. Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972)); *see also* Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970).

167. *See* United States v. Karo, 468 U.S. 705, 714 (1984) (holding that the government could not monitor a beeper within a private residence without a warrant, probable cause, or reasonable suspicion); Michigan v. Clifford, 464 U.S. 287, 292-93 (1984) (reaffirming reasonable expectation of privacy in fire-damaged premises).

168. Cindy J. Weigel-Garrey, Christine C. Cook & Mary Jane Brotherson, *Children and Privacy: Choice, Control, and Access in Home Environments,* 19 J. FAM. ISSUES 43, 46 (1998).

169. 495 U.S. 91, 99 (1990).

edging that a "host" always retains a superior right to admit or exclude others from the house as he prefers, the Court made clear that the existence of a legitimate privacy interest cannot turn on the power to admit or exclude other civilians from the property.[170] The Court in dicta analogized the interest of an overnight guest to the protected privacy interest of an adult daughter living in her parents' home.[171] Even when parents retain the power to exclude the daughter's guests or to invite others the daughter would prefer to exclude from the home, the daughter still retains an expectation of privacy from unwarranted State intrusion.[172] Like the adult husband in *Randolph* and the adult daughter in *Olson*, the minor who expressly objects to the officer's search of his or her bedroom or other private space intuitively perceives a fundamental interest in security and shelter from the State that should be respected. As explored in the next Section, privacy becomes central to the minor's identity and development at a very young age.

2. Psychological Import of Fourth Amendment Protections for Minors

Although social consensus—not psychological understandings of privacy—determines the legal zone of privacy, expectations and consensus necessarily evolve out of common psychological experiences.[173] Thus, a psychological examination of the meaning of privacy for minors is relevant and informative. Psychological concepts of privacy and security are intuitive at very early ages and then nurtured and supported by the family and society as the child matures.[174] Infants are weaned from the parents' bedroom very early on; families with sufficient wealth have separate rooms for their children; and parents encourage children to spend time

170. *Id*. at 99-100.

171. *Id*.

172. *Id*.

173. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641 (2009) (stating that the reasonableness of the teen's privacy expectation was indicated by the "consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifie[d] the patent intrusiveness of the exposure").

174. Weigel-Garrey et al., *supra* note 168, at 43 ("Independence, privacy, and physical distance from others are generally valued by mainstream American culture, and children typically are encouraged to become independent almost from birth.").

alone.[175] As children mature, they are allowed to close the door to their bedrooms, and parents choose to knock before entering.[176]

Children experience and achieve privacy through control over their bodies, physical space, and territory,[177] and a child's home provides one of the earliest opportunities to create and experience a private space.[178] Privacy in the home and elsewhere is measured by the child's ability to avoid unwanted interaction with others and to control the nature of the interactions he does have.[179] Even children who live in homes without a private bedroom may create privacy in bathrooms, unclaimed areas of the home, or constructed enclosures created by the youth.[180] A couch in a living room may therefore become a private space for a poor inner-city child.

Of course, normative restrictions on privacy for minors may be warranted when society seeks to balance the child's right to be let alone with the need for parents and other adults to supervise and protect the child.[181] Parents and society may limit a child's choice about privacy to ensure the youth is not engaged in behavior that society finds harmful or offensive.[182] In one of the few articles that examines both legal and psychological aspects of minors' privacy, Gary Melton writes:

> [T]enuous application of privacy rights to minors is apparently based on doubts that they really are autonomous persons whose physical and psychological integrity is worthy of protection. Such ambivalence about minors' personhood is based further on assumptions that minors are typically incompetent decision makers who are incapable of free choice and who consequently are not full members of the moral community.[183]

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175. *Id.*

176. Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 490 (1983).

177. *Id.* at 458; Weigel-Garrey et al., *supra* note 168, at 43-45.

178. Weigel-Garrey, *supra* note 168, at 44, 47.

179. *Id.* at 45.

180. *Id.* at 47, 54-55; *see also* Melton, *supra* note 176, at 491 ("[S]paces which suburban, middle-class people may regard as public may take on meaning as 'private' places for inner-city, lower-class children.").

181. Melton, *supra* note 176, at 460-63.

182. *Id.* at 489; *see also* Weigel-Garrey et al., *supra* note 168, at 55.

183. Melton, *supra* note 176, at 493.

Given the concerns identified by Melton, privacy rights for minors may require an evaluation of the minor's competence and capacity to exercise private and independent decisions.[184] Similar to the analytic framework advanced by Professor Buss, Melton also suggests that the recognition of both legal and factual privacy rights for minors involves a balancing of the benefits of privacy to the minor, including dignity, self-esteem, and enhanced legal socialization, with the potential harm of misbehavior, which may be shielded by privacy of the child's space and information.[185]

Research on adolescent development and privacy suggests that children negotiate privacy with their parents over time. As the child matures, the need for supervision diminishes and the child's desire and opportunities for privacy increase. Thus, any proposed bright-line rule denying the child a right to exclude police from his bedroom contrary to the parents' consent would not adequately account for the evolving dynamics in the parent-child relationship. Notwithstanding the primarily hierarchical nature of the parent-child dyad, there is relatively little justification for allowing police to intervene in the family dispute when mature minors have begun to negotiate private space within the family home and the State has given parents other tools to safeguard and affirm their authority.[186] Accordingly, although a categorical rule may be warranted when police confront adults at the threshold of a home, police may be called upon to summarily assess the minor's maturity to consent when presented with a parent and child who disagree. Albeit more burdensome than a bright-line rule, police and courts are repeatedly required and adequately equipped to assess the minor's capacity in consent cases involving a minor.[187]

3. Societal Interest in Respecting Minors' Privacy in the Home

As noted above, research suggests that privacy plays an important role in the child's maturation and development of self-identity,

184. *Id.* at 489-90.

185. *Id.*

186. *See infra* notes 201-04 and accompanying text for discussion of alternative means of safeguarding the parental authority.

187. *See infra* notes 242-45 and accompanying text for discussion of police assessment of a minors' capacity to consent to search.

self-differentiation, and autonomy.[188] As youth mature, both family and society have an interest in ensuring that minors are ready and able to participate in society.[189] Society ensures that children become healthy and independent citizens not only by affirming and supporting parental control and guidance over minors but also by allowing children to have experiences with privacy, self-determination, and the exercise of rights.[190]

There is an especially important value in helping children understand that they have rights independent of adults in the criminal and juvenile justice context. Since the Supreme Court's seminal ruling in *In re Gault*,[191] courts have consistently recognized that children have a right to counsel, protection from custodial interrogation without procedural safeguards, privilege against self-incrimination, freedom from unreasonable searches of their person, and a right to confront witnesses against them at trial.[192] However, children are often asked to waive these important rights without the aid of a lawyer, parent, or other loyal and interested advocate. As a result, when children find themselves in one-on-one encounters with the police, including police interrogations and searches, they must understand that adults generally, and the State in particular, cannot violate their rights simply because of their status as a minor.

Reinforcing rights not only protects children against unlawful invasions and coercive interrogations, but ultimately protects the entire family. When police request permission to search the home in the parents' absence, the child must understand that he has a right to deny the police entry and protect the family's privacy. At the extreme, the child must also understand that his right to physical safety must prevail over the parents' rights. Most obviously, parents cannot sexually or physically abuse children simply because they have "authority."

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188. Melton, *supra* note 176, at 460; Weigel-Garrey et al., *supra* note 168, at 44, 47.

189. *See* Bellotti v. Baird, 443 U.S. 622, 638-39 (1929) (justifying restrictions on minors by suggesting they can facilitate minors' meaningful social participation).

190. Weigel-Garrey et al., *supra* note 168, at 44-45.

191. 387 U.S. 1, 33, 41, 55-56 (1967) (establishing the rights of notice, counsel, confrontation cross-examination and protection against self-incrimination).

192. *See* Breed v. Jones, 421 U.S. 519, 541 (1975) (establishing double jeopardy protections); *In re* Winship, 397 U.S. 358, 368 (1970) (establishing proof beyond a reasonable doubt).

The affirmation of children's privacy rights not only advances societal interests, but a threat to those rights may also undermine the child's respect for the independence and privacy of others and foster bitterness in the child. In the criminal and delinquency context, children often come to understand notions of law, liberty, justice, and fairness through experience with law enforcement and other key players in the juvenile justice system.[193] Evidence suggests that when children perceive legal rules, procedures, and actors as unfair and overly paternalistic, they will have less respect for the law and legal authorities.[194] On the other hand, when a child believes the legal system has treated him with fairness, respect, and dignity, he is more inclined to accept responsibility for his conduct and to engage in the process of reform.[195] Judge White of the Texas Court of Appeals summarized it well when he wrote:

> Children have the strongest sense of justice .... Such an inherent sense of justice, however, is fragile and can easily be turned to cynicism, helplessness, disillusionment and disrespect. Not only would such an attitude be contra-rehabilitative, but it could breed dissention and reactionary criminal behavior.... Even a juvenile who has violated the law but is unfairly arrested will feel deceived and thus resist any rehabilitative efforts.... Inherent in youth is a malleable nature, and example can be the most formidable teacher.... Affording a child the essentials of basic human dignity and announcing a respect for their autonomy through the extension of constitutional privacy protections can only further these efforts.[196]

193. Kristin N. Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence To Define the Lawyer's Role and Build Alliances that Aid the Child Client*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 411, 411-13 (Marjorie A. Silver ed., 2007).

194. *See In re* Amendment to the Rules of Juvenile Procedure, 804 So. 2d 1206, 1211 (Fla. 2001); *see also* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 44-47 (1999).

195. *In re Amendment,* 804 So. 2d at 1211; Winick, *supra* note 194, at 44-47.

196. Lanes v. State, 767 S.W.2d 789, 795-96 (Tex. Crim. App. 1989) (citing *Gault*, 387 U.S. at 51 (affirming Fourth Amendment privacy rights of minors in delinquency cases); New Jersey v. T.L.O., 469 U.S. 325, 372-75 (1985) (Stevens, J., dissenting); Schall v. Martin, 467 U.S. 253, 290-91 (1984) (Marshall, J., dissenting)).

B. Parental Authority in the Home: Scope, Limits, and Alternatives

The most compelling argument in favor of police reliance on parental consent over the child's objection is the parental duty to monitor and regulate the behavior of children. By virtue of the weighty obligation that society imposes on parents through parental liability and other laws and norms, arguably parents should not only be permitted, but also required, to exercise authority over children and their private space within the home. As one California appellate court noted following the dicta in *Georgia v. Randolph*, "[t]o fulfill their duty of supervision, parents must be empowered to authorize police to search the family home, even over the objection of their minor children."[197] Although it is certainly appropriate to ensure that parents have the support of the State in fulfilling their duty of parental control, the California ruling and others like it go too far in giving parents an absolute veto over children's rights.

Even in *Georgia v. Randolph*, the Court readily acknowledged the wife's important interests in bringing criminal activity to light. For example, she may want to deflect police suspicion away from herself or ensure the safety of her children by having the police remove her husband's drugs from the home.[198] However, the Court immediately countered with alternatives available to the wife short of violating the husband's Fourth Amendment privileges. The wife may deliver incriminating evidence to the police, provide the police with information to secure a warrant, or in the extreme, seek a divorce or temporary restraining order.[199]

Likewise, parents are not without recourse in dealing with a child who is suspected of delinquent behavior or poses a risk of danger to others in the home. The police are always free to enter the home to seize the child or contraband possessed by the child if there are exigent circumstances such as hot pursuit, imminent destruction of

197. *In re* D.C., 115 Cal. Rptr. 3d 837, 846 (Ct. App. 2010) (holding that because of the unique nature of the rights and duties of parents with respect to their children, *Randolph* does not require the police to defer to an objecting minor child over a consent to search by his or her parent).

198. 547 U.S. 103, 115-16 (2006).

199. *Id.* at 116-18.

evidence, or risk of danger to the police or others inside the home.[200] In addition, not only may the parent remove drugs from the child's bedroom and provide police with information to support a warrant, but virtually every state also allows the parent to initiate an "unruly" or "Child in Need of Supervision" (CHINS) complaint in juvenile court.[201] If the CHINS petition is sustained, the parent and the child will have access to services such as drug treatment, counseling, and even residential placement.[202] The choice between a parent's consent to a search over her child's objection and the parent's delivery of evidence to the police for a warrant or CHINS petition may appear to be a meaningless distinction, but each of the latter alternatives provide parents with tools they need to exercise their authority while simultaneously protecting the child's right to due process and preserving the integrity of the child's relationship to the State.[203]

Although the Supreme Court granted substantial deference to parents seeking to commit a child to a mental institution[204] and hoped to encourage pregnant minors to consult with their parents before an abortion,[205] in both instances the Court was unwilling to grant the parent absolute, unreviewable rights.[206] It would be difficult to characterize parental consent to search over the child's express and contemporaneous objection as anything other than an absolute veto. A police entry in these circumstances is facilitated by nothing more than parental approval—whether motivated by real suspicion, simple curiosity, the best interest of the child, or more

200. *See* Cupp v. Murphy, 412 U.S. 291, 296 (1973); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); United States v. Rabinowitz, 339 U.S. 56, 60 (1950) (search incident to arrest), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

201. *See, e.g.*, CAL. WELF. & INST. CODE, § 601 (West 2008); COLO. REV. STAT. § 19-1-102 (West, Westlaw through 2011); D.C. CODE § 16-2301 (West, Westlaw through 2011); GA. CODE. ANN. § 15-11-2(12) (West, Westlaw through 2010); 705 ILL. COMP. STAT. ANN. § 405/3-33.5 (West 2011); MONT. CODE ANN. § 41-5-103(51) (West, Westlaw through 2009); N.J. STAT. ANN. § 2A:4A-22 (West, Westlaw through 2011) (interpreted in *In re* Interest of J.G., 547 A.2d 336 (N.J. Ch. 1988)); N.Y. FAM. CT. ACT §§ 712, 732-33 (McKinney 1999 & Supp. 2011); OHIO REV. CODE ANN. § 2151.022 (West Supp. 2010).

202. *See* sources cited *supra* note 201.

203. *Cf. Randolph*, 547 U.S. at 116-17 (recognizing that a tenant can satisfy his interests in exposing criminal activity to the police without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search of his property).

204. Parham v. J.R., 442 U.S. 584, 600-01, 604 (1979).

205. Bellotti v. Baird, 443 U.S. 622, 639-41 (1979).

206. *Id.* at 642-43; *Parham*, 442 U.S. at 603-04.

sinister objectives by the parent. Even in *Parham v. J.R.*, in which the Court voiced its highest confidence in the parents' intent to act in the best interest of the child, the Court recognized a need to guard against the risk of error that could lead to unnecessary hospitalization and stigma inherent in the decision to commit.[207]

In third-party consent cases, the concern is not the risk that an officer's search will not turn up contraband but the cost associated with compromising the minor's evolving understanding of privacy and appreciation of individual rights—both his own and others—as set forth in the previous Section.[208] A warrant or other alternatives available to the parents provide adequate procedural safeguards for the child's interests without unduly burdening the State or discouraging parents from seeking help. The warrant requirement presents no greater imposition on the State when a minor rather than an adult is involved, and a CHINS petition will generally require only minimal screening from a probation officer or prosecuting authority.

As long as parental authority can be bolstered by other means, the rationale for denying a child the protections articulated in *Randolph* is not convincing. Moreover, reliance on a warrant or another procedural mechanism has the added benefit of situating decision making in the hands of those who best understand the advantages and disadvantages of prosecution in the juvenile and criminal justice systems. As discussed throughout this Article, the Court's deference to parental authority is largely rooted in the assumption that parents act in the best interest of the child.[209] When parents do not or cannot act in the child's best interest, however, deference to parents may not be warranted.

Much like the teen pregnancy context, families with children suspected of crime or delinquency are often in tension and conflict. Research in adolescent development suggests that families with delinquent children have higher rates of conflict and emotional turmoil than other families.[210] Delinquency is also associated with poor parent-child ties and a history of psychological or mental

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207. *Parham*, 442 U.S. at 606-09.

208. *See supra* Part II.A.2.

209. *See, e.g.*, *supra* notes 116-17 and accompanying text.

210. Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 848-51 (2006) (reviewing literature on familial causes of delinquency).

health problems in the home.[211] When law enforcement becomes involved, parents experience a range of emotions, including fear, anxiety, shame, guilt, and disappointment.[212] Parents, who often achieve their own status and recognition through the achievements and failures of their children, may be angry and embarrassed when the police arrive at the home and request permission to search.[213] Further, although there is presumptively little reason to doubt the motives and judgment of parents in matters of education, religion, and visitation, it may be unwise to presume a unity of interests between parents and children in the contexts of crime and delinquency. Parents' motives may be compromised by fear of their own arrest, eviction from public housing, neglect proceedings for failing to protect other youth in the home, or criminal charges for contributing to the delinquency of a minor.[214] Thus, the very duty and liability that requires parents to monitor and regulate the behavior of minors creates a potential for conflict in the parents' judgment. As the Court concluded that parents' control of abortion decisions would not restore order,[215] it would be equally unreasonable to assume that granting parents unfettered control over police access to a child's private space or property would restore order and authority in the home.[216] To the contrary, the child may be hurt, embarrassed, or traumatized by the parent's failure to protect him from police invasion and exacerbate existing tensions in the family.

Even without obvious tension or conflict in the home, parents may not be in a suitable position to decide what is best for the child in the delinquency or criminal context. As I have argued elsewhere, parents confronted with the possibility that a child is engaged in illicit behavior may be eager to have the police intervene without understanding the alternatives available, such as counseling or

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211. *Id.* at 849.

212. *Id.*; *see also* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogatories: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1296 (2004).

213. Henning, *supra* note 210, at 849.

214. *Id.* at 856-64 (reviewing range of penal, financial, and other consequences that may be imposed on parent of delinquent child).

215. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976).

216. *See* Henning, *supra* note 210, at 850, 856-57 (discussing risk of mental, physical, and emotional burden on parents and further deterioration of family relationship when child is involved in justice system).

community-based access to drug treatment.[217] More important, parents may also fail to recognize that a law enforcement search of a child's bedroom is rarely conducted to improve the child's health or welfare. Instead it is typically initiated to determine whether the child is involved in criminal activity and to collect contraband or evidence that may be used against him in a juvenile court proceeding.[218] In addition, parents who hope to secure rehabilitative services for the child or to teach the child a moral lesson too often have an exaggerated view of what the juvenile justice system can achieve by way of treatment and rehabilitation and have limited knowledge of the long-term negative consequences associated with involvement in the court.[219]

Today, even a single arrest can label a child as a delinquent to teachers, parents, employers, and law enforcement officers.[220] Worse, delinquent youth could face inclusion on sex offender registries, transfer for prosecution in adult criminal court, eviction from public housing, expulsion from school, and other stigma that could limit the child's educational or employment goals and subject him to further police surveillance or unwarranted arrests.[221] Many youth also experience considerable psychological trauma in detention, while others face peer pressure to conform to the behavior of older youth in the juvenile justice system. As the Supreme Court recognized in *Schall v. Martin*, "the impressionability of juveniles may make the experience of incarceration more injurious ... all too quickly juveniles subjected to ... detention come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'"[222] Further, as the Court of Criminal Appeals of Texas recognized, "[d]etention can be extremely destructive to a child's life and act as a determinative factor toward recidivism."[223]

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217. *See supra* note 204 and accompanying text.

218. Henning, *supra* note 210, at 851-52.

219. *Id*. at 850-51.

220. Lanes v. State, 767 S.W.2d 789, 796 (Tex. Crim. App. 1989) (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545-47 (1971)).

221. *Id*. at 796; *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 557 (2004).

222. 467 U.S. 253, 291 (1984) (Marshall, J., dissenting).

223. *Lanes*, 767 S.W.2d at 796.

Given the many detrimental consequences that may follow police intervention after the parents' consent to search, as well as the existence of alternatives that maintain parental authority while preserving the child's privacy vis-à-vis the State, the Court's dicta in *Randolph* gives too much deference to parents. This conclusion is further supported by courts' long-standing recognition that minors have the capacity to consent to a search of their and their parents' property as explored in the next Section.

C. The Minor's Capacity and Authority To Consent

The serious outcomes that often accompany a police search of a child's space or property in the home provide considerable justification for deference to those minors who exhibit some capacity to safeguard their own rights and interests. The very act of objecting is the type of independent conduct that signals maturity, self-identity, and autonomy, and that justifies recognition of a child's capacity and rights.[224] A child who has the foresight to object to the police intrusion has likely taken into account the long-term consequences associated with arrest, prosecution, and adjudication. Moreover, because parents are always free to encourage—and even coerce—the child to consent, as long as they are not acting as an agent of the State, the child may also take the parent's views into consideration.

Professor Buss's framework of decisional autonomy may be particularly suited to this context where the degree of harm associated with the child's refusal to consent may be contained or ameliorated by other strategies to meet the needs of troubled youth.[225] Unlike the immediate and irreversible consequences of the abortion decision,[226] a child's exclusion of police from his bedroom may deny the state immediate access to contraband, but it does not leave the parent or police without recourse.[227] If, as noted above, no exigent circumstances justify the officer's warrantless entry into the home,

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224. *See* Buss, *supra* note 139, at 40 ("[C]hildren will only self-initiate [take independent action in furtherance of the right] if they have a high level of conviction (and perhaps sophistication) about the exercise of the right.").

225. *See id.* at 34-45.

226. *See* Bellotti v. Baird, 443 U.S. 622, 642-43 (1979).

227. *See supra* notes 202-04 and accompanying text.

the parent may seek State intervention through appropriate judicial mechanisms or community-based treatment alternatives. Although contraband may be destroyed in the interim, these are trade-offs American society has always been willing to accept to ensure privacy and autonomy—at least for adults—in the most respected place of the home.[228] In addition, evidence suggests that most youth will age out of delinquent behavior by late adolescence and few will persist in a lifetime of crime and delinquency.[229] Thus, the long-term harm of adolescent illicit behavior is significantly reduced.

State and federal courts have long factored capacity into third-party consent analysis involving minors. Based on these court rulings, it simply cannot be said that all youth lack the capacity to make decisions about whether to grant or deny police entry into the home. Courts have repeatedly held that mature minors have the capacity to consent to a search, not only of their own property, but also to a search of the family home and property within.[230] Although the third-party consent doctrine has largely developed in cases involving adults,[231] a brief survey of third-party consent cases involving minors and their parents reveals few per se rules and reaffirms the principle that the resolution of conflicts between adults and children may vary according to the minor's capacity to consent.

In traditional third-party consent analysis, each occupant has authority in his own right to grant or deny admission to the space that is available for the mutual use or control of all.[232] The validity and scope of the child's common authority within the home is most often tested when a parent challenges the seizure of evidence from the family home after a child consents to a police search in the parent's absence. Although courts have adopted widely varying

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228. *See* Melton, *supra* note 176, at 489 ("On the other hand, minors are not necessarily recognized as autonomous, and both parents and the state have been accorded considerable authority to 'protect' adolescents from themselves.").

229. Henning, *supra* note 221, at 539 (discussing research on adolescent development and trajectory of delinquency).

230. *See infra* notes 241-50 and accompanying text.

231. *See supra* notes 145-55 and accompanying text.

232. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); *see also* United States v. Rith, 164 F.3d 1323, 1329 (10th Cir. 1999) (holding that a woman who was held against her will in defendant's residence for two months could give her consent to search the residence (citing United States v. McAlpine, 919 F.2d 1461 (10th Cir. 1990))).

approaches in evaluating the authority of minors to consent, most courts have found that at least mature minors have sufficient common authority to consent to a police search of common areas in the home.[233] Only one state, Montana, presumptively rejects the consent of a minor under sixteen to search the parent's home due to enhanced privacy protections under the state constitution.[234]

Although some jurisdictions consider the totality of the circumstances,[235] others, such as the Sixth Circuit, have found a presumptive validity in the consent of a mature minor.[236] As the Sixth Circuit noted, "there is every reason to suppose that mature family members possess the authority to admit police to look about the family residence, since in common experience family members have the run of the house."[237] Applying the common authority test from *Matlock*, the court held that absent a "clearly manifested ... expectation of exclusivity,"[238] "all rooms in the residence can be said to be areas of usage common to all members of the family."[239] The third-party consent doctrine

> does not rest upon the law of property ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[240]

In evaluating common authority under the totality of the circumstances, courts will consider the minor's age and mutual use

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233. *See infra* notes 241-51 and accompanying text.

234. *See* State v. Schwarz, 136 P.3d 989, 992 (Mont. 2006) (establishing the per se rule that minors under sixteen do not have the capacity or authority to relinquish their parents' privacy rights); *see also* State v. Ellis, 210 P.3d 144, 156 (Mont. 2009) (holding that the defendant's thirteen-year-old daughter could not give valid consent to search of her bedroom in her father's residence after a police officer responded to a report that the defendant had sexually assaulted the daughter).

235. *See infra* notes 241-45 and accompanying text.

236. *See* United States v. Clutter, 914 F.2d 775, 778 (6th Cir. 1990).

237. *Id.* at 777.

238. *Id.* at 778.

239. *Id.* at 777.

240. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

of the property, the minor's right of access to the premises to be searched, the minor's right to invite others onto the property, and whether the officers acted reasonably in believing the minor was of an age at which he or she could be expected to exercise at least minimal discretion and had sufficient control over the premises to give a valid consent to the search.[241] Some courts will also attempt to determine whether the child understands the consequences of the right to privacy held by the child's parents.[242] Courts have held that minors ranging in ages from eight to sixteen have the authority and capacity to consent to a warrantless search when they live in and have unrestricted access to the property.[243] Even the Supreme Court

241. *See, e.g.*, People v. Hoxter, 75 Cal. App. 4th 406, 413-14 (1999) (holding that sixteen-year-old had authority to consent to search of her parents' home when she engaged in conduct consistent with her authority over the property, such as supervising the conduct of her younger sister and twice inviting the officers to enter); Saavedra v. State, 622 So. 2d 952, 958 (Fla. 1993) (holding that fifteen-year-old minor could validly consent to search parents' home when he had a key and shared common household duties); Davis v. State, 422 S.E.2d 546, 549 (Ga. 1992) (holding that, under the four-part test, a ten-year-old child home alone for ninety minutes "had *no* right, absent an emergency, to invite anyone into the house while he was alone there, much less into his parents' bedroom"); Atkins v. State, 325 S.E.2d 388, 390-91 (Ga. App. 1984) (applying a four-part test and finding defendant's seventeen-year-old brother's consent to search valid), *aff'd*, 331 S.E.2d 597 (Ga. 1985); *see also* People v. Jacobs, 729 P.2d 757, 764 (Cal. 1987) (holding that eleven-year-old did not have authority to consent to search of her parents' home but acknowledging that "[a]s a child advances in age she acquires greater discretion to admit visitors on her own authority").

242. Abdella v. O'Toole, 343 F. Supp. 2d 129, 136-37 (D. Conn. 2004) (holding that there was no factual basis to support that an eleven-year-old had authority to consent to a search of her parents' house).

243. *See, e.g.*, Lenz v. Winburn, 51 F.3d 1540, 1549 (11th Cir. 1995) (holding that eight-year-old had authority to consent to her guardian ad litem's entry into her grandparents' home because she effectively resided with the grandparents and had free access to the living room); State v. Lotton, 527 N.W.2d 840, 844 (Minn. Ct. App. 1995) (finding valid consent by ten-year-old); *see also* United States v. Sanchez, 608 F.3d 685, 689 (10th Cir. 2010) (holding that fifteen-year-old had authority to consent to search of parents' house because she lived there full time and had unrestricted access); United States v. Clutter, 914 F.2d 775, 778 (6th Cir. 1990) (holding that defendant's two teenaged sons could give valid consent to search defendant's house and bedrooms); United States v. Gutierrez-Hermosillo, 142 F.3d 1225, 1231 (10th Cir. 1989) (upholding fourteen-year-old's consent for police to enter motel room she shared with her father); United States v. Mathis, 377 F. Supp. 2d 640, 644-45 (M.D. Tenn. 2005) (holding that sixteen-year-old had the authority to consent to search of father's house if he shared the living quarters and was frequently left in charge of the house); Allen v. State, 44 So. 3d 525, 532-33 (Ala. Crim. App. 2009) (adopting rule that minors can give third-party consent and holding that, according to the *Atkins* factors, a seventeen-year-old's consent was valid); State v. Tomlinson, 2002 WI 91, ¶ 33, 648 N.W.2d 367, 377 (holding that officers could reasonably conclude that a high-school-aged child would have some authority to allow limited entry into the family home).

in *Randolph*, acknowledged that "a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted."[244]

As evident in this brief survey, the minor's maturity and apparent cognitive capacity has factored heavily into the validity of the minor's consent, and most courts have rejected the idea that minors categorically lack the capacity to consent to a search of the family home.[245] Recognizing that legal sophistication is not necessary for an appreciation of the privacy interest, the Eleventh Circuit has concluded that minors need not be presumed incapable of consenting.[246] At the threshold of a residence, police may inquire of the minor's age and assess the minor's maturity in preliminary conversation. On review, the courts may evaluate the voluntariness of the minor's consent by considering factors such as the age, vulnerability, maturity, intelligence, and education of the consenting minor.[247] The younger and less mature the child, the less likely the court is to find that the child gave valid consent and understood the consequences of consenting to the search.[248] However, even a younger child may demonstrate voluntariness through his or her actions, including inviting officers into the home and freely showing them around the dwelling.[249]

In contrast to the many courts that have found mature minors have authority to consent, some judges have taken issue with the application of third-party consent rules originally designed for adult

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244. 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), but speculating that "no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom").

245. *See Lenz*, 51 F.3d at 1548-49.

246. *Id.*

247. *Id.*; *see also* People v. Hoxter, 89 Cal. Rptr. 2d 259, 265 (Ct. App. 1999) (holding that sixteen-year-old could reasonably give consent due to her age and mature conduct).

248. *See, e.g.*, United States v. Barkovitz, 29 F. Supp. 2d 411, 413-16 (E.D. Mich. 1998) (holding that twelve-year-old lacked actual and apparent authority to consent, and consent was not voluntary given disparity in age, size, and maturity between twelve-year-old and officer); Davis v. State, 422 S.E.2d 546, 549-50 (Ga. 1992) (holding that ten-year-old did not give valid consent when he showed immaturity and naivety).

249. *See, e.g.*, *Lenz*, 51 F.3d at 1549 (collapsing the voluntariness and common authority analyses and holding eight-year-old's consent to search grandmother's house by a guardian ad litem was voluntary).

relationships to those involving children. In a concurrence, Judge Carlos Lucero expressed dismay over the Tenth Circuit's application of the third-party consent reasoning to consenting minors in the home.[250] Referencing the Supreme Court's dicta in *Randolph*, Lucero contended that although children do often have control of the parent's home when they are left alone, "one normally assumes that a minor child is *not* allowed to invite guests into the home absent a parent's approval."[251] Instead, he contended, a minor's authority over the home is "dependent upon and limited by a parental grant of responsibility."[252] Although Judge Lucero would not impose a per se ban on third-party consent by minors in the family home, he argued for a default presumption that a minor who answers the door lacks the authority to consent to a search of the home.[253] Only when the government can demonstrate that parents gave the child permission to invite guests will the presumption be overcome.[254]

Notwithstanding the concerns voiced by Judge Lucero and a minority of state courts,[255] the third-party consent doctrine generally does not ask courts to inquire whether the absent occupant has given express permission for other tenants to authorize the police search.[256] Further, 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.[257] It would be disingenuous for courts to construct a bright-line rule that all minors lack the capacity and authority to exclude

250. United States v. Sanchez, 608 F.3d 685, 692-98 (10th Cir. 2010) (Lucero, J., concurring).

251. *Id.* at 694.

252. *Id.*

253. *Id.* at 697-98.

254. *Id.* at 698; *see also* People v. Jacobs, 729 P.2d 757, 762-63 (Cal. 1987) (finding that eleven-year-old child's consent to police search of parents' home was invalid and noting that "parent has not surrendered his privacy of place in the living room to the discretion of the ... child; rather, the latter [has] privacy of place there in the discretion of the former" (quoting Lloyd Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 60 (1974))); Commonwealth v. Garcia, 387 A.2d 46, 55 (Pa. 1978) (holding that sixteen-year-old's consent to search of her mother's home was ineffective because the minor did not have dominion over home equal to that of the mother, and the mother had the power to determine extent of the minor's authority to admit people to the house).

255. *See supra* note 249.

256. Matlock v. United States, 415 U.S. 164, 171 (1974).

257. *See* Lenz v. Winburn, 51 F.3d 1540, 1549 (11th Cir. 1995).

the police in the face of parental consent given the many cases in which the courts have admitted incriminating evidence against the child or the parent after validating the child's consent to search.[258] Although police may benefit from a bright-line rule that allows parental consent to override the minor's objection, a case-by-case determination of maturity is exactly what the courts have asked the police to do in other third-party consent cases. If the child appears to be of a certain age, can understand and articulate consent, seems to have unrestricted access to the home, and is left alone with responsibilities in the house, courts have consistently upheld the minor's consent as valid.[259]

It is worth noting that adult children are generally afforded greater privacy than minors in areas set aside for them in their parents' homes. Thus, parents are not generally found to have superior authority or even sufficient common authority to consent to a search of areas set aside for the exclusive use or control of an adult child.[260] Most courts evaluate these cases with a totality of circumstances test that considers the age of the adult child, any explicit agreements between the adult child and the parent, the frequency of the parents' presence in the room to clean or visit with the adult child, and the adult child's effort to keep his bedroom locked.[261] Adult children who have established a landlord-tenant

258. *See* cases cited *supra* note 245.

259. *See supra* note 243.

260. *See* United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (holding that parent could not give permission to search her adult son's locked footlocker in his bedroom); People v. Daniels, 93 Cal. Rptr. 628, 631 (Ct. App. 1971) (holding that mother could consent to search of adult son's bedroom and dresser but not a suitcase); People v. Egan, 58 Cal. Rptr. 627, 629-30 (Ct. App. 1967) (holding that stepfather's consent to search did not apply to the content of his adult stepson's bag); State v. Harris, 642 A.2d 1242, 1248 (Del. Super. Ct. 1993) (holding that mother had the authority to search her adult son's room but not a locked toolbox to which she did not have a key); State v. Miyasato, 805 So. 2d 818, 821 (Fl. Dist. Ct. App. 2001) (holding that mother could not consent to search of son's desk drawer); Brown v. State, 358 So. 2d 1004, 1005 (Miss. 1978) (holding that mother validly consented to search of adult defendant's dirty clothes hamper in kitchen); People v. Snipe, 841 N.Y.S.2d 763, 768 (Sup. Ct. 2007) (holding that mother could not consent to a search of a padlocked closet that contained her adult son's personal items). *But see* Colbert v. Commonwealth, 43 S.W.3d 777, 783 (Ky. 2001) (holding that mother had superior property interest in home that allowed her to search her adult son's room for weapons).

261. *See, e.g.*, Reeves v. State, 807 So. 2d 18, 34 (Ala. Crim. App. 2000) (holding that a mother clearly had the authority to consent to the search of her eighteen-year-old son's bedroom); State v. Vinuya, 32 P.3d 116, 131-32 (Haw. Ct. App. 2001) (holding that mother could not consent to search of adult son's bedroom because he kept it locked and prevented

relationship with their parents are generally afforded greater protections than adult children who remain dependent on parents for shelter and living expenses.[262] Both before and after *Randolph*, state courts have been generally unwilling to honor the consent of a parent or guardian over the express objection of an adult child living in the parents' home.[263] In these cases, the adult child is treated as a joint or co-tenant of equal status as the parent. The few pre-*Randolph* cases that have upheld the consent of a parent over the express objection of an adult child may no longer be valid.

Because minors do not achieve adulthood overnight, there is considerable justification for the evolving recognition of rights for minors as they mature and are afforded greater privacy in the family home. Thus, application of the mature minor doctrine to the *Randolph* context would be more faithful to the principle of capacity followed in other children's rights cases and would give minors an opportunity to develop decision-making skills and increase their capacity to safeguard their own rights in the future.

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other family members from entering even when he was in the house); State v. Ham, 744 P.2d 133, 135 (Idaho Ct. App. 1987) (holding that mother could consent to search adult son's bedroom because she had regular access to the room); Huspon v. State, 545 N.E.2d 1078, 1081-82 (Ind. 1989) (holding that mother had authority to consent to son's bedroom search because he lived there rent-free).

262. *See* United States v. Rith, 164 F.3d 1323, 1331 (10th Cir. 1999) (stating the fact that the adult child did not pay rent supported the presumption of the parent's control over the child's room); State v. Brown, 558 So. 2d 1054, 1058 (Fla. Dist. Ct. App. 1990) (holding that mother could consent to search of her adult son's room because she paid his living expenses and he submitted to her rules); Howard v. State, 427 S.E.2d 96, 97 (Ga. Ct. App. 1993) (holding that mother could consent to a search of her adult son's bedroom because he did not pay any rent or contribute to any living expenses); *Huspon*, 545 N.E.2d at 1081-82 (holding that mother had sufficient authority to consent to search adult child's bedroom because he lived there rent-free and shared the room).

263. Martin v. United States, 952 A.2d 181, 188 (D.C. 2008) (holding that mother's consent did not override adult son's refusal to consent to search); Shingles v. State, 872 So. 2d 434, 438 (Fla. Dist. Ct. App. 2004) (holding a search illegal when grandmother gave consent but defendant was available and had already refused); Carter v. State, 762 So. 2d 1024, 1025-26 (Fla. Dist. Ct. App. 2000) (holding that parents' consent to search adult child's room is not controlling if child is present and objecting). *But see Rith*, 164 F.3d at 1323 (holding that parents have a presumption of control that allows them to consent to search over eighteen-year-old's protests); Vandenberg v. Superior Court, 87 Cal. Rptr. 876, 880 (Ct. App. 1970) (holding that parent could consent to search of bedroom shared with his adult son over his son's protests).

CONCLUSION

Although *Georgia v. Randolph* only directly implicates a small category of third-party consent cases involving adult tenants who are physically present and objecting to a police search, the Court's dicta concerning the parent-child hierarchy oversimplifies the analysis of children's rights in previous cases and has broader implications on the parent's authority to waive or abrogate the Fourth Amendment rights of children in any encounter with the police. Overreliance on the Court's long-standing deference to parental authority coupled with the Court's more recent dicta in *Randolph* has and will likely continue to distort state and federal courts' analysis of children's rights in competition with the rights and duties of parents.

In a search for continuity and coherence in Fourth Amendment jurisprudence involving minors, this Article identifies three guiding principles—context, parental authority, and the minor's capacity—that weave together children's rights cases and advocate for a more faithful and nuanced application of those principles in future cases. Although children have no expectation of privacy or constitutional authority to ward off a parent's inspection of their bedroom, closet, e-mail, or other computer exchange, a minor retains the greatest interest and protected right in avoiding the State's intrusion into their most intimate living space and private property. The principles of context and capacity provide a fair and reasonable balance to the dominance of parental authority in the evaluation of privacy rights for minors. Without such balance, complete deference to parental authority threatens to undermine children's privacy at every level. At its extreme, uncontained parental authority might even sanction a police search of the child's physical body over the child's express and vehement objection.

Although parental authority serves a valuable function in society, this Article contends that absolute, unreviewable authority is rarely, if ever, necessary or appropriate for parents. In the third-party consent context, for example, the State's legitimate interest in preserving the authority of parents to care for and discipline children may be satisfied without the severe intrusion of a warrantless police search over the child's objection. Parental

authority is not undermined by requiring parents to satisfy procedural hurdles, such as providing police with information and evidence to support a warrant, initiating a CHINS proceeding, or securing treatment and services from community-based or non-penal government providers. Further, deference to parents in decisions that affect their children presumes the existence of normal family relationships and the involvement of parents who are willing and able to act in the best interest of the child. Because research suggests that these presumptions may not be appropriate in the criminal or delinquency context due to preexisting family conflict, tension arising at the onset of suspected delinquent behavior, or exaggerated views by parents about what the juvenile justice system can accomplish with youth, the added safeguard of a warrant or other judicial review is needed when the rights of allegedly delinquent minors are at stake.

Finally, it is undeniable that some minors have the capacity to exercise rights and regulate their interactions with police. Recognizing a mature minor's right to privacy from the State in his parents' home—even over his parent's objection—comports with the evolving capacity of the child as a decision maker and recognizes the societal benefits that are achieved when children's privacy is protected. Considering the psychological importance of privacy to minors, the heightened protection generally afforded to the sanctity of the home, and the societal benefits of preparing mature minors to serve as trustees of their own rights, the State's interest in preserving parental authority does not provide a sufficiently compelling basis upon which to abrogate the right of a mature minor to refuse State examination of his private space and property at home.