American University Law Review

Volume 67 | Issue 5 Article 2

2018

The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment

Kristin N. Henning
Georgetown University, hennink@law.georgetown.edu

The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment

LEAD ARTICLE

THE REASONABLE BLACK CHILD: RACE, ADOLESCENCE, AND THE FOURTH AMENDMENT

KRISTIN HENNING*

Police contact with black youth is ubiquitous. Under the guise of reasonable articulable suspicion, police stop black youth on the vaguest of lookout descriptions—"black boys running," "two black males in jeans, one in a gray hoodie," "black male in athletic gear," and "black male with a bicycle." Young black males are treated as if they are "out of place" not only when they are in white, middle-class neighborhoods, but also when they are hanging out in public spaces or sitting on their own porches.

In this Article, Professor Henning seeks to reduce racial disparities in the juvenile and criminal justice systems by urging courts to modify the reasonable person standard that undergirds much of Fourth Amendment jurisprudence. Drawing upon recent advances in cognitive science and developmental research, this Article attempts to bring the search and seizure doctrine into line with what we now know about normal adolescent development, implicit racial bias, and contemporary relationships between black youth and the police. This Article explores four contexts in which the unique interplay between race and adolescence should alter current Fourth Amendment analysis—seizure, the consent-to-search doctrine, the officer's recitation of facts to support reasonable articulable suspicion for a stop, and the court's assignment of meaning to those facts.

Historically, courts have gauged the reasonableness of an officer's on-the-street

* Agnes N. Williams Research Professor of Law and Director, Juvenile Justice Clinic, *Georgetown Law.* I am grateful to Brittany Harwell and Jenadee Nanini for their excellent research assistance. I am also grateful to the many colleagues who reviewed earlier drafts of this Article in the Mid-Atlantic Criminal Law Research Collective and the faculty research workshop at the *George Washington University Law School.*

encounter with a youth against the same "reasonable person" standard applied to adults. However, in 2011, the Supreme Court announced a major shift in criminal justice jurisprudence when it held in J.D.B. v. North Carolina *that the test for determining whether a child was in "custody" for purposes of* Miranda v. Arizona *must be evaluated through the lens of a "reasonable juvenile" rather than a reasonable adult. Since then, several scholars have called for the extension of the reasonable child standard to other aspects of criminal law and procedure, including the Fourth Amendment. These shifts provide a critically important advance in criminal procedure, but may not go far enough to protect the rights of black youth who are disproportionately overrepresented in the juvenile justice system.*

To ensure adequate Fourth Amendment protection for black youth, Professor Henning argues that police and courts should be honest about how race and age affect every critical decision in the Fourth Amendment inquiry. To this end, it is incumbent upon police officers to better understand the nature of adolescent development and implicit racial bias and to develop more appropriate strategies for engaging black youth. It is equally incumbent upon reviewing courts to reject outdated assumptions about the meaning of "suspect" behavior—including flight from the police—and to rethink the limits of the reasonable person standard throughout the Fourth Amendment doctrine.

TABLE OF CONTENTS

INTRODUCTION

> In 2015, Andre, a fifteen-year-old black male was walking down the street with a friend, James, of the same age. There was no report of crime, and the boys were not engaged in any suspicious activity. Yet the police drove up next to them and asked them if they had heard any gunshots. When the boys said "no" and kept walking, the police asked them to "show me your waist." Both boys complied. Still unsatisfied, the police asked the boys for permission to search them, at which point either Andre or his friend said "yes." Four uniformed officers exited their marked police car, forced the boys against the wall, and frisked them. The police found a gun on Andre.[1]

Under the most common reading of the Fourth Amendment, the police conduct was lawful. A reviewing court would likely view the officer's initial request as a mere contact and the search as consensual.

1. Although "Andre" is a pseudonym, the factual scenario is real and was drawn from the police report of one of the many youths the author has represented in the last twenty-three years as a juvenile defense attorney and clinical law professor in Washington, DC.

But is this a fair and accurate interpretation of the interaction between Andre and the police? Would a reasonable black child in Andre's position really have felt free to ignore the officers or deny their request? Was the consent to search truly voluntary?

Now imagine that Andre had refused to cooperate. Imagine that Andre and James refused to look at the officers when they appeared in the block—or that they ran when the officers approached in a marked police car. The officers would likely characterize Andre's conduct as nervousness, furtive movement, or flight indicative of consciousness of guilt and sufficient to provide reasonable articulable suspicion to justify a stop. But would that be a fair evaluation of Andre's behavior? Would his refusal to cooperate—or even his flight—be fairly interpreted as consciousness of guilt?

The Fourth Amendment protects individuals like Andre from unreasonable searches and seizures.[2] Anytime the police restrain Andre's liberty in any significant way, they must justify that restraint with evidence of Andre's consent or with facts sufficient to demonstrate reasonable articulable suspicion to believe Andre was engaged in some kind of criminal conduct.[3] On review, the legality of the officers' interaction with Andre will be evaluated on a standard of reasonableness,[4] but the vantage point of reasonableness will fluctuate depending on the question posed. Reviewing courts will evaluate the seizure and consent-to-search inquiries from the lens of the person being seized and searched.[5] Thus, a court will decide whether Andre has been seized by asking whether a reasonable person in Andre's position would have felt free to leave.[6] A court will assess the validity of Andre's consent by asking whether a reasonable person in Andre's circumstance would have felt free to give or decline consent.[7] By contrast, courts will evaluate justifications for police intrusion from the lens of a reasonable police officer.[8] That is, a court will ask whether the

---

2. U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

3. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968).

4. *See id.* at 27–28 (explaining that the officer's search and seizure of the defendant must be reviewed for its reasonableness).

5. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

6. *Id.* (establishing the "free to leave" test).

7. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973) (holding that the test for reviewing whether a defendant's consent was voluntary is a totality of the circumstances test, which includes an analysis of the defendant's personal characteristics).

8. *Terry*, 392 U.S. at 21.

officers in the scenario above had reasonable articulable suspicion to believe Andre and his friend were engaged in some criminal activity.[9] The reasonableness of the officers' assessment will turn on the totality of the officers' observations as well as the commonsense judgments the officers make about the meaning of those observations.[10]

Historically, courts have gauged the reasonableness of a child's conduct and perceptions in the Fourth Amendment framework against the same "reasonable person" standard applied to adults.[11] Thus, in the synopsis above, courts would presume that Andre had the same freedom and capacity as an adult to ignore the police and walk away. Andre's flight and furtive gestures would also tend to convey an adult-like consciousness of guilt, or otherwise suggest that he had something to hide.[12] Recently, courts have begun to retreat from presumptions like these as they consider the commonsense conclusions that should be drawn about how *youth* think and behave.[13]

In 2011, the Supreme Court announced a major shift in criminal justice jurisprudence when it held in *J.D.B. v. North Carolina*[14] that the test for determining whether a child was in "custody"—and no longer free to terminate a police interrogation—for purposes of *Miranda v. Arizona*,[15] must be evaluated through the lens of a "reasonable child" rather than a reasonable adult.[16] Since then, several scholars have called for the extension of the reasonable child standard to other aspects of criminal law and procedure, including the courts' evaluation of a minor's mens rea and criminal responsibility, affirmative defenses,

---

9. *See id.* ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

10. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

11. Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for the Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012) (citing *In re* J.D.B., 686 S.E.2d 135, 140 (N.C. 2009)).

12. *See Wardlow*, 528 U.S. at 125 (reasoning that flight suggests guilt).

13. *See* Hoffman v. Saginaw Pub. Schs., No. 12–10354, 2012 WL 2450805, at *6 (E.D. Mich. June 27, 2012) (determining that youth is a relevant factor in a *Miranda* custody analysis) (quoting J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011)); *see also* Smith v. Clark, No. 2:11-cv-3312, 2013 WL 4409717, at *9–11 (E.D. Cal. Aug. 15, 2013) (acknowledging that age is now a relevant factor in a *Miranda* custody analysis, but not faulting the state court for not applying it as a factor before federal law was clear on the matter), *aff'd*, 612 F. App'x 418 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1464 (2016).

14. 564 U.S. 261 (2011).

15. 384 U.S. 436 (1966).

16. *J.D.B.*, 564 U.S. at 272.

waiver of the right to counsel, *Terry* stops, and consent to search among other critical Fourth Amendment questions.[17] These shifts provide a critically important advance in criminal procedure but may not go far enough to protect the rights of black youth who are disproportionately overrepresented in the juvenile justice system.

This Article urges courts to go further and consider the commonsense judgments and inferences that flow readily from the unique interplay between race and adolescence in a typical police-youth encounter. Specifically, this Article explores four contexts in which race and adolescence affect the Fourth Amendment analysis: (1) seizure; (2) the consent to search doctrine; (3) an officer's observation of facts that provide reasonable articulable suspicion to justify a stop; and (4) the assignment of meaning to those facts. To what extent does the child's race affect the objective assessment of whether a police-youth encounter ventures from a "contact" to a seizure? To what extent does the child's race affect the voluntariness of consent? To what extent should the child's race affect the officers' interpretation of a child's behavior in the reasonable articulable suspicion or probable cause analysis? In the encounter described above, few, if any, black boys in Andre's circumstances would have felt free to ignore the officer's intrusion.[18] Andre's age *and race* would necessarily affect the reasonableness of his perception about whether he was free to

---

17. *See, e.g.*, Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (2014) (calling for courts to "meaningfully consider age when deciding whether a minor gave consent"); Hilary B. Farber, J.D.B. v. North Carolina*: Ushering in a New "Age" of Custody Analysis Under* Miranda, 20 J.L. & POL'Y 117, 120 (2011) (discussing the impact of recent juvenile rights cases with respect to *Terry* stops, waiver of the right to counsel, and the attorney-client relationship); Lily N. Katz, *Tailoring Entrapment to the Adolescent Mind*, 18 U.C. DAVIS J. JUV. L. & POL'Y 94, 100 (2014) (arguing that for cases involving minors, entrapment should be evaluated from the perspective of an ordinary, law-abiding youth); Levick & Tierney, *supra* note 11, at 504 (asserting that the reasonable juvenile standard should be extended to other areas of criminal law); Shobha L. Mahadev, *Youth Matters:* Roper*,* Graham*,* J.D.B.*,* Miller*, and the New Juvenile Jurisprudence*, CHAMPION, Mar. 2014, at 14, 14 (advising defense attorneys to raise youth-centered arguments for juveniles in light of the Supreme Court's recent transformational decisions regarding youth and criminal procedure). *But see* Jonathan S. Carter, *You're Only as "Free to Leave" as You Feel: Police Encounters with Juveniles and the Trouble with Differential Standards for Investigatory Stops Under* In re I.R.T., 88 N.C. L. REV. 1389, 1391–92 (2010) (arguing that courts should not consider age in the seizure inquiry).

18. *See* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150–52 (2012) (arguing that race can influence one's perception of the world, and that "[a] young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground").

leave and disregard the police contact.

Several scholars have advocated for a reasonable African American standard in the Fourth Amendment context.[19] This Article advances that discourse by urging law enforcement officers and reviewing courts to consider the intersection of race and adolescence in the search and seizure analysis and incorporate the Supreme Court's evolving jurisprudence regarding a reasonable child standard into the Fourth Amendment framework. Part I of this Article surveys the Court's recent articulation of a reasonable child standard in criminal law and procedure and then advocates for an extension of that standard to the Fourth Amendment seizure analysis and consent-to-search doctrine. Recognizing that even a reasonable child standard may be inadequate to protect black youth from unreasonable police intrusions, Part I also considers the impact of race on the child's perception of his freedom to leave and the voluntariness of his consent. Part II draws upon race and adolescence to examine the adequacy of the reasonable articulable suspicion standard as a safeguard against arbitrary and unnecessary stops and frisks. This Part also explores the impact of implicit racial bias on police interpretations of innocuous and ambiguous behaviors as violent or aggressive and urges courts to abandon long-held, but inaccurate "commonsense judgments" about the meaning of behaviors such as flight and furtive gestures among adolescents, especially black adolescents, in contemporary police-youth encounters. Part III identifies likely objections to the consideration of race and age in the Fourth Amendment analysis and responds to them in turn. Part III concludes with suggestions for police reform, such as training on adolescent development, organizational commitment to developmentally appropriate policing, and less police involvement in school discipline.

I. THE REASONABLE PERSON IN THE FOURTH AMENDMENT ANALYSIS

Reasonableness undergirds every aspect of the search and seizure inquiry. In the plain language of the Fourth Amendment, the people have the right "to be secure in their persons, houses, papers, and

19. *See, e.g.*, Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 349 (1994) (arguing that courts should scrutinize racial factors when determining whether there was reasonable suspicion); Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry *Stops*, 6 MICH. J. RACE & L. 355, 356 (2001) (expanding Susskind's proposal to include flight in high-crime areas).

effects, against unreasonable searches and seizures."[20] Reasonableness in the Fourth Amendment context is largely—though not entirely—measured by an objective reasonable person standard.[21] The reasonable person standard has long been a prominent feature of the American common law,[22] providing a normative, objective measure by which we can determine the contours of negligence, recklessness, and liability in civil law and blameworthiness, excuse, and mitigation in criminal law.[23] It also allows us to regulate police conduct by identifying common perceptions and expectations in police-citizen encounters, such as searches, seizures, and interrogations.[24]

The reasonable person has been defined in criminal law as one who "possesses the intelligence, educational background, level of prudence, and temperament of an average person."[25] In tort law, the reasonable person has been defined as "a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others."[26] Originally labeled the "reasonable man,"[27] the objective reasonable person standard reflects the norms of dominant groups in society.[28] The reasonable person

---

20. U.S. CONST. amend IV.

21. *See* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 83 (2007) (analyzing the Supreme Court's reliance on objective and subjective standards in various Fourth Amendment doctrines).

22. Levick & Tierney, *supra* note 11, at 504 n.15 (noting that "[t]he reasonable person standard emerged in the common law during the first half of the nineteenth-century," and "[t]he concept appeared for the first time in both tort and the criminal law in the same year" (citing R. v. Kirkham (1837) 173 Eng. Rep. 422, 424 (stating that "the law . . . requires that [man] should exercise a reasonable control over his passions"))).

23. *Id.* at 501–06 (summarizing the use of the reasonable person standard in American law).

24. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 271 (2011) (explaining that a suspect is in custody if a reasonable person would have believed himself to be under formal arrest or retrained in her freedom of movement to the degree associated with formal arrest); Yarborough v. Alvarado, 541 U.S. 652, 662 (2004) (holding that a suspect is in custody for purposes of *Miranda* if, under the totality of the circumstances, a reasonable person would not feel free to end the encounter and leave); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

25. Levick & Tierney, *supra* note 11, at 505 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04 [B][3][b] (1987)).

26. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 283 cmt. B (AM. LAW INST. 1965)).

27. Kinports, *supra* note 21, at 73.

28. Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818–19 (1992) (observing that these dominant groups historically included "male dates").

is a fictitious character,[29] likely an adult white male—if for no other reason than he has been penned over time by judges and lawmakers who are predominately white and male.[30]

A. Race, Adolescence, and Seizure

In analyzing the legality of an officer's on-the-street encounter with a civilian, courts will first call upon the reasonable man in deciding whether the Fourth Amendment has even been implicated—that is, whether a person has been seized.[31] As the Supreme Court articulated in *United States v. Mendenhall*[32]: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[33] Not every police-citizen encounter involves a seizure. A casual encounter escalates into a seizure only when an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[34] In determining whether there has been a show of authority sufficient to indicate a stop, the courts may consider the officer's tone of voice, the time of day, the location of the encounter, the number of police officers present, any physical contact with the suspect, and the officer's display of weapons.[35] Police officers may identify themselves as an officer and engage with an individual on the street as long as they do not convey that compliance is required.[36]

---

29. Levick & Tierney, *supra* note 11, at 504–05.

30. *See* Lee, *supra* note 18, at 1150 (2012) (noting that "a reasonableness standard can mask the fact that what the law considers reasonable is often just what those in positions of authority consider to be reasonable"); *see also* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 n.3 (2000) (finding that, as of 2000, "African Americans comprise only 3.3% of the judges on our nation's federal, state, and local courts" and "[o]ver 90% of all federal appellate judges are white"); Nia Malika-Henderson, *White Men Are 31 Percent of the American Population. They Hold 65 Percent of All Elected Offices*, WASH. POST (Oct. 8, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/08/65-percent-of-all-american-elected-officials-are-white-men.

31. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

32. 446 U.S. 544 (1980).

33. *Id.* at 554.

34. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

35. *Mendenhall*, 446 U.S. at 554–55.

36. Florida v. Bostick, 501 U.S. 429, 434–35 (1991); *see also* Florida v. Royer, 460 U.S. 491, 497 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal

A police-citizen encounter that is consensual—and not required by the police—does not implicate the Fourth Amendment.[37] These consensual encounters or "contacts" do not require warrants, probable cause, or reasonable articulable suspicion.[38] The seminal question is whether the person knew he was free to leave when he agreed to engage with the officer.[39]

Let us turn again to Andre, and consider whether a reasonable person in Andre's position would have believed he was free to leave when approached by four uniformed officers in a marked police car. The Supreme Court assumes that any person approached by the police "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way."[40] If the Court is right, a reasonable adult might rationally conclude that the disadvantages of engaging with the officers (e.g., the risk of arrest) outweigh any advantages of that engagement (e.g., a false belief that "acting innocent" and being cooperative will dispel the officers' suspicion). An adult who values his privacy and resents the officers' intrusion might also refuse to engage as a way of preserving his own dignity; and an adult with some familiarity with the law might understand that the officers have no authority to command his compliance and that indeed, he is free to go about his business.[41] Although this is a comforting allusion for the Court, it has little support in psychology. As many commentators have noted, in reality very few people—adult or child—feel free to walk away from an officer's questions without consequences.[42] Research finding

---

prosecution his voluntary answers to such questions.").

37. *Bostick*, 501 U.S. at 434.

38. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1 (4th ed. 2004).

39. *Mendenhall*, 446 U.S. at 554.

40. *Royer*, 460 U.S. at 498.

41. *Cf.* James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 441 (1993) (explaining that people who know their rights and would otherwise exercise them are in a "Catch 22" because not complying "may cause police to escalate the intrusiveness of the encounter and place the citizen at risk of both physical harm and formal arrest").

42. *See* John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114 (2007) (exploring cases and studies in depth and questioning whether citizens really ever give voluntary consent given the psychological and social pressures that accompany a police-citizen encounter); Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1207–08 (2008) (discussing psychological studies that suggest that the inherently coercive nature of a police-citizen encounter pressures the majority of adult citizens to acquiesce to demands by police); *see also* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for*

that people tend to "interpret questions or suggestions as orders when they come from a person of authority" confirms that many people feel compelled to cooperate with police.[43]

This compulsion to comply is exacerbated for youth like Andre. Youth are not only socialized to comply with adult authority figures, such as parents, teachers, and police,[44] but they also have less experience to draw upon than adults, especially in the legal arena.[45] Today, much of a youth's knowledge of the police comes from television, internet, and social media, which provide them with little reason to believe they can decline to engage with an officer who approaches them.[46] Even when young people know their rights, research demonstrates that adolescents are especially vulnerable to coercive circumstances and "may respond adversely to external pressures that adults are able to resist."[47] Clinical psychologist Thomas Grisso and colleagues studied adolescents' abilities to make decisions in the law enforcement and juvenile justice contexts by asking adolescents and young adults how they would respond to various scenarios, including police interrogation, attorney consultation, and plea agreement discussions.[48] Grisso's study revealed that adolescents aged fifteen years and younger were more likely than older adolescents and young adults to make

---

Understanding the Consent Search Doctrine, 80 IND. L.J. 773, 800–17 (2005) (examining psychological studies on obedience to authority and obedience to uniformed officials, studies which demonstrate the compelling effect of the social authority most people associate with law enforcement).

43. Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. C.R. & SOC. JUST. 315, 332 (2012).

44. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSYCHOL. REV. 53, 62 (2007) (citing Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 357 (2003) [hereinafter *Juveniles' Competence to Stand Trial*]) (explaining that the choices of juveniles seem to reflect their tendency to heed authority figures).

45. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003) (stating that youths' cognitive levels can impact their choices, and that their cognitive abilities greatly improve through life experience and education).

46. *See, e.g.*, Christina Dacchille & Lisa Thurau, *Improving Police-Youth Interactions*, ABA (Apr. 2, 2013), https://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2013-0413-improving-police-youth-interactions.html (noting that youth learn incorrect information from television and therefore are confused in interactions with police).

47. Steinberg & Scott, *supra* note 45, at 1014.

48. *Juveniles' Competence to Stand Trial*, *supra* note 44, at 340.

decisions that were compliant with adult authority figures.[49] These findings are instructive as courts evaluate the reasonableness of a youth's perception about whether he was free to leave.

1. The reasonable child in criminal law and procedure

In common law, the "reasonable person" initially failed to account for the unique attributes of youth.[50] Although courts have recognized the difference between children and adults in tort law for some time,[51] criminal law has lagged behind other legal doctrines in acknowledging that children and youth need some special legal protections.[52] Historically, criminal courts measured the reasonableness of police conduct and the reasonableness of a youth's response to police presence against the same reasonable person standard applied to adults.[53] Only recently have courts been willing to acknowledge differences in our commonsense understanding of what a *child* would do and what an *adult* would do in similar circumstances in the criminal context.[54] In 2005 and 2010, respectively, the Court articulated the earliest recognition of differences between youth and adults in measuring criminal responsibility when it abolished the juvenile death penalty under the Eighth Amendment in *Roper v. Simmons*[55] and held that a sentence of life without the possibility of parole for youth

49. *Id.* at 353.

50. Levick & Tierney, *supra* note 11, at 502, 508 (describing some of the unique attributes of youth as immaturity, susceptibility to peer pressure, and personality traits still in development).

51. *Id.* at 502; *see* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (citing RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (AM. LAW INST. 2005)). Negligence doctrine only holds children to a standard of care described as "that of a reasonable person of like age, intelligence, and experience under like circumstances." *See* RESTATEMENT (SECOND) OF TORTS § 283A & cmt. a (AM. LAW INST. 1965) (grounding this relaxed standard in the notion that a child is defined as "a person of such immature years as to be incapable of exercising the judgment, intelligence, knowledge, experience, and prudence demanded by the standard of the reasonable man applicable to adults").

52. Levick & Tierney, *supra* note 11, at 506 (discussing the different trajectory of reasonableness for children and adults in other areas of common law).

53. *Id.* at 503.

54. *Id.* at 502–03, 507–08; *see J.D.B.*, 564 U.S. at 281 (holding that a child's age must be considered in determining whether a person is in custody in the *Miranda* analysis); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that a sentence of life without parole for juveniles convicted of a non-homicide violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 578 (2005) (abolishing juvenile death penalty under the Eighth Amendment).

55. 543 U.S. 551 (2005).

convicted of a non-homicide offense violated the Eighth Amendment in *Graham v. Florida*.[56] However, it was not until 2011 that the Court first articulated an explicit "reasonable child" standard.[57]

a. The first reasonable child in criminal law: custodial interrogation

Criminal law experienced a major shift in 2011 when the Supreme Court held in *J.D.B. v. North Carolina* that the test for determining whether a child was "in custody" for *Miranda* purposes—and thus would not have felt free to terminate a police interrogation—must be evaluated through the lens of a "reasonable child" rather than a reasonable adult.[58] In *J.D.B.*, a thirteen-year-old, middle-school student was removed from his classroom and interrogated in a closed conference room about a series of burglaries in his neighborhood by a police investigator, a uniformed school resource officer, the assistant principal, and an administrative intern.[59] The officers did not read J.D.B. his *Miranda* rights, provide him with an opportunity to consult with his grandmother, or tell him he was free to leave the room.[60]

In *the majority opinion*, Justice Sotomayor treated youth as an "unambiguous fact" that "generates commonsense conclusions about behavior and perception,"[61] and noted that throughout American history "a person's childhood is a relevant circumstance" in ascertaining what the so-called reasonable person would have done in the particular circumstances at issue.[62] Society has long recognized that children lack the intelligence, knowledge, experience, judgment, and prudence embodied by a reasonable man. Restrictions on a child's right to obtain a driver's license, get married, enter into a contract, join the military, vote, make medical decisions, view pornography, drink alcohol, or drop out of school reflect our understanding that children lack the judgment and experience needed to make these types of decisions or engage in these types of activities.[63] Recently, developmental research has confirmed what

56. 560 U.S. 48, 82 (2010); *Roper*, 543 U.S. at 578.
57. Levick & Tierney, *supra* note 11, at 517.
58. *J.D.B.*, 564 U.S. at 271–72.
59. *Id.* at 265–66.
60. *Id.* at 266.
61. Levick & Tierney, *supra* note 11, at 511 (quoting *J.D.B.*, 564 U.S. at 272).
62. *J.D.B.*, 564 U.S. at 274 (quoting RESTATEMENT (THIRD) OF TORTS § 10 cmt. b. (AM. LAW INST. 2005)) (internal quotation marks omitted).
63. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 65–67 (2008).

society has long known—that children are not as mature as adults.[64] In *Roper*, the Court relied on developmental science to make the following conclusions: (1) youth are immature and fail to demonstrate mature judgment; (2) youth are more susceptible to peer pressure, especially negative pressure; and (3) youth do not have fixed characters and thus have a greater capacity to change than adults.[65] The Court went on to note that common features of adolescence often lead youth to engage in impetuous and ill-considered actions and decisions, and that youth have less control, or less experiences with control over their own environment.[66]

The Supreme Court has repeatedly expressed concerns that adolescents are more easily intimidated and vulnerable to police pressure than adults in the interrogation context.[67] In 1948, the Court in *Haley v. Ohio*[68] noted that police conduct "which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[69] In 1962, the Court in *Gallegos v. Colorado*[70] excluded a fourteen-year-old's confession because he was too immature to understand and assert his constitutional rights.[71] In 1967, the Court in *In re Gault*[72] cautioned that great care must be taken to ensure that an adolescent's confession "was not the product of ignorance of rights or of adolescent fantasy, fright[,] or despair."[73] Finally, in *J.D.B.*, the Court noted that "[b]y its very nature, custodial police interrogation entails 'inherently compelling procedures,'" which become "all the more acute" when a child is the subject of the interrogation.[74] As the Court observed, a "reasonable child

64. Steinberg & Scott, *supra* note 45, at 1011.

65. Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (drawing from studies relied upon by in amici curiae briefs from the American Medical Association and the American Psychological Association); Levick & Tierney, *supra* note 11, at 508.

66. *Roper*, 543 U.S. at 569 (citations omitted).

67. Scott-Hayward, *supra* note 44, at 63; *see J.D.B.*, 564 U.S. at 272 ("Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'" (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion)); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) ("[A] 14-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police.").

68. 332 U.S. 596 (1948).

69. *Id.* at 599.

70. 370 U.S. 49 (1962).

71. *Id.* at 54.

72. 387 U.S. 1 (1967).

73. *Id.* at 55.

74. J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (quoting Miranda v.

subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[75] Drawing upon commonsense judgments confirmed by research, prior case law regarding the link between youth status and legal status, and the observations of any parent, Justice Sotomayor provided the first explicit articulation of a "reasonable child" doctrine in criminal law.[76] Under this new standard, a child's age would affect how a reasonable person in the suspect's position would perceive his or her freedom to leave.[77]

Prior to *J.D.B.*, the Court had been unwilling to formally consider age in the custody analysis because of the need to give clear guidance to police and to avoid creating a subjective inquiry with the consideration of age.[78] Justice Sotomayor bypassed that objection in 2011 by concluding that courts can take age into account without dismantling the objective nature of the *Miranda* analysis: Because the differences between children and adults are "self-evident to anyone who was a child once himself, including any police officer or judge," then "[w]e think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis."[79] As long as the officer knew the child's age or objectively should have known the child's age, its addition as a factor comports with the objective character of the custody analysis.[80]

b. Extending the reasonable child standard to the Fourth Amendment

Just as a child's age affects the determination of whether a child is in custody for purposes of *Miranda*, it must also affect the determination of whether a child has been seized in the Fourth Amendment context.[81] The seizure analysis, which requires courts to determine

---

Arizona, 384 U.S. 436, 467 (1966)).

75. *Id.* at 272.

76. *See* Levick & Tierney, *supra* note 11, at 517; *see also J.D.B.*, 564 U.S. at 272–74.

77. *J.D.B.*, 564 U.S. at 275.

78. *See* Yarborough v. Alvarado, 541 U.S. 652, 668 (2004) (declining to consider the youth's age in the custody analysis).

79. *J.D.B.*, 564 U.S. at 272.

80. *Id.* at 277.

81. *See* Annitto, *supra* note 17, at 36 (contending that reasonable child analysis should apply in the consent search context); Farber, *supra* note 17, at 121 (contending that the reasonableness of a whether a child would feel free to terminate an encounter with the police will be affected when age is considered); Levick & Tierney, *supra* note 11, at 504, 517 (contending that courts' articulation of reasonable juvenile standard of *J.D.B.* should have application in several other areas of the criminal law beyond the Fifth Amendment).

whether a reasonable person, in view of all the circumstances, would have felt free to walk away or ignore the police,[82] is virtually identical to the custody analysis. Both ask courts to evaluate the reasonableness of subjectively held beliefs.[83] Now that the Court has acknowledged the importance of considering immaturity when applying constitutional protections to youth, "absent compelling justification to the contrary[,] a child's age has 'an objectively discernible relationship' to determinations of reasonableness throughout the common law."[84] The same concerns about adolescents' limited decision making capacity and susceptibility to outside influences are relevant to various aspects of the Fourth Amendment framework. As Justice Sotomayor concluded in *J.D.B.*, "To hold . . . that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards" that the Constitution guarantees to adults.[85]

Since *J.D.B.*, several state courts have incorporated the reasonable child standard into their Fourth Amendment jurisprudence. In Delaware, for example, the state supreme court explicitly recognized that a child's age is a factor to be considered in evaluating the reasonableness of a seizure when it held that an eight-year-old had been seized for Fourth Amendment purposes when the child was escorted to the Vice Principal's office by a teacher's aide, held for close to an hour by a uniformed officer carrying a gun, handcuffs, and other indicia of police authority, and was not advised that he could leave.[86] Courts in California have cited *J.D.B.* extensively in dicta when discussing whether *J.D.B.*'s holding that a child's age is a factor in the reasonable person standard for custody should implicate other areas of criminal procedure, including voluntariness of waivers of rights and seizure inquiries.[87] Even before *J.D.B.*, courts in Florida, North

82. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1988); *see also* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

83. Levick & Tierney, *supra* note 11, at 520.

84. *Id.* at 517 (quoting *J.D.B.*, 564 U.S. at 275).

85. *J.D.B.*, 564 U.S. at 281.

86. Hunt *ex rel.* DeSombre v. State, 69 A.3d 360, 366 (Del. 2013).

87. *See, e.g.*, *In re* J.G., 175 Cal. Rptr. 3d 183, 190 (Cal. Ct. App. 2014) (finding it unnecessary to decide whether age should be considered in the reasonable-person analysis for custody because the current juvenile appellant "would not have felt free to go regardless of his or her age"); *In re* Michael S., No. B229809, 2012 WL 3091576, at *4 (Cal. Ct. App. July 31, 2012) (discussing *J.D.B.* in dicta to state "that a child's age 'would have affected how a reasonable person' in appellant's position 'would perceive [his] freedom to leave'" (alteration in original) (quoting *J.D.B.*, 564 U.S. at 271–72)).

Carolina, and Illinois had already adopted a reasonable child standard in the Fourth Amendment seizure analysis.[88]

To date, the Court has not specifically addressed the role of age in determining whether a child was seized under the Fourth Amendment. However, Wayne R. LaFave's leading treatise on search and seizure law has predicted that if the Supreme Court were to resolve the question of whether age is relevant to the seizure inquiry, "it is likely a majority of the Court would conclude that this 'reasonable person' test requires consideration of some known unique characteristics of the suspect (e.g., his youth). Indeed such a result seems highly likely given the Court's resolution of an analogous issue in *J.D.B. v. North Carolina*."[89]

2. The reasonable black child

Despite its profound impact on criminal law and procedure, the reasonable child standard may not be sufficient to protect a childlike Andre if it fails to account for race. Implicit in the reasonable person standard is an assumption that all groups have similar historical and contemporary relationships with law enforcement.[90] Critical race theorists and feminist scholars have long challenged the reasonable person standard as a masquerade for the reasonableness of what the people in authority (white, male, and wealthy) believe to be reasonable.[91] Thus, a court's reliance on a reasonable person standard runs the risk of reinforcing the prevailing biases and racial stereotypes in the criminal justice system.[92] Critics complain that the standard "ignores the real world" and promotes "social inequities."[93] To account for distinctive experiences across race, some have advocated for a more subjective standard of reasonableness.[94] Others contend that the Court's failure to account for race undermines the original intent of the Fourth Amendment drafted by framers who specifically intended to protect disfavored minorities from the government's selective use of

88. *See, e.g.*, F.E.H. v. State, 28 So. 3d 213, 216–17 (Fla. Dist. Ct. App. 2010); J.N. v. State, 778 So. 2d 440, 442 (Fla. Dist. Ct. App. 2001); People v. Lopez, 892 N.E.2d 1047, 1064–65 (Ill. 2008); *In re* I.R.T., 647 S.E.2d 129, 134 (N.C. Ct. App. 2007).

89. LAFAVE, *supra* note 38, § 9.4(a).

90. *See* Susskind, *supra* note 19, at 345–46 (arguing that courts apply the wrong standard in evaluating police conduct to determine whether a minority suspect has been seized); *see also* Lee, *supra* note 30, at 1150–51.

91. *See* Lee, *supra* note 30, at 1150.

92. *Id.* at 1156–57.

93. Kinports, *supra* note 21, at 73.

94. *See id.*

search and seizure powers.[95]

Experience suggests that a child's race would have as much impact on a child's perception of whether he was free to leave as would his age. Throughout American history, blacks have had a tenuous relationship with police. In every critical era—slavery, Jim Crow, lynching, and the contemporary era of mass incarceration—blacks have perceived police to be proponents of discrimination and subordination through violence and intimidation.[96] Today, it is difficult to imagine any black person who is immune from the persistent national coverage of police-on-black killings. To account for these distinct experiences of black Americans with the police, at least two scholars have advocated for a reasonable African American standard in the Fourth Amendment construct.[97] Professor Randall Susskind has proposed that courts determine seizure through a reasonable person standard that asks whether a reasonable African American would have felt free to ignore the police.[98] Mia Carpiniello extended Susskind's proposal by seeking to apply a reasonable black person standard to the evaluation of suspicion in "location plus evasion" police stops.[99]

This Article contends that a black child's experience is unique. That is, a black child's perception of the police arises not only from his blackness, but also from his youth. Courts will find important insights for the Fourth Amendment analysis at this intersection of race and adolescence. While there is no body of empirical research on normative trends in how black Americans interact with law enforcement, there is a wealth of anecdotal and qualitative literature on how blacks—and black youth in particular—perceive and respond to the police. Black youths' perceptions of law enforcement are shaped by the vicarious and collective experiences of their friends and family members, especially those who have been verbally or physically abused by the police.[100] Black

---

95. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 991–92 (1999).

96. *See* Carpiniello, *supra* note 19, at 361–62.

97. *See* Susskind, *supra* note 19, at 346–49; *see also* Carpiniello, *supra* note 19, at 356 (advocating for the expansion of the reasonable African American standard into the specific context of "location plus evasion" stops).

98. Susskind, *supra* note 19, at 344.

99. Carpiniello, *supra* note 19, at 357–58.

100. *See* Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING 37, 49 (2000) (discussing the fact that black youth are more likely than white youth to have family members who have been verbally or physically abused by police); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435, 450 (2002) (same).

families have long been proactive in transmitting norms on dealing with the police to their children.[101] Black parents tell their children to keep their hands where police can see them, avoid sudden movements, and behave in a courteous and respectful manner toward officers.[102] For some black youth, these lessons mean the difference between life and death. For many black youth, they also transfer negative attitudes and resentments about the police from one generation to the next as youth internalize the negative experiences of their community.[103]

At school, black children's first encounters with a school resource officer ("SRO") will often confirm what their parents have told them. Notwithstanding policymakers' efforts to improve the image of police among students through SRO programs, which are now ubiquitous[104] in urban communities, evidence suggests that the current proliferation of police in schools has done little to improve police-community relations. SROs remain deeply entrenched in their traditional law enforcement and crime control roles.[105] The visual presence of police officers—many of whom patrol schools in uniforms with guns, pepper spray, and batons at their waist[106]—merely reinforces students' image

---

101. *See* Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 138 (noting that black children have had their expectations about police shaped by conversations with family, friends, and elders).

102. *See* Ulysses Burley III, *Dear Son, "A Letter to My Unborn [Black] Son*," SALT COLLECTIVE, http://thesaltcollective.org/letter-unbornblack-son (last visited June 1, 2018); Celia K. Dale, *A Black Mother's Painful Letter to Her 8-Year-old Son: How to Behave in a World that Will Hate and Fear You*, ATLANTA BLACK STAR (Nov. 26, 2014), http://atlantablackstar.com/2014/11/26/letter-son; Geeta Gandbhir & Blair Foster, Opinion, *"A Conversation with My Black Son*," N.Y. TIMES (Mar. 17, 2015), http://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html; *see also* Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUSTICE Q. 819, 833 (1999) (noting that blacks typically feel compelled to take more precautions around police than whites).

103. Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police Among Inner-City Youth*, 50 SOC. Q. 235, 250 (2009) [hereinafter *Strategic Responses*].

104. *See* Arrick Jackson, *Police-School Resource Officers' and Students' Perception of the Police and Offending*, 25 POLICING 631, 633 (2002) (explaining that part of an SRO's role is to be a model for all police to students).

105. *See* Brad A. Myrstol, *Public Perceptions of School Resource Officer (SRO) Programs*, 12 W. CRIMINOLOGY REV. 20, 21, 35 (2011) (explaining that over seventy percent of local law enforcement departments serving jurisdictions with more than 100,000 residents maintain an active SRO program); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (noting that "school-based policing is the fastest growing area of law enforcement").

106. *Police in Schools: Arresting Developments*, ECONOMIST (Jan. 9, 2016), http://www.economist.com/news/united-states/21685204-minorities-bear-brunt-

of the police in their punitive capacities. Overly aggressive officers who treat students "like criminals" undermine students' respect for law enforcement,[107] and cause students to believe that SROs are representative of how all officers will treat them.[108]

Hostile, on-the-street encounters with the police only exacerbate negative views about law enforcement among black students. In a recent qualitative study involving young black males in St. Louis, evidence indicates that black boys expect to be stopped and mistreated.[109] Black boys complain that they are repeatedly peppered with questions like "Where are you coming from?," "Where are you going?," and "Where is your mother?"[110] Black boys and girls complain that police are mean and disrespectful and do not know how to talk to others, especially black people.[111] Black boys describe police as belligerent and antagonistic and are especially outraged by the officers' use of inflammatory language, including racial slurs, profanity, and demeaning terms like "punk[]" and "siss[y]."[112] When youth watch any of the recent police shootings or assaults captured on video, they see officers who are visibly hostile and rude, creating such a negative tone that virtually any child would be afraid.[113] These experiences, combined with developmental features of adolescence, leave black youth particularly vulnerable to the

---

aggressive-police-tactics-school-corridors-too-many.

107. Myrstol, *supra* note 105, at 21; *see also* LAWRENCE F. TRAVIS III & JULIE K. COON, THE ROLE OF LAW ENFORCEMENT IN PUBLIC SCHOOL SAFETY: A NATIONAL SURVEY 197 (2005), https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf; Nicole L. Bracy, *Student Perceptions of High-Security School Environments*, 43 YOUTH & SOC'Y 365, 369 (2011).

108. Jackson, *supra* note 104, at 637, 645–46; *see also* Myrstol, *supra* note 105, at 35 (stating that perceptions of SROs may be correlated with perceptions of the police generally).

109. *See* Rod. K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 GENDER & SOC'Y 531, 535 (2006) [hereinafter *Gender, Race, and Urban Policing*].

110. The pervasiveness of these intrusions is debilitating for black boys. Consider Tremaine McMillian's encounter with the Miami-Dade officer who demanded that Tremaine point out his mother, suggesting that he did not believe the fourteen-year-old was legitimately visiting the beach with his family. *See Tremaine McMillian, 14-Year-Old with Puppy, Choked by Miami-Dade Police Officer over "Dehumanizing Stares" (VIDEO)*, HUFFINGTON POST (May 30, 2013, 9:30 PM), https://www.huffingtonpost.com/2013/05/30/tremaine-mcmillian-14-year-old-miami-dade-police_n_3362340.html.

111. *See Gender, Race, and Urban Policing*, *supra* note 109, at 548–49.

112. *Id.* at 539, 541; *see Strategic Responses*, *supra* note 103, at 244.

113. *See, e.g.*, Michael Wines, *In Police Shootings, Finding Jurors Who Will Say "Not Guilty,"* N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/police-shootings-trial-jury.html (arguing that an increase in police shooting videos showing the police as the hostile parties has made it difficult for prosecutors to find jurors who are not biased towards police).

psychological pressures of police presence.[114] As such, black youth are even less likely than other youth and adults to believe they are free to leave and decline police contact.

Ironically, the Court in *Terry v. Ohio*[115] explicitly acknowledged the tenuous relationship between police, youth, and minorities when it conceded in a footnote that

> the frequency with which "frisking" forms a part of the field interrogation practice . . . cannot help but be a severely exacerbating factor in police-community tensions[,] . . . particularly . . . in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer."[116]

The Court further acknowledged that community resentments caused by certain police practices is relevant to the courts' assessments of an intrusion upon the reasonable expectations of privacy and security from those practices.[117] Notwithstanding these acknowledgements, the Court dismissed these considerations, stating that "the abusive practices which play a major . . . role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations."[118] Since then, the Court has been unwilling to use the Fourth Amendment to address abusive and discriminatory police conduct and has persisted with a reasonable person standard that obscures the realities of black Americans and other racial minorities in relation to the police.[119]

To consider race and assess discriminatory police conduct in critical Fourth Amendment inquiries, courts will likely have to break free from the rigid, objective-subjective binary that is common in reasonableness discourse.[120] Debates about the application of subjective and objective

---

114. *See* Annitto, *supra* note 17, at 5 (discussing the psychology of coercion and its application to police encounters with minors).

115. 392 U.S. 1 (1968).

116. *Id.* at 14 n.11 (citation omitted).

117. *Id.* at 17 n.14.

118. *Id.*

119. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding that "the actual motivations of the individual officers" are irrelevant to the Fourth Amendment analysis and noting that these issues are better left to the Equal Protection Clause).

120. *See* Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 36 (2008) (rejecting the purely subjective and purely objective binary and advocating for a hybrid standard that takes into account the characteristics of a particular defendant, while at the same time

standards in the law are rife with questions of power and equality.[121] As Professor Richard Delgado contends, it is often the stronger party who wants the objective standard to apply and the weaker party who prefers a more personalized standard.[122] The preference for an objective standard among the members of the dominant group reflects their allegiance to their own worldview.[123] Because the powerful class dictates the contours of the objective standard, reasonableness becomes self-referential.[124] Over time, the subjective view of the dominant class becomes the "objective" reasonable view.[125] Thus, it is no surprise that decisions under the objective reasonable-person standard will generally favor a dominant class.[126] Meanwhile, the purportedly "objective" nature of the standard allows the dominant class to see its preferred outcomes as fair, just, and principled even when those outcomes are disproportionately skewed in their favor.[127]

Professor Victoria Nourse rejects the purely subjective and purely objective binary and advocates for a hybrid standard that takes into account the characteristics of a particular defendant while at the same time offering normative guidance.[128] Recognizing that legal rules have little value absent context, Professor Nourse notes that the law is not self-applying, but always dependent on context.[129] The reasonableness of some identified behavior is always assessed according to the context.[130] Extrapolating that insight to the seizure analysis, a suspect's perspective about whether he is free to leave will be measured against what a reasonable person in a like "situation" would have perceived. Race cannot be easily disentangled from the police-civilian context.

B. Race, Adolescence, and Consent to Search

Although this Article focuses primarily on the point at which a police contact transforms into an investigatory *Terry* stop, it is important to

---

offering normative guidance).

121. Delgado, *supra* note 28, at 817; *see* Nourse, *supra* note 120, at 48 (arguing that debates about subjective and objective standards are debates about equality).

122. Delgado, *supra* note 28, at 817–18.

123. *Id.* at 818, 820.

124. *Id.* at 820.

125. *Id.* at 818.

126. *Id.*

127. *Id.* at 818–19.

128. Nourse, *supra* note 120, at 35–38.

129. *Id.* at 35 (arguing that law is not self-applying and that questions of law can only be answered by "confronting the ways in which law moves from rule to context").

130. *Id.* at 36–38.

recognize that stops often escalate rapidly into frisks and full searches.[131] Officers frequently seek a civilian's consent to frisk or search.[132] Consent allows police to search a person's body, home, or possessions without a warrant or probable cause.[133] To benefit from this exception to the warrant requirement, the police must show that consent was freely given and not the result of express or implied duress and coercion.[134] A suspect's mere "acquiescence to a claim of lawful authority" will not constitute consent.[135]

Courts will consider the totality of the circumstances in deciding whether consent is voluntary.[136] Relevant factors include both the details surrounding the officer's request and the characteristics of the suspect, such as age, education, low intelligence, and the suspect's lack of information about constitutional rights.[137] Thus, the consent analysis not only involves an objective evaluation of the facts and circumstances leading up to the consent, but also a subjective inquiry that takes into account personal experiences that produce fears and motivate people to act.[138] In this way, the law is arguably already better suited to accommodate age and race in the determination of voluntariness of consent.

Although Fourth Amendment inquiries are normed largely on an objective reasonable person test, subjective considerations are not foreign to the search and seizure analysis. As one commentator has observed, the Supreme Court seems to shift (opportunistically) between subjective and objective tests in both the Fourth and Fifth Amendment contexts.[139] For example, while the Supreme Court has

---

131. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1547–48 (2017) (discussing the litigation of *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), to illustrate that, in practice, justification for stop may be seen as justification for frisk or search, despite the requirement of separate reasonable suspicion).

132. *See* Annitto, *supra* note 17, at 7 (discussing consent as the most common exception to the warrant requirement for searches).

133. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

134. *Id.* at 248.

135. *See* Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968).

136. *Id.* at 226–27 (analogizing voluntariness of consent to search with the voluntariness of consent to answer question in an interrogation).

137. *Id.* at 226.

138. *Id.* at 229.

139. Kinports, *supra* note 21, at 77, 93–94 (explaining that, in the exclusionary rule context, courts oscillate between objective and subjective standards).

insisted upon on a purely objective inquiry in the Fourth Amendment seizure analysis,[140] the Court has granted more flexibility in the consent-to-search query.[141] The test for voluntariness of consent is a totality of the circumstances test that accounts for both the subtle and blatantly coercive nature of police questioning, as well as the "possibly vulnerable subjective state of the person who consents."[142] Factors that may render a person particularly "vulnerable" to coercion include the suspect's young age and mental deficiencies.[143] On review, courts will consider the suspect's vantage point in determining whether consent was freely and voluntarily given.[144]

If we turn back to Andre, we see that a purely objective consent-to-search test is inadequate. A test that ignores Andre's race and age leaves Andre even more vulnerable than a white youth or an adult to subtle interrogation strategies that coerce youth to consent. The susceptibility of children to authority figures, like the police, has already been explored in the seizure analysis above.[145] Youth as a class are more deferential to adults, have less experience with and knowledge about their legal rights, and have less cognitive capacity to identify and weigh the advantages and disadvantages of allowing the police to search.[146] Moreover, neurological studies show that the section of the brain responsible for logical reasoning, planning, self-regulation, and impulse control is still immature in adolescence.[147] A youth's capacity for mature or deliberate thinking, including the ability to identify and consider

---

140. Annitto, *supra* note 17, at 9.

141. *See* Kinports, *supra* note 21, at 93–94 (concluding that the Court inexplicably switches from a reasonable person focus to a subjective standard).

142. *Schneckloth*, 412 U.S. at 228–29 (recognizing the need to protect citizens from even subtle forms of coercion by "explicit or implicit means, by implied threat or covert force").

143. *Id.* at 226. For state examples, see *State v. Butler*, 302 P.3d 609, 612–13 (Ariz. 2013) (en banc), which considered age and intelligence, and *In re J.M.*, 619 A.2d 497, 502–03 (D.C. 1992) (en banc), which factored in the defendant's age and maturity.

144. Kinports, *supra* note 21, at 90–91.

145. *See supra* Section I.A.

146. *See supra* notes 44–48 and accompanying text.

147. *See* Brief for the American Medical Ass'n & the American Academy of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 14–36, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237, at *14–36 [hereinafter Brief for the American Medical Ass'n] (describing studies that conclude that adolescent brains have immature cognitive functions and a hyperactive reward-drive system that results in impulsive behavior); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812 (2005) [hereinafter *Developmental Incompetence*] (noting that development of the pre-frontal cortex continues through adolescence).

future consequences, understand a possible sequence of events, and control impulses continues to develop well into young adulthood.[148] Teens are also more likely to focus on the short-term, immediate consequences of a decision rather than the long-term consequences.[149] Thus, when the police ask a child to consent to a search, the child may focus on his desire to terminate the interaction with the police as soon as possible and fail to identify or give weight to the potential long-term consequences of the search.[150] Since most average adult are unaware if and when they are truly free to resist a search,[151] we should be even less confident in a child's knowledge and capacity to refuse.

Moreover, as discussed above, contemporary tensions between police and the black community further complicate a black youth's capacity to refuse consent. The open hostility, fear, and distrust that exist between the police and black youth creates a psychological atmosphere that significantly undermines the voluntariness of consent. If the seizure analysis and the consent-to-search doctrine are both intended to promote voluntary decision making and free and unconstrained choice,[152] then it is essential that courts consider age and race in advancing these goals. Although the Supreme Court has identified age as one of the relevant factors in the voluntariness doctrine,[153] many courts do not explicitly consider age in their totality

148. Levick & Tierney, *supra* note 11, at 523–24; *see* Brief for the American Medical Ass'n, *supra* note 147, at 14–36 (collecting and summarizing studies); *Developmental Incompetence*, *supra* note 147, at 812.

149. *Juveniles' Competence to Stand Trial*, *supra* note 44, at 356–57 (studying adolescents' capacities to make decisions related to police interrogation, attorney consultation, and plea agreements); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35–36, 39 (2009) [hereinafter *Age Differences in Future Orientation*] (measuring individuals' self-reported ability to plan ahead, anticipate consequences, and time perspective and finding that adolescents aged twelve to fifteen scored significantly lower on planning than individuals older than fifteen years old).

150. *Juveniles' Competence to Stand Trial*, *supra* note 44, at 356 (finding that younger adolescents, ages eleven to thirteen, have a lower level of comprehension regarding the long-term impact of their legal decisions, compared to older adolescents, ages sixteen to seventeen).

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

152. Kinports, *supra* note 21, at 75–76 (arguing that the Supreme Court should adopt a principled approach that considers the goals of the Fourth Amendment in deciding whether to consider the officer's vantage point or the defendant's vantage point).

153. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *see also* Annitto, *supra* note 17,

of the circumstances analysis.[154] To meaningfully account for these factors, courts should make explicit findings on the record concerning the effect of both race and relative immaturity on the voluntariness of the suspect's consent.[155]

II. RACE, ADOLESCENCE, AND THE SUSPICION RUBRIC

Although the Fourth Amendment was originally interpreted to prohibit state intrusions absent probable cause to believe a person is committing or had recently committed a crime, the Supreme Court's 1968 ruling in *Terry v. Ohio* now permits officers to engage civilians in an "investigatory stop" based on a much lower and arguably even more ambiguous standard of "reasonable . . . articulable suspicion."[156] *Terry* and its progeny ultimately created two new categories of police-citizen encounters: "stops," which are time-limited seizures permitted when officers have reasonable articulable suspicion to believe a suspect is or has been engaged in criminal conduct, and "frisks," which must be preceded by a lawful stop and are permitted when officers have reasonable articulable suspicion to believe a suspect is armed and dangerous.[157]

Absent a warrant or consent to search, the Supreme Court has held that officers may "stop and frisk" a person only when the officer can point to reasonable articulable suspicion to justify that intrusion.[158] Thus, a *Terry* stop is reasonable only if the officer can "point to specific and articulable facts, which taken together with rational inferences from those facts," reasonably warrant a belief that a suspect is engaged in or has been engaged in criminal conduct.[159] Although reasonableness remains the touchstone of the Fourth Amendment analysis, Fourth

---

at 7 (acknowledging that the Supreme Court has not consistently applied age as a factor).

154. Annitto, *supra* note 17, at 3, 8–9 (contending that considerations like age seem to have gotten lost after the Court emphasized the objective nature of the Fourth Amendment inquiry in *United States v. Mendenhall*, 446 U.S. 544 (1980)).

155. *See, e.g.*, United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977) (finding an atmosphere of authoritative control to be an important factor when considering if consent is freely given); *In re* J.M., 619 A.2d 497, 503 (D.C. 1992) (en banc) (requiring the trial judge to make findings on age and relative immaturity).

156. 392 U.S. 1, 33 (1968) (Harlan, J., concurring); *see also* Renee McDonald Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 886 (2013) (providing an in-depth critique of *Terry*'s erosion of the Fourth Amendment's probable cause standard).

157. *Terry*, 392 U.S. at 27, 30; LAFAVE, *supra* note 38, §§ 9.1–9.2 (discussing the general permissible scope of stops and frisks).

158. *Terry*, 392 U.S. at 27, 30.

159. *Id.* at 21.

Amendment cases fluctuate between whose vantage point of reasonableness is controlling.[160] While the suspect's point of view prevails in the seizure and consent-to-search inquiries,[161] the officer's vantage point prevails in assessing the quantum of suspicion needed to justify a Fourth Amendment intrusion.[162] Absent consent, a warrantless seizure is only permissible if an objectively reasonable police officer, viewing all the circumstances, would believe there was reasonable suspicion or probable cause.[163]

To justify a *Terry* stop and frisk, an officer will consider relevant objective facts about the suspect and the suspect's behavior and make reasonable inferences and judgments from those facts.[164] The officer may consider the time and location of the purported offense as well as information about the suspect's conduct, including flight, furtive gestures, association with known criminals, proximity to a suspected crime scene, presence in a high-crime area, and response to questioning.[165] To justify a frisk, the officer must demonstrate that he had reason to believe the suspect was armed and dangerous.[166] Factors include reports of crime involving a weapon, appearance of a bulge in the suspect's clothing, sounds of gunfire, and suspect gestures like grabbing at the waistband area.[167]

An officer's objective observations have little value absent the meaning the officer assigns to those facts. In determining whether the officer has provided the requisite justification for an intrusion, courts will review the facts and inferences from the lens of a reasonable police officer.[168] As the Court stated in *Illinois v. Wardlow*,[169] "courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on

160. Kinports, *supra* note 21, at 74, 78.
161. *Id.* at 89–92.
162. *Id.* at 79.
163. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).
164. *Id.* at 696–97.
165. *See* Illinois v. Wardlow, 528 U.S. 119,124 (2000) (high crime area and flight); Sibron v. New York, 392 U.S. 40, 66–67 (1968) (furtive gestures); Carroll v. United States, 267 U.S. 132, 159–60 (1925) (relevance of a high crime area). *See generally* LAFAVE, *supra* note 38, § 9.5 (discussing the grounds for a permissible stop).
166. Terry v. Ohio, 392 U.S. 1, 21, 27 (1968).
167. *See generally* LAFAVE, *supra* note 38, § 9.5.
168. *Terry*, 392 U.S. at 21–22.
169. 528 U.S. 119 (2000).

commonsense judgments and inferences about human behavior."[170]

In *Wardlow*, the Court assessed "the degree of suspicion that attaches to a person's flight" by making "commonsense conclusions" about the motives behind the suspect's flight from police.[171] In a traditional reasonable person framework, an individual's flight tends to convey a consciousness of guilt and furtive gestures suggest that an individual has something to hide.[172]

Part II of this Article considers how race and adolescence affect the reasonableness of police conduct in at least two critical layers of the suspicion rubric—distortions in seemingly objective factual observations and the reasonableness of commonsense judgments made from those observations. First, sociological and anecdotal evidence suggests that police interact differently with youth than they do with adults.[173] Inherent biases about childhood and adolescence cause police officers to be hyper-vigilant in their surveillance of young people.[174] In addition, empirical research on implicit racial bias suggests that police are more likely to interpret ambiguous behavior and innocuous facial expressions by blacks as violent and aggressive than they would if they were observing that same behavior and expressions by whites.[175] Thus, what officers perceive as innocent adolescent play among white youth

---

170. *Id.* at 124–25.

171. *Id.* at 128 (internal quotations omitted).

172. *Id.* at 128–30.

173. *See* Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, CHILD. LEGAL RTS. J., Fall 2009, at 30, 30 (describing the current police approach as believing youths present the same or greater risk than adults). Thurau is the founder and director of Strategies for Youth, an organization that seeks to improve police-youth relations and reduce unnecessary referrals of youth to the juvenile justice system through police training and community education. *Staff*, STRATEGIES FOR YOUTH, https://strategiesforyouth.org/about/staff (last visited June 1, 2018).

174. Jackson, *supra* note 104, at 638.

175. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976) (noting that among college students, the threshold for labeling an act as violent is lower when viewing a black committing the same act); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 WEST VA. L. REV. 307, 310 (2010) (finding that mock jurors primed with a black perpetrator were significantly more likely to find ambiguous evidence to be indicative of guilt than a white perpetrator); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2046–48 (2011) [hereinafter *Arrest Efficiency*] (finding that research subjects, who watched videos of a man pushing another man, found black pushers more violent than white pushers and two black actors as having a more aggressive interaction that two white actors).

may appear as threatening, dangerous behavior among black youth.[176]

Second, the failure to explicitly address race and adolescence in the reasonable articulable suspicion analysis leaves courts to rely on outdated and inaccurate assumptions about the meaning of human behavior in police-civilian encounters in the black community. Whereas behaviors like flight and furtive gestures may reliably imply consciousness of guilt for some, there are too many innocent reasons for black youth to be nervous and flee from police to infer criminal intent from those behaviors among black youth. This Part urges police officers and courts to abandon outdated judgments that ignore what we know about youth from developmental science and fail to account for the impact of race on reasonable adolescent behavior.

A. Police Surveillance of Youth

Youth in general are more likely than adults to have contact with the police as they play in the streets, congregate in public spaces, hang out past curfew, drink alcohol, ride around in cars, and talk or laugh loudly.[177] Police are heavily involved in youths' lives in America.[178] Police engage with youth on the streets, in malls, in schools, in their homes, and by perusing youths' activities on social media.[179] In the story that opens this Article, Andre and James were on the street precisely because they were teenagers in an urban, low-income neighborhood: they did not have a car, they had time to spare, and they were moving in a group from one public place to another.

Police contact with youth in black communities is pervasive. Young black males who move in crowds, "jone," and "play fight" are even more likely than young white men, young minority women, and older minority men to attract attention from the police and experience verbal abuse, excessive force, unwarranted street stops, and other negative interactions with police.[180] Under the guise of reasonable articulable suspicion, police stop black boys on the vaguest of

---

176. Richardson, *supra* note 175, at 2039–40 (explaining that officers tend to stop more blacks than whites, but stops of whites will typically be more accurate because the stops are based on less ambiguous activity).

177. Hurst et al., *supra* note 100, at 40; Terrance J. Taylor et al., *Coppin' an Attitude: Attitudinal Differences Among Juveniles Toward Police*, 29 J. CRIM. JUST. 295, 296 (2001).

178. Thurau, *supra* note 173, at 30.

179. *Id.* at 32.

180. *See* Weitzer & Brunson, *supra* note 103, at 235; Taylor et al., *supra* note 177, at 302; *see also* Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys, in* POLICING THE BLACK MAN 57, 59 (Angela Davis ed., 2017).

descriptions—"black boys running," "two black males in jeans, one in a gray hoodie," "black male in athletic gear," and "black male with a bicycle."[181] Young black males are treated as if they are "out of place" not only when they are in white, middle-class neighborhoods, but also when they are hanging out in public spaces or sitting on their own front porches.[182] Black boys who congregate "on the "corner" attract police attention at all times of day or night.[183] Young black males cannot escape police surveillance even when they dress nicely or drive nice cars because such signs of wealth among black youth are presumed to be associated with drug dealing.[184]

Police officers bring their own social and psychological assumptions into each encounter they have with young people. Those assumptions dictate what officers will expect and often cause them to develop conscious or subconscious schema for handling youth.[185] Officers who interact with youth have little understanding of adolescent development and little training in appropriate strategies for interacting with youth.[186] The prevailing approach to policing youth, especially black, Latino, and immigrant youth, involves excessive displays of force, a liberal use of arrest power to control youth conduct, and militarism that underscores the power of the police over the child.[187] There is little tolerance for conflict with and among youth, and police are encouraged by structural, philosophical, and cultural factors to take a punitive approach with youth.[188] Revisiting the scenario at the beginning of this Article, it is no surprise that Andre's compliance with the "request" to lift his shirt and reveal his waist area did not satisfy the officers. The officers continued to assert their

---

181. Kristin Henning & Angela J. Davis, *Opinion: How Policing Black Boys Leads to the Conditioning of Black Men*, NPR (May 23, 2017, 12:41 PM), https://www.npr.org/sections/codeswitch/2017/05/23/465997013/opinion-how-policing-black-boys-leads-to-the-conditioning-of-black-men. These examples are drawn from the author's own extensive experience representing accused youth in the District of Columbia juvenile court.

182. Brunson & Miller, *supra* note 109, at 549; Hurst et al., *supra* note 100, at 40–41.

183. Henning & Davis, *supra* note 181.

184. Rod K. Brunson, "*Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL. 71, 84 (2007) [hereinafter *Police Don't Like Black People*].

185. Jackson, *supra* note 104, at 638.

186. *See* Thurau, *supra* note 173, at 31, 38–39 (finding little evidence of training to prepare police for youth interaction and noting only one state statute requiring police training in juvenile matters).

187. *Id.* at 31–32.

188. *Id.* at 31.

authority by asking the boys for permission to search and forcing the boys to stand with their hands on the wall during a frisk.

B. The Black Threat: Understanding Implicit Racial Bias & the Officers' Interpretation of Innocuous Facts

The impact of implicit bias on decision making has been well documented in all phases of the criminal justice system.[189] Thus, while Andre's status as a child already exposes him to heightened surveillance by the police, his race exposes him to additional stereotypes and judgments. Police officers who must "synthesize vast amounts of complex information" in a short period of time to ensure their own safety and the safety of others rely on cognitive shortcuts in their observations and judgments during on-the-street encounters with civilians.[190] Cognitive science teaches us that people use cognitive shortcuts to process and contextualize large volumes of new information, make sense of other people's actions, and reduce stress.[191] Cognitive shortcuts involving race are referred to as "implicit racial bias" and include both "unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups)."[192] Implicit bias is so subtle that we are generally not aware of it and may act on it reflexively without realizing it.[193] Implicit racial bias evolves from our repeated exposure to cultural stereotypes in society[194] and is activated by environmental stimuli, including cultural

189. *See* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 653–57 (2017) (summarizing studies showing evidence of implicit racial bias in the criminal and juvenile justice systems).

190. Thompson, *supra* note 95, at 986 (noting police officers rely on categorization to make quick decisions).

191. *Id.* at 984–85 (concluding categorization of information provides benefits for human organization); *see also* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877 (2004) (explaining that these associations help differentiate between important and non-important information); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 297 (2012) (noting that while cognitive shortcuts allow humans to make sense of the world around them, these shortcuts may lead to errors in judgement).

192. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630 (2013) [hereinafter *Implicit Racial Bias in Public Defender Triage*].

193. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1145 (2000); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 956 (2004); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 759 (2012); *Arrest Efficiency*, *supra* note 175, at 2043.

194. *Implicit Racial Bias in Public Defender Triage*, *supra* note 192, at 2630.

stereotypes, that cause us to associate crime and race, particularly crime and blackness.[195] Once stereotypes and biases are subconsciously triggered, they may evoke negative judgments and behaviors that are involuntary and unplanned.[196] These types of cognitive biases are not limited to rogue officers who abuse their power or intentionally target racial minorities with discriminatory motives. People of all races have implicit racial biases that may negatively affect their behavior, even those who ardently reject racism and discrimination and have positive relationships with people of other races.[197] Even black Americans have some implicit racial bias in associating blackness with crime.[198]

Implicit racial bias helps explain why Andre was at such a disadvantage from the moment the officers saw him. Police expect youth to be anti-authoritarian;[199] they expect black boys to be dangerous.[200] Even when police are willing to disregard some youth behavior as mere adolescence, research suggests that black youth do not get the benefit of that mitigation. In one study of police

195. *See id.* at 2630; *see also* Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10–12 (Justin D. Levinson & Robert J. Smith eds., 2012) (explaining that certain events and stimuli can trigger specific unconscious decision making and behavior); CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 36–45 (2013), http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf (discussing studies that measure the association between race and criminality in the criminal justice context).

196. *See Arrest Efficiency*, *supra* note 175, at 2043; *Implicit Racial Bias in Public Defender Triage*, *supra* note 192, at 2629–30.

197. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2004) (discussing the pervasiveness of implicit biases in death penalties cases); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (explaining that even people who "embrace nondiscrimination norms" may still "hold implicit biases that might lead them to treat black Americans in discriminatory ways"); *Arrest Efficiency*, *supra* note 175, at 2039 (noting that individuals of all races have implicit biases); *see also* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006) (discussing studies, including those in which test subjects have been African American and Latino and reject racism but still display implicit bias).

198. *See Implicit Racial Bias in Public Defender Triage*, *supra* note 175, at 2634.

199. *See* Samantha A. Goodrich et al., *Evaluation of a Program Designed to Promote Positive Police and Youth Interactions*, OJJDP J. OF JUV. JUST., Spring 2014, at 55, 57 (observing that interactions between police and youths were more likely to result in an arrest if the youth was disrespectful or hostile).

200. *Gender, Race, and Urban Policing*, *supra* note 109, at 532, 534 ("[R]esearch confirms that young black men typify the 'symbolic assailant' in the eyes of the police.").

perceptions of childhood innocence, researchers showed police officers a series of photographs of young white, black, and Latino males, advised them that the children in the photographs were accused of either a misdemeanor or a felony, and asked them to estimate the age of each child.[201] While the officers overestimated the age of adolescent black felony suspects by five years, they underestimated the age of adolescent white felony suspects by one year.[202] Moreover, the older an officer thought a child was, the more culpable the officer perceived the child to be of the suspected crime.[203] Further nuancing their study, researchers asked officers to take a "dehumanizing" implicit association test to determine the extent to which the officers associated black people with apes.[204] This study found that the more readily participants implicitly associated blacks with apes, the higher their culpability ratings were for both black misdemeanor and black felony suspects.[205] In a related experiment with university students, the same researchers found that study subjects perceived youth aged zero to nine as equally innocent regardless of race, but began to think of black children as significantly less innocent than other children at every age group thereafter.[206] The perceived innocence of black children aged ten to thirteen was equivalent to that of non-black children aged fourteen to seventeen, and the perceived innocence of black children aged fourteen to seventeen was equivalent to that of non-black adults aged eighteen to twenty-one.[207] These findings suggest that black youth are more likely to be treated as adults much earlier than other youth and less likely than white youth to receive the benefits and special considerations of adolescence.[208]

The current reasonable articulable suspicion framework obscures the reality of implicit racial bias when it assumes that officers can cleanly separate race-neutral "suspicion" from conscious and unconscious bias.[209] The officers' purported factual observations may not be "facts" at all, but instead cognitive interpretations of ambiguous

---

201. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 530 (2014).
202. *Id.* at 531–32.
203. *Id.* at 532.
204. *Id.*
205. *Id.*
206. *Id.* at 529.
207. *Id.*
208. *Id.* at 527.
209. Thompson, *supra* note 95, at 983.

or innocuous behavior, influenced by cultural norms and stereotypes.[210] On the street, bias may cause officers to misinterpret ambiguous behavior to fit prevailing narratives or stereotypes about black youth.[211] The cultural stereotype of "blacks as violent, hostile, aggressive, and dangerous" is so pervasive within our society,[212] the mere presence of a black male on the street may cause an officer to anticipate criminal activity or fear for their safety.[213]

Several studies on implicit racial bias have found that individuals are more likely to interpret ambiguous behavior by blacks as more aggressive and consistent with violent intentions while interpreting the same behavior by whites as harmless.[214] In one study, researchers asked participants to view a brief movie clip in which a target's facial expression morphed from unambiguous hostility to unambiguous happiness and a second clip where the target's expression did the reverse.[215] Participants with higher levels of implicit bias took longer to perceive the change of black faces from hostile to friendly, but not that of white faces.[216] In the second clip, participants perceived the onset of hostility much earlier for black faces than for white faces.[217] In another study, researchers asked participants to view a series of black or white faces and then determine whether some object was crime-related or neutral.[218] Study participants were more likely to see crime-related objects when associating the object with a black face rather than with a white face.[219]

Studies on police shootings confirm suspicions that police perceive blacks to be more dangerous in spontaneous encounters. In one 2007 study, researchers randomly selected 124 patrol police officers and 135 civilians to play a video game simulation in which they were confronted with a black or white person and were asked to shoot if the person was

---

210. *Id.* at 987.
211. *Id.* at 987 nn.160–61.
212. *Implicit Racial Bias in Public Defender Triage*, *supra* note 192, at 2630.
213. *See* Eberhardt et al., *supra* note 191, at 890.
214. Levinson & Young, *supra* note 175, at 310–11 (explaining that when mock jurors were primed with a black perpetrator, they were significantly more likely to find ambiguous evidence to be more indicative of guilt than with a white perpetrator); *Arrest Efficiency*, *supra* note 175, at 2046–48.
215. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640 (2003).
216. *Id.* at 642.
217. *Id.*
218. Eberhardt et al., *supra* note 191, at 886.
219. *Id.*

armed or to press a "don't shoot" button as quickly as possible if the person was unarmed.[220] Although officers were better able than civilians to differentiate between armed and unarmed targets, the results showed clear evidence of racial bias among both police officers and civilians.[221] Both police officers and civilians were faster at shooting black targets than white targets, and police officers were slower to make correct decisions when faced with either an unarmed black man or an armed white man.[222] In a 2005 study, police officers were initially more likely to mistakenly shoot unarmed black suspects than unarmed white suspects.[223] However, over time, participation in the simulation resulted in a shift from a liberal bias toward shooting in early trials to a more conservative response in later trials involving both black and white suspects.[224]

Given the demonstrated impact of bias on police and other criminal justice actors, race must be meaningfully considered in assessing the reliability of an officer's objective facts and decision to stop a black youth. An officer's report of "furtive gestures," "evasive" eye movements, and "excessive nervousness" may all be distorted by stereotypes about race and adolescence.

C. The Reasonableness of Suspect Behavior: Commonsense Conclusions About Race and Adolescence

Even assuming the officers' factual observations are reliable and not unduly distorted by implicit biases, the officer's suspicion may still be distorted by the meaning he or she assigns to those observations. Although the Court articulated a lower quantum of evidence needed

---

220. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1009 (2007) [hereinafter *Across the Thin Blue Line*]; *see also* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1317 (2002) (reporting the results of shooter-paradigm videogame in which undergraduate students and randomly selected people were quicker to shoot black targets as compared to white, made more mistakes in shooting more unarmed black targets (false alarms) than unarmed white targets and failing to shoot more armed white targets (misses) than armed black targets).

221. *See Across the Thin Blue Line*, *supra* note 220, at 1015 (comparing the implicit racial bias of police officers with the average citizen).

222. *See id.* at 1015, 1017.

223. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005) (highlighting further research that shows the pervasiveness of implicit bias in police officers).

224. *Id.* at 182.

to justify an investigative *Terry* stop,[225] the reasonable articulable suspicion standard requires more than mere "inarticulate hunches."[226] It requires more than an officer's intuitive sense that a person "looked suspicious."[227] To provide the requisite suspicion, an officer must identify facts and observations that are specific, objective, and largely race-neutral unless race is an identifying factor in an otherwise sufficiently detailed description.[228] The standard allows the officer to consider the totality of the circumstances but highlights specific factors that reasonably contribute to that analysis.[229] Factors include the activities of the person being stopped, the officer's knowledge about the person, the area in which the activity is taking place, and the person's immediate reaction or response when approached and questioned by the officer.[230] Within this broad framework, police may infer nefarious intent from a person's flight, furtive gestures, presence in a high crime neighborhood, association with known offenders, knowledge of recently reported crime in the area, presence in a particular location at an unusual time of day, and exchange of items believed to be contraband.[231]

The totality of the circumstances standard also allows officers to infer criminal intent from a collection of otherwise innocuous facts. For example, in *Terry* the officer inferred criminality from Terry's actions of pacing in front of a store, gazing into the store window, and conferring with a third man—each of which the Court itself acknowledged were innocuous behaviors not indicative of criminal activity.[232] On review, the Court concluded that the officer's thirty-nine years of professional

225. Terry v. Ohio, 392 U.S. 1, 27 (1968).

226. *Id.* at 21–22; Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring) ("There must be something at least in the activities of the person being observed on or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended.").

227. Brown v. Texas, 443 U.S. 47, 52 (1979).

228. Thompson, *supra* note 95, at 967–69, 975–77 (discussing the Court's reliance on specific, objective facts and omission of race in *Terry* to explain the officer's stop of Terry, and appropriate use of race); *see, e.g.*, United States v. Collins, 532 F.2d 79, 81 (8th Cir. 1976) (finding that the officer was justified in making an investigative stop because the defendant drove a car similar to one described over police radio).

229. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000); United States v. Cortez, 449 U.S. 411, 417 (1981).

230. *See generally* LAFAVE, *supra* note 38, § 9.5 (detailing what constitutes a permissible stop).

231. *See, e.g.*, *Wardlow*, 528 U.S. at 124 (articulating that flight and presence in a high crime area can be grounds for reasonable suspicion).

232. Terry v. Ohio, 392 U.S. 1, 22–23 (1968).

experience and knowledge of the patterns of criminal activity were sufficient to validate the stop.[233]

In reviewing the propriety of an officer's conduct, courts will evaluate the officer's inferences from the lens of a reasonable police officer viewing similar facts and circumstances.[234] As the Court noted in *Terry*,

> In justifying the particular intrusion[,] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion . . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?[235]

Notwithstanding the Court's endorsement of an objective, race-neutral standard to undergird the Fourth Amendment stop-and-frisk framework, race and adolescence cannot be extracted from the interpretation of most common justifications for a stop. Some factors—such as presence in a high crime neighborhood—are so intertwined with race that they have become a proxy for race.[236] Unless the police and courts meaningfully evaluate the role of race and adolescence in the suspicion rubric and revisit the traditional judgments and inferences that are frequently assigned to behaviors by blacks and youth, black children will continue to be disproportionately targeted by the police.

1. Flight and refusal to rooperate

A child's flight from the police is a clear example of how race and age together negate the inference of guilt that might otherwise flow from a youth's avoidance of or refusal to cooperate with the police. In

---

233. *Id.* at 23.

234. *Id.* at 21–22; *see Wardlow*, 528 U.S. at 124–25 ("[C]ourts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." (citing *Cortez*, 449 U.S. at 418)).

235. *Terry*, 392 U.S. at 21–22; *see also Cortez*, 449 U.S. at 418 ("The analysis proceeds with various objective observations, information from police reports . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and deductions—inferences and deductions that might well elude an untrained person.").

236. *See* Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 493 (2004) ("Thus 'high crime area' becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops. Location in America, in this context, is a proxy for race and ethnicity.").

the scenario we have been examining throughout this Article, Andre did not flee. Maybe he saw no way out, with four uniformed officers and a marked police car at his side. Maybe he was terrified the officers would shoot him in the back if he walked away. Regardless, Andre faced a dilemma that many black boys face when they are confronted by the police: to either blindly comply with whatever the police say to avoid getting hurt (and thereby submit to a seizure) or run as fast as possible to get out of there.[237]

Although courts have long given lip service to the notion that civilians have a right to avoid the police and go about their business,[238] that notion has been undermined by an equally long-standing inference that an individual's "flight" from the presence of police conveys a consciousness of guilt.[239] Relying on commonsense judgments about human behavior, police and courts assume that a person who runs has something to hide.[240] However, as with other aspects of the Fourth Amendment doctrine, assumptions about the meaning of flight need to be reexamined in light of recent developmental science and the evolving reasonable child standard. As the Court held in *J.D.B.*, a child's age itself generates its own set of commonsense conclusions about behavior and perception.[241] A child's decision to flee may be impulsive, emotional, or rebellious, particularly in the face of perceived unfairness.[242] Adolescent decision making is often compromised by cognitive and psychosocial immaturity.[243] Cognitive immaturity refers to "deficiencies in the way adolescents

---

237. *See* Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (emphasizing that racial profiling of black males has conditioned them to run from police).

238. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 497–98 (1983) (holding that a person may decline to listen to police officer questions at all and may go on his way); Smith v. United States, 558 A.2d 312, 316 (D.C. 1989) ("Leaving a scene hastily may be inspired . . . by a legitimate desire to avoid contact with the police. A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention.").

239. *Wardlow*, 528 U.S. at 124.

240. *See Warren*, 58 N.E.3d at 341.

241. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (citing Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

242. David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 13 n.2 (2003) (describing the propensity of children to react negatively in the face of perceived unfairness).

243. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 742–43 (2000); Scott-Hayward, *supra* note 44, at 62.

think"; psychosocial immaturity refers to "deficiencies in adolescents' social and emotional capability."[244] Even when adolescents' cognitive capacities begin to approximate those of an adult, deficiencies in their psychosocial capacities compromise decision making well into late adolescence and early adulthood.[245] As discussed in Part II, the region of the brain associated with impulse control, risk assessment, and moral reasoning is still developing well into late adolescence.[246] The adolescent brain reaches heightened emotional reactivity before it develops the capacity to regulate those emotions.[247] As a result, youth as a class tend to be more impulsive, less risk averse than adults, and prefer short-term gains.[248] Youth are also less able than adults to envision the danger inherent in a particular behavior.[249] Even when youth can anticipate the long-term consequences of a given course of conduct, they tend to make impetuous decisions and actions,[250] especially when they are under stress.[251]

Youth are also more susceptible to the influence of others—both peers and adults.[252] It is not a myth that teens are more sensitive than adults to the perceived and actual influences of their peers.[253] Peer

---

244. Cauffman & Steinberg, *supra* note 143, at 742–43.

245. Steinberg & Scott, *supra* note 45, at 1011–12; *see also* Cauffman & Steinberg, *supra* note 243, at 756–57.

246. Levick & Tierney, *supra* note 11, at 523–24 (citation omitted); *see supra* notes 147–51 and accompanying text.

247. Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161–62 (2010).

248. *See* Steinberg & Scott, *supra* note 45, at 1012 (noting that adolescents are generally less risk adverse than adults). *See generally* Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 206 (2010) (providing perspectives on age differences and risk taking); *Age Differences in Future Orientation*, *supra* note 149, at 28 (using an increasing risk dynamic paradigm in which probability of a negative outcome increases with each additional decision to measure risky decision making).

249. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

250. *Id.* at 569.

251. B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 82, 82–87 (2013) (finding that juveniles' cognitive capacity is undermined in circumstances that are not controlled, deliberate and calm); Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. OF EXPERIMENTAL PSYCHOL. 709, 728 (2009) (finding that in emotionally laden settings adolescents were more likely to make risky decisions compared to children and adults).

252. Steinberg & Scott, *supra* note 45, at 1012.

253. *See* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*,

influence can be direct (e.g., friends encouraging others to do something risky like run from the police) or indirect (e.g., doing something risky to avoid peer rejection even in the absence of direct pressure).[254] Given that youth frequently hang out in groups during adolescence, susceptibility to peer influence during the teen years cannot be underestimated.[255] When one child runs, they all run—regardless of guilt or innocence.[256] To expect anything else is unrealistic and creates unwarranted suspicion.

Acknowledging that flight from the police does not create suspicion per se, some courts have tried to honor the individual's right to avoid the police by inferring consciousness of guilt only when the suspect has engaged in some "headlong flight" or "fleeing" that manifests a real, immediate, and urgent desire to escape.[257] This distinction is of little, if any, benefit for a youth who runs as fast as he can out of impulse. Among youth as a class, there are too many innocent reasons a child might run to warrant a fair and reasonable conclusion that their flight conveys consciousness of guilt.[258]

When we add race to these adolescent indiscretions, the link between flight and consciousness of guilt becomes even more tenuous. In *United States v. Drayton*,[259] the Court asserted that the presence of a uniformed and visibly armed officer "is cause for assurance, not discomfort."[260] As

---

41 DEVELOPMENTAL PSYCHOL. 625, 629 (2005) (summarizing the results of a study that found that teens took more risks in a driving game when their peers were in the room than adults in the same situation); *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1536 (2007) (discussing a study finding that individuals capacity to resist peer pressure grows linearly between ages fourteen to eighteen, but after eighteen there is not much evidence of further growth).

254. Gardner & Steinberg, *supra* note 253, at 625–26.

255. *Id.* at 625.

256. *See id.* (finding that adolescents are more likely to follow their peers and make riskier decisions when with peer groups).

257. Illinois v. Wardlow, 528 U.S. 119, 124 (2000); *see also* Smith v. United States, 558 A.2d 312, 317 (D.C. 1989) (finding no reasonable articulable suspicion when suspect neither ran nor bolted); State v. Kreps, 650 N.W.2d 636, 648 (Iowa 2002) (holding that certain facts coupled with headlong flight is sufficient for reasonable suspicion). *But see* Wilson v. United States, 802 A.2d 367, 370 (D.C. 2002) (rejecting argument that only "headlong flight" meets the test of *Wardlow*).

258. *See* Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 781–82 (1996) (highlighting multiple reasons why juvenile actions must be treated differently in Fourth Amendment contexts).

259. 536 U.S. 194 (2002).

260. *Id.* at 204.

the Court further opined, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[261] Quite to the contrary, the current strain in police-black relations give black Americans little reason to be comforted by the presence of an armed officer. Several federal and state courts have already acknowledged that innocent minorities sometimes flee from the scene of a crime for entirely innocent reasons, including a desire to avoid unwarranted harassment by the police, fear of being apprehended for a crime they did not commit, and fear of physical injury or even death at the hands of an officer.[262] As Justice Stevens pointed out in his concurrence in *Wardlow*:

> Among some citizens, particularly minorities . . . there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.
>
> . . .
>
> The probative force of the inferences to be drawn from flight is a function of the varied circumstances in which it occurs.[263]

More recently, one state court was even more assertive in its rejection of flight as a reliable indicator of guilt for black males.[264] In 2016, in *Commonwealth v. Warren*,[265] the Supreme Court of Massachusetts held that officers had no reasonable articulable suspicion to stop Jimmy Warren given the vagueness of the suspect description, the lapse of time between the reported burglary and the stop of Warren, and Warren's distance from the location of the reported crime at the time he was stopped.[266] In declining to treat Warren's purported "flight" from the police as a meaningful contributing factor in the officers'

---

261. *Id.* at 205.

262. *See Wardlow*, 528 U.S. at 132–33 (Stevens, J., concurring in part and dissenting in part) (highlighting citizen's fears over contact with police as a potential reason for flight); *see also In re* T.L.L., 729 A.2d 334, 341–42 (D.C. 1999) (finding flight not sufficient for reasonable articulable suspicion when respondent and his companions "rapid[ly] retreat[ed]" into the house when police approached).

263. *Wardlow*, 528 U.S. at 132–33, 135 (Stevens, J., concurring in part and dissenting in part).

264. Commonwealth v. Warren, 58 N.E.3d 333, 342–43 (Mass. 2016).

265. 58 N.E.3d 333 (Mass. 2016).

266. *Id.* at 342–43.

suspicion, Justice Hines wrote,

> Where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department . . . report documenting a pattern of racial profiling of black males in the city of Boston . . . . We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for [field interrogation observation] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.[267]

A black youth's flight from the police is just as likely to reflect a personal desire to avoid contact with a corrupt system as it is to be consciousness of guilt. Given the myriad of negative direct and indirect contacts young black males have with the police, it is no surprise that black boys have an especially low opinion of the police, particularly in socioeconomically disadvantaged communities where friction between the police and citizens is common.[268] Research shows that while youth in general have less favorable views about the police than adults, black youth have even less favorable attitudes toward the police than white youth.[269] Unlike white youth, who tend to see police misconduct as an aberration, black male youth experience that misconduct as ubiquitous.[270]

Black boys are angered not only by the sheer number of police

---

267. *Id.* at 342; *see also In re* J.M., 619 A.2d 497, 513 (D.C. 1997) (Mack, J., dissenting) ("I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team.").

268. *See* Goodrich & Anderson, *supra* note 199, at 87 (describing the importance of community context in shaping perceptions of police).

269. *Police Don't Like Black People*, *supra* note 184, at 71, 74; Yolander G. Hurst & James Frank, *How Kids View Cops: The Nature of Juvenile Attitudes Toward the Police*, 28 J. CRIM. JUST. 189, 200 (2000); Taylor et al., *supra* note 177, at 302.

270. *See, e.g.*, *Strategic Responses*, *supra* note 103, at 252–53 (examining youths' responses to police in three neighborhoods in St. Louis, Missouri).

officers patrolling their neighborhoods but also by the frequency with which they are stopped.[271] Black boys complain of persistent pedestrian stops, vehicle stops, and the assignment of specialized units and detectives to patrol their neighborhoods, making their friends and relatives reluctant to visit.[272] Children grow up watching their friends and family members accosted for minor infractions like not wearing a seat belt, having car windows too tinted, and playing the radio too loud.[273] Black boys are offended by repeated orders to "sit or lie on the pavement"[274] and resent strip searches and cavity probes, especially when there is no obvious rationale for such an order.[275] Boys interviewed in St. Louis reported that the "vast majority of their involuntary police contacts"—and harassment from the police—occurred when they were not doing anything wrong.[276] With frustration at the "officers' apparent inability to distinguish law-abiding residents from those engaged in crime," the boys resented stops that seemed arbitrary and baseless and quickly learned to avoid contact with the police at all costs.[277]

Black boys who live in a society where police-on-black violence is commonplace have every reason to flee to avoid physical injury. Police stops involving black boys are routinely initiated by some physical contact such as grabbing, pushing, shoving, pulling, or tackling the youth to the ground.[278] Black youth complain of harassment, physical violence, and other forms of police misconduct as extreme as taking money from suspects, driving suspects around the city instead of taking them to the police station, and dropping suspects off in unfamiliar or rival neighborhoods.[279] Other aggressive police tactics include teams of

---

271. *Id.* at 235–36.

272. *Id.* at 241.

273. *Gender, Race, and Urban Policing*, *supra* note 109, at 543.

274. *Police Don't Like Black People*, *supra* note 184, at 81; *see also Gender, Race, and Urban Policing*, *supra* note 109, at 540 (describing an experience that is consistent with this author's clients' experience in D.C.).

275. *Gender, Race, and Urban Policing*, *supra* note 109, at 548.

276. *See, e.g.*, Jacinta M. Gau & Rod K. Brunson, *Procedural Injustice, Lost Legitimacy, and Self-Help: Young Males' Adaptions to Perceived Unfairness in Urban Policing Tactics*, 31 J. CONTEMP. CRIM. JUST. 132, 141 (2015).

277. *Id.* at 142–43.

278. *See, e.g.*, Michael E. Miller, *Calif. Police Officer Scuffles with 16-Year-Old over Walking in the Bus Lane*, WASH. POST (September 18, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/18/calif-cop-scuffles-with-16-year-old-over-walking-in-the-bus-lane (reporting that a black teenager was struck with a baton by a police officer after being told to exit a bus lane and allegedly talking back to the officer).

279. *Police Don't Like Black People*, *supra* note 184, at 85–86. Sadly, these rides sound

plainclothes officers called "jump out boys" who drive up fast to street corners, jump out to grab and search youth on the streets, and shove their hands in the youths' mouths in search of drugs.[280] Even more violent encounters involve billy clubs or chokeholds, like the one that killed Eric Garner in New York.[281] Fear of violence by police is now the norm for black boys. Instead of looking to police for protection, young black males see police as a primary source of potential danger. As young black males internalize the lessons they acquire about police from their families, schools, and communities, their views and reactions to the police—like running—become unconscious and automatic.[282]

2. Hostility, nervousness, response to questions, and furtive gestures

By all accounts, Andre cooperated with the police—either willfully or by tacit resignation to the authority of the police to stop black boys. Had Andre refused to cooperate, there is little doubt the police would have justified their stop and frisk with a litany of facts describing Andre's apparent nervousness, hostility, furtive movements, questioning of the officer's authority, and refusal to listen, answer, or cooperate with the police. Although none of these factors alone would provide the requisite justification for a stop, they would all add to the officer's expert assessment of the totality of the circumstances.[283]

---

eerily similar to the "rough ride" that Freddie Gray experienced in Baltimore leading up to his tragic death from injuries. *See* Justin Fenton & Kevin Rector, *Officer Goodson, Driver of Freddie Gray, Faces the Most Serious Charges*, BALT. SUN (Jan. 9, 2016), http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-trial-preview-20160108-story.html; *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 34, 67, 85–87 (2016) [hereinafter INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT], https://www.justice.gov/crt/file/883296/download (chronicling police misconduct and harassment against Baltimore Youths).

280. *Police Don't Like Black People*, *supra* note 184, at 88.

281. Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html; Kyle Munzenrieder, *Miami-Dade Police Choke Black Teenager Because He Was Giving Them "Dehumanizing Stares,"* MIAMI NEW TIMES (May 29, 2013, 3:09 PM), http://www.miaminewtimes.com/news/miami-dade-police-choke-black-teenager-because-he-was-giving-them-dehumanizing-stares-6548482.

282. *See* Goodrich & Anderson, *supra* note 199, at 86–87 (explaining that community context can inform how individuals interpret another's behavior).

283. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 437 (1991) (stating that refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a seizure); Brown v. Texas, 443 U.S. 47, 52 (1979) (recognizing that "[t]he fact that appellant was in a neighborhood frequented by drug users, standing alone, is

Like flight, furtive gestures and nervousness are frequently cited as evidence that a suspect has something to hide.[284] A suspect's hostility and refusal to answer questions only heighten that suspicion.[285] Factors like furtive gestures and nervousness are even more ambiguous and unreliable than flight as an indicator of criminal intent when evaluated from the lens of adolescent development. A youth who talks back to police in front of peers may simply be acting out to get attention, protect their reputation, or mask their fears.[286] Notwithstanding youths' general perception that they must comply with the commands of adult authority figures,[287] adolescence is also characterized as a period of rebellion, bravado, and resistance—especially in the face of perceived injustice.[288] Common developmental features of youth, such as impulsivity and challenging authority, increase the chances that police encounters with youth will involve conflict and confrontation.[289]

Children are particularly sensitive to issues of fairness and respect.[290] Black youth who resent excessive police presence in their neighborhoods may be particularly hostile and disrespectful to law enforcement, exacerbating perceptions and assumptions that they are engaged in criminal activity.[291] In the St. Louis studies, black boys quickly learned that even obeying the law does little to insulate them from police suspicion and physical violence.[292] In fact, as the

---

not a basis for concluding that appellant himself was engaged in criminal conduct"); *see also* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (concluding that evasive and nervous behavior combined with headlong flight in a high narcotics area was enough to justify a *Terry* stop and protective pat down).

284. *See Wardlow*, 528 U.S. at 124 ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975)).

285. Consider Emilio Mayfield's refusal to stop walking when the officer ordered him to do so and Tremaine McMillian's clenched fist as he walked away from the officer on the beach. Miller, *supra* note 278; Munzenrieder, *supra* note 281; *Tremaine McMillian, 14-Year-Old with Puppy, Choked by Miami-Dade Police over "Dehumanizing Stares,"* YOUTUBE (May 31, 2013), https://www.youtube.com/watch?v=pB3hjlpstm0.

286. Thurau, *supra* note 173, at 37.

287. *See supra* notes 44–48 and accompanying text.

288. Thurau, *supra* note 173, at 31.

289. *Id.*

290. Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207, 209 (2008).

291. *See Police Don't Like Black People*, *supra* note 184, at 83 (noting that young black men are "particularly frustrated" when police stop them without any seeming basis for suspicion).

292. *Id.* at 88.

researchers in St. Louis concluded, being innocent could actually increase a young man's chance of being assaulted, as he is more likely to challenge the inappropriateness of the officers' actions.[293] Even when children remember their parents' advice about the dangers of talking back to the police, they lack the emotional capacity to regulate their emotions and impulses, especially in fast-paced, emotionally charged situations like those involving the police.[294] Consistent with the developmental research outlined throughout this Article, adolescents have a hard time focusing on the likely consequences of their actions and making rational decisions in the heat of the moment.[295] Moreover, a child's aggression or reticence to engage with police may arise out of developmental disabilities and language impairments, which occur at significantly elevated rates among youth in the juvenile justice population.[296] Children with language impairments often have difficulty following direction, recognizing and articulating emotions, reading social cues, identifying and controlling inappropriate behavior, and interpreting the motivations and thoughts of others.[297]

3. Presence in high crime area, proximity to suspected crime scene, association with known criminals, and "known to the officer"

Police routinely cite the "high crime rate" of a neighborhood to justify a stop or arrest.[298] The reference is so common that it has been called a "talismanic litany."[299] Unfortunately, thousands of citizens live

293. *Id.* at 95–96.

294. Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 216–20 (2011) (arguing that socio-emotional stimuli paired with adolescents' immature self-regulatory skills hinders decision making); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOL. 583, 592 (2009) (finding that adolescents decision making is less mature than adults in situations of emotional arousal or social coercion).

295. Cauffman & Steinberg, *supra* note 243, at 748–49, 754, 759; Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764, 1774–76 (2008).

296. *See* Michelle LaVigne & Gregory Van Rybroek, *"He Got in My Face so I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships*, 17 CUNY L. REV. 69, 71, 75–76 (2013) (stating that children with speech and language impairments are more likely to be arrested than their peers).

297. *Id.* at 75–77.

298. *See, e.g.*, Davis v. United States, 781 A.2d 729, 735 (D.C. 2001) (describing the location of the search as a "high narcotics area").

299. *See, e.g.*, Smith v. United States, 558 A.2d 312, 316 (D.C. 1989) (en banc) (stating

and go about their legitimate day-to-day activities in areas identified as high-crime areas. The parroting of phrases like "high crime area" to conjure up inferences of chaos and crime without regard to the nuances of the circumstances deprive inner city youth of equity in Fourth Amendment protections.[300] The fact that an individual was observed in or near a purportedly high crime area does not objectively lend any sinister connotation to facts that are otherwise innocuous on their face. Black youth are particularly penalized by this factor. Not only do they live in neighborhoods with a higher police presence, but poor black youth who live in small crowded apartments are also more likely to play outside where they will be seen and engaged by the police. The "high crime" label is especially problematic when it refers to a "neighborhood" or "area" that is overbroad and imprecise. Entire sectors of an urban city may fall within this designation. Absent a recent and specific report of crime at the precise location where the suspect is observed, the high crime factor should be removed from the suspicion rubric, even as a contributing factor.

Another closely related factor in the reasonable articulable suspicion analysis is an individual's apparent association with known criminals.[301] Given the frequent and disproportionate arrest of black Americans, it is hard to find a black child who does not have a friend or relative who has not been arrested or "known to the police."[302] Adolescents are particularly loyal to their friends and family. Thus, even when they

---

that regardless of the "talismanic litany," the high crime rate of a neighborhood alone is not enough to give an officer reasonable suspicion of criminal activity).

300. *See supra* notes 158–65 and accompanying text (explaining how *Terry* means that officers do not violate an individual's Fourth Amendment rights by stopping them simply for being in a high crime area).

301. *See* Ybarra v. Illinois, 444 U.S. 85, 90 (1979) (finding that where police had a warrant to search a tavern known for narcotics activity and a bartender working there, police could not *Terry* frisk anyone there without individualized reasonable suspicion); Hemsley v. United States, 547 A.2d 132, 135 (D.C. 1988) (holding that observations of a car lawfully parked in a high narcotics area, with three occupants, windows rolled up, and excessive smoke inside were held not to support more than mere suspicion and *Terry* stop not valid).

302. *Crime in the United States 2015: Table 43A: Arrests by Race and Ethnicity*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43 (last visited June 1, 2018) (reporting that in 2015, 69.7% of people arrested were white and 26.6% were black); *see* JOSHUA ROVNER, THE SENTENCING PROJECT, POLICY BRIEF: RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 1, 6 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf (explaining that African American juveniles are more likely to be arrested than their white peers).

have a choice about with whom they will spend time, they are not likely to abandon friends and family who have been targeted by the police.[303] Black youth are even more likely to side with friends and family as compared to police officers they perceive as corrupt and racist.

III. REGULATING POLICE CONDUCT: JUDICIAL REVIEW AND ITS LIMITS

To be sure, there will be considerable resistance to any Fourth Amendment interpretation that asks officers and trial courts to relax the test for determining whether there has been a seizure or to omit long-standing considerations like flight and high crime neighborhoods from the rubric of reasonable articulable suspicion.

A. Anticipating the Objections

This Part examines likely objections to the consideration of race and adolescence in the search and seizure doctrine and argues that any inconveniences for police are outweighed by the need to ensure that black youth benefit from the full protections of the Fourth Amendment.

1. No monolithic "Reasonable Black Person"

The evolution of an objective, reasonable child standard in *J.D.B. v. North Carolina* was possible largely because there are "commonsense conclusions" that can be made about children's behavior and abilities that "apply broadly to children as a class."[304] Noting that a child's age is "different,"[305] the Court set age apart from other subjective factors in the custody analysis.[306] Conclusions about age are "self-evident to anyone who was a child once himself, including any police officer or judge."[307] Detractors from the arguments in favor of a reasonable black child standard might fairly ask whether there are similar "commonsense conclusions" that can be made about black Americans and black children, in particular.

Whereas age is a quantifiable, unambiguous fact that is often readily identifiable by physical appearance, race is arguably a social construct.[308] Unlike age, which most people experience in fairly

303. *Supra* notes 100–01 and accompanying text.
304. 564 U.S. 261, 272 (2011).
305. *Id.*
306. *Id.* at 275.
307. *Id.* at 272.
308. *See, e.g.*, Jennifer L. Pierce, *Why Teaching About Race as a Social Construct Still*

universal developmental trajectories of maturity, rationality, and emotional capacity, people will express and experience race differently in their day-to-day lives.[309] For some, race will be difficult to visually ascertain.[310] Others may decline to identify with any particular race or reject meanings commonly associated with an outward physical appearance.[311] There are certainly middle-class, suburban black youth who have never feared police in quite the same way as poor, urban, inner city black youth might fear police, but that distinction is increasingly less true today.[312] Even youth who do not experience heavy police surveillance in their own neighborhoods share the vicarious trauma of perceived police-on-black violence through the news, internet, and social media.[313] Middle-class black parents have been equally compelled to warn their children of the need to avoid or cooperate with police.[314] Focusing on the variability of race obscures the broad and largely indisputable evidence of tension between black Americans and the police and underestimates the impact of race on youth-police interactions in the Fourth Amendment framework.

Moreover, just as there is no monolithic black person, there is also no one monolithic "child." Children raised in different schools, different socioeconomic classes, and in different families will develop

---

Matters, 29 SOC. F. 259, 259 (2014); *cf.* Margaret Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125, 125 (2007).

309. Shih, *supra* note 308, at 125.

310. *See* David Gilbert, *Interrogating Mixed-Race: A Crisis of Ambiguity?*, 11 SOC. IDENTITIES 55, 64 (2005) (discussing how physical appearance and social networks can impact racial identity as much as actual racial composition).

311. Shih, *supra* note 308, at 126.

312. *See* Hurst & Frank, *supr*a note 269, at 200 (explaining that suburban youth are more likely than urban youth to have a favorable view of police).

313. *See, e.g.*, Kenya Downs, *When Black Death Goes Viral, It Can Trigger PTSD-Like Trauma*, PBS (July 22, 2016, 8:04 PM), http://www.pbs.org/newshour/rundown/ black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma (citing research suggesting that for people of color, frequent exposure to the shootings of black people, including through graphic videos, can have long-term mental health effects); Imani J. Jackson, *The Trauma of Police Brutality*, USA TODAY (Sept. 2, 2016, 11:39 PM), http://www.usatoday.com/story/opinion/policing/spotlight/2016/09/02/trauma-police-brutality-column/89019122 (discussing the psychological damage of watching police brutality on people of color); Jenna Wortham, *Racism's Psychological Toll*, N.Y. TIMES MAG. (June 24, 2015), https://www.nytimes.com/2015/06/24/ magazine/racisms-psychological-toll.html (reporting that events experienced vicariously through social medial or the news may cause "race-based stress reactions").

314. *See supra* notes 100–01 and accompanying text.

at different paces and likely perceive police differently.[315] Yet, notwithstanding these obvious nuances and distinctions, Justice Sotomayor and a majority of the Court in *J.D.B.* concluded that the immaturity of youth is such a prevalent fact—despite the exceptions—that the balance tips in favor of incorporating age into the custody analysis, and arguably giving youth heightened protection through a "reasonable child" standard.[316] The same is true of race. Although there is no equivalent body of quantitative research demonstrating how black youth as a class respond to police, as noted above, there is ample anecdotal and qualitative research to support the claim that black youth are not only impulsive and immature like any other youth, but they also have additional reasons to fear and avoid the police.[317] Justice Sotomayor took pains to relegate the quantitative developmental research to a footnote in *J.D.B.* to make the point that we do not need science to tell us what every parent knows and what every officer who has ever been a child knows.[318] Likewise, it does not stretch the officer's imagination to contemplate any number of reasons a black youth might run from the police.

Explicit consideration of the interplay between race and age in the Fourth Amendment analysis is necessary to displace the fictitious reasonable person in criminal law—a person who is white, male, educated, and presumptively innocent.[319] To that end, this Article has surfaced the latent effects of race and adolescence on the definition of seizure and urges police and courts to abandon long-held inferences and judgments associated with behaviors like flight and hostility among black youth. This Article also challenges the criminalization of normal black adolescence and provides judges with an opportunity to curtail implicitly and explicitly racially motivated searches and seizures. Contrary to Justice Scalia's assertion in *Whren v. United States*[320] that the Fourth Amendment is not the appropriate constitutional basis for objecting to "discriminatory application of laws,"[321] this Article joins scholars like Anthony Thompson who contend that it is too early to

315. *See supra* notes 103–14 and accompanying text.
316. J.D.B. v. North Carolina, 564 U.S. 261, 275 (2011).
317. *See supra* notes 242–51 and accompanying text.
318. *J.D.B.*, 564 U.S. at 272 n.6.
319. *See supra* notes 11–18 and accompanying text.
320. 517 U.S. 806 (1996).
321. *Id.* at 813 (stating that the Equal Protection Clause is the appropriate basis to address racial discrimination).

take the Fourth Amendment off the table as a source of relief.[322]

2. Unwieldy task: subjective tests and changing cultural norms

Some critics will likely argue that incorporating seemingly subjective factors like race and age into the Fourth Amendment analysis will emphasize the variable and unreliable vulnerabilities of an individual suspect and shift focus away from the reasonableness of police conduct.[323] Others may argue that it is too complicated and unwieldy to allow officers to infer consciousness of guilt when white suspects flee, but not black suspects, or to require officers to be more cautious when approaching and seeking consent from a black suspect. Thus, as the argument goes, Fourth Amendment standards such as seizure must remain objective if they are to provide practical guidance for officers in the field and deter the abuse of police power against minorities.[324] Proponents of simplicity and objectivity contend that the purposes of the Fourth Amendment are best served by providing law enforcement officers with a clear, consistent, and predictable measure of when their conduct or questioning will trigger constitutional protections.[325] Objectivity ensures that Fourth Amendment protections do not "vary with the state of mind of the particular individual being approached."[326]

The Court in *J.D.B.* addressed similar concerns in deciding whether age was a relevant and appropriate consideration in the *Miranda* custody analysis.[327] In that context, the Court explicitly rejected the state's arguments that allowing considerations of age to inform the custody analysis would undercut the intended clarity of the *Miranda* principle.[328] To the contrary, Justice Sotomayor asserted that "ignoring a juvenile defendant's age will often make the [*Miranda*] inquiry more artificial . . . and thus only add confusion."[329] The majority also rejected any notion that *Miranda* works only with a "one-size-fits-all"

322. Thompson, *supra* note 95, at 961.
323. *See* Carter, *supra* note 17, at 1406–07.
324. *Id.* at 1391 (citing LAFAVE, *supra* note 38, § 9.4(a)).
325. *Id.*; Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (calling for a test that provides consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police and noting that "[t]he test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment").
326. *Chesternut*, 486 U.S. at 574.
327. J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011).
328. *Id.* at 271–72.
329. *Id.* at 279.

analysis and insisted that age is both a relevant and objective factor that cannot be excluded from the *Miranda* analysis in the hope of making it easier to implement.[330]

Some might argue that commonsense judgments should not be tied to the ever-changing cultural dynamics between law enforcement and society and should not require judges to speculate about evolving perceptions and preferences among the police and civilians. This argument ignores the fact that norms and commonsense judgments do change, and that we do expect our courts to pay attention. The juvenile death penalty was outlawed in 2005 precisely because public opinion shifted.[331] Juvenile life without parole was prohibited in non-homicide cases precisely because we learned more about the resilience of youth.[332] By limiting the range of factors the police may consider in the reasonable articulable suspicion analysis, this Article hopes to reduce courts' tremendous deference to police perception and to encourage courts to engage in an a more rigorous and transparent review of police conduct that considers both the impact of implicit racial bias on the reliability of an officer's factual observations and the assignment of meaning to those facts.

Finally, nothing proposed in this Article is any more unwieldy for judges than the current, highly ambiguous, reasonable articulable suspicion standard. By its very nature, reasonable articulable suspicion is a fluid, discretionary standard that requires officers to make judgments based on experience and commonsense.[333] This Article simply attempts to bring the search and seizure doctrine, and its attendant inferences and judgments, into line with contemporary police-youth realities. As Justice Sotomayor noted in *J.D.B.*:

> Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age . . . . The same is true of judges, including those whose childhoods have long since

330. *Id.*

331. *See* Roper v. Simmons, 543 U.S. 551, 575–79 (2005) ("[I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.").

332. *See* Graham v. Florida, 560 U.S. 48, 78–79 (2010) (prohibiting life without parole in part because of the long-term consequences of such incarceration on the development of juveniles).

333. United States v. Cortez, 449 U.S. 411, 417 (1981) ("Terms like 'articulable reasons' and 'founded suspicion' are not self-defining . . . .").

> passed . . . . In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a [seven]-year-old is not a [thirteen]-year-old and neither is an adult.[334]

Ultimately, arguments about the need for predictability, fairness, and ease of administration for the police are red herrings that draw courts away from the reality that the dominant class in America has managed to inscribe their own cultural views and interests into a reasonableness standard.[335] By not factoring race and age into the search and seizure analysis, the current standard perpetuates inequities in Fourth Amendment protections and leaves black youth disproportionately vulnerable to police stops.

3. Consideration of race and age will render every encounter a seizure

At least one scholar has expressed concern that consideration of age in the Fifth Amendment custody inquiry will make age the determinative factor, rendering almost any police encounter with a youth custodial.[336] Others will likely raise similar objections in the Fourth Amendment seizure context. Some judges and police officers will worry that recognition of adolescents' deference to adults and racialized fears of the police will convert every police encounter with a black youth into a seizure, discouraging officers from engaging with black youth and leaving youth and the community in danger. As an initial matter, this argument overstates the definitive influence of race and age in the seizure analysis and ignores the vast array of other factors that determine whether police conduct invokes Fourth Amendment protections. An encounter in which weapons are drawn, physical force is used, and a uniformed officer commands an individual to stop will likely be recognized as a seizure regardless of the race or age of the suspect. Other factors include the length of time involved in the encounter, the officer's tone of voice, and the officer's exact words to the suspect.[337] Second, even if consideration of race and age does increase the frequency with which courts will find a seizure, that outcome would be appropriate to guard against the arbitrary searches of black youth. The unique interplay between age and race argues in

---

334. *J.D.B.*, 564 U.S. at 279–80.

335. *See* Delgado, *supra* note 28, at 820–21.

336. *See, e.g.*, Carter, *supra* note 17, at 1412–13 (rejecting the consideration of age in the "free-to-leave" seizure test).

337. LAFAVE, *supra* note 38, § 9.4(a).

favor of requiring police to justify their intrusion more often in juvenile cases than adult cases and even more often when black youth are involved than white youth. It does not mean that every seizure will be illegal, but only that the police will have to justify those encounters more often with the requisite quantum of suspicion.

4. Public safety and the totality of the circumstances

Some will complain that limiting the factors police may consider in the reasonable articulable suspicion analysis will unnecessarily constrain the officer's expertise and intuition in detecting crime. The "totality of the circumstances" test allows the police to consider a "series of acts," which by themselves may be innocent, but if taken together warrant further investigation.[338] Because officers have little time to reflect and calculate before on-the-street encounters, they need flexibility to make snap judgments to protect themselves and others.[339] Consider Andre's encounter with the police. No doubt, many will be fixated on the fact that Andre did indeed have a gun when he was frisked by police. Those who favor the public safety advantage of getting that gun off the street will likely oppose any interpretation of the Fourth Amendment that undermines the officer's legal authority to stop and investigate. These critics would prefer to ignore race and adolescence if such considerations would prevent officers from achieving their highest priority—protecting the public. Unfortunately, this analysis ignores important collateral implications of excessive stops of black youth and assumes there is an absolute, positive correlation between getting one gun off the street and subsequent short and long-term improvements in public safety.[340] These arguments fail to consider the psychological impact of persistent police surveillance on black youth as a class.[341]

First, we must remember that although Andre had a gun, his friend

338. Terry v. Ohio, 392 U.S. 1, 22 (1968).

339. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 554 (1980) (noting the need for flexible investigation techniques and police questioning "as a tool in the effective enforcement of criminal laws"); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam) (allowing officer flexibility to remove driver from car during a stop because "the State's proffered justification—the safety of the officer—is both legitimate and weighty"); *Terry*, 392 U.S. at 10 (noting that law enforcement officers on the street need "an escalating set of flexible responses").

340. *See infra* note 345 and accompanying text.

341. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. OF PUB. HEALTH 2321, 2321 (2014) (finding that young men stopped by the police experienced compromised mental health, including higher levels of anxiety and trauma).

James did not. The vast majority of stops do not result in the recovery of a gun, or any contraband at all.[342] In New York, for example, out of over 500,000 police stops in 2009, officers found a gun in only 1.1 percent of those encounters.[343] Out of 4.4 million police stops in New York between 2009 and 2012, police ultimately released ninety percent of the targeted persons after no evidence or other wrongdoing was discovered.[344] Second, we must be careful not to dismiss James's contact with the police as an insignificant consequence of Andre's arrest. The collateral damage from over-policing black youth is significant not only for the many youth who are stopped for no criminal activity at all, but also for the members of the larger public who will be affected by the long-term, indirect impact of over-policing on public safety. Adolescence is a critical time during which norms and values, including beliefs about law and legal institutions, are formed.[345] Negative attitudes about the police acquired during childhood and adolescence have a "lasting" effect on adults' opinions about police.[346] Thus, a child's experiences and perceptions of fairness and justice during adolescence may have a substantial impact on their risk of offending and of having dangerous and hostile encounters with the police as they transition to adulthood.[347] Effective socialization occurs when youth develop a healthy respect for legal authority and internalize the social norms that prohibit illegal behavior.[348] Studies involving youth have found a strong correlation between youths' perceptions of legitimacy and self-reported compliance with the law.[349] Youth who perceive police to behave fairly are more like to view police as legitimate authority figures, less likely to be cynical about the law, and more likely to comply with the rules.[350] In the long

342. Hutchins, *supra* note 156, at 903.

343. *Id.*

344. *Id.*

345. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 220 (2005) [hereinafter *Legal Socialization of Children*].

346. Lyn Hinds, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 196 (2007); *see Legal Socialization of Children*, *supra* note 345, at 218–19 (explaining that attitudes toward law and authority are developed early in life and stick with people).

347. Hinds, *supra* note 346, at 196–97.

348. *See* Rick Trinkner & Ellen S. Cohn, *Putting the "Social" Back in Legal Socialization: Procedural Justice, Legitimacy, and Cynicism in Legal and Nonlegal Authorities*, 38 L. & HUM. BEHAV. 602, 602 (2014).

349. *Id.* at 606–08; Erika K. Penner et al., *Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38 L. & HUM. BEHAVIOR 225, 225 (2014).

350. Penner et al., *supra* note 349, at 234; Trinkner & Cohn, *supra* note 348, at 608.

run, fair and equitable policing enhances public safety while racially disparate and arbitrary policing tends to erode public safety.

This Article does not ask courts to abandon the totality of the circumstances test altogether, but instead to refine the boundaries of that standard given what we now know about adolescent development, implicit racial bias, and the realities of police-black relations. As currently interpreted, the reasonable articulable suspicion standard is so broad that it allows police to identify almost anything as evidence of suspicion under the guise of the "totality." Courts routinely defer to police expertise and training and are reluctant to discredit officers' justifications for suspicion.[351] As long as an officer can articulate some specific facts that justify the suspicion, they need not discuss or even consider how race and age might have influenced their decision.[352] When a black youth runs from the police, the officer need only talk about the flight, not the race of the suspect. In this way, race is sanitized from the analysis and judges pretend it is irrelevant. Although stops based on race alone are not permitted,[353] police may easily bury race among a "post hoc litany" of other race-neutral reasons for their suspicion.[354] Because judges seldom question whether race had any effect in the officers' decision making process, it is generally impossible to identify any particular instance of abuse in the search and seizure inquiry. By not inquiring about race, courts absolve officers of accountability for both conscious discriminatory intent and the subconscious effects of implicit racial bias.

To correct this deficit in the totality analysis, it is essential that the range of appropriately considered factors be narrowly tailored to help officers distinguish between suspicious and innocent behaviors and that judges and police officers be required to think critically about race in assigning

---

351. Thompson, *supra* note 95, at 970–71, 1001–02; *see also* United States v. Cortez, 449 U.S. 411, 419 (1981) ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions . . . to form a legitimate basis for suspicion.").

352. Whren v. United States, 517 U.S. 806, 813 (1996) (noting that subjective motivations lack Fourth Amendment significance if the officer can and does identify objective bases for her actions).

353. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (condoning stops that involve racial identification if it is not a primary factor in the stop); United States v. Brignoni-Ponce, 422 U.S. 873, 875, 886–87 (1975) (holding that stops made by border police based on Mexican descent alone would not be enough, but noting that Mexican appearance was relevant factor given the high likelihood that a person of Mexican ancestry might be alien on the identified southern California highway).

354. Susskind, *supra* note 19, at 337.

meaning to those behaviors. The need to clarify and restrain the suspicion analysis has become even more important since the Court diluted the probable cause standard to reasonable articulable suspicion in *Terry*.[355] Nonetheless, some will worry that if factors like nervousness and flight are removed from the framework, then black youth will get a "free pass" to walk about the streets carrying weapons and other contraband with impunity. Detractors will also likely complain that police should be increasing—not decreasing—the surveillance of youth given evidence that delinquency peaks among adolescents between ages fifteen and nineteen and given the general consensus that children need more oversight for their own safety and healthy development.[356] Yet, just as the Fourth Amendment seeks to balance two competing interests—the interests of citizens to be free from unreasonable liberty intrusions (regulating police abuses) and the interests of police officers in protecting themselves and other citizens and in enforcing the law[357]—the reasonable articulable suspicion standard should protect both the right of black youth to be left alone and the need for law enforcement to investigate crime and ensure public safety. Taking factors like flight and nervousness out of the suspicion rubric and requiring courts to reexamine the assumptions that currently undergird all of the reasonable suspicion factors serves both interests. The reality is that, although a majority of the seventy-four million American youth self-report behaviors that could be labeled delinquent,[358] only a very small subset of those delinquent youth come to the attention of authorities.[359] Society has always tolerated some

355. Terry v. Ohio, 392 U.S. 1, 21 (1968).

356. Cross-cultural data indicate the onset of offending occurs between ages eight and fourteen, the frequency of offending peaks between ages fifteen and nineteen, and the peak of desistance occurs between ages twenty and twenty-nine. Kathryn C. Monahan & Alex R. Piquero, *Investigating the Longitudinal Relation Between Offending Frequency and Offending Variety*, 36 CRIM. JUST. & BEHAV. 653, 653–54 (2009).

357. Brown v. Texas, 443 U.S. 47, 50–51 (1979) (examining the balance between public interest in police protection and individual right to personal privacy); *Terry*, 392 U.S. at 9–12; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 224–25 (1973) (discussing competing concerns between law enforcement and individual rights, stressing the value of consent searches to law enforcement while recognizing the inherent risks of coercion).

358. *United States, High School Youth Risk Behavior Survey, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://nccd.cdc.gov/Youthonline/App/Results.aspx?LID=XX (last visited June 1, 2018) (reporting percentage of youth responses to a range of questions, including unintentional injury or violence, tobacco use, and alcohol and drug use).

359. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2013, at 38 (2015), https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2013.pdf (noting that, in 2013, the number of delinquency

level of undetected delinquency as a part of normal adolescence, and there is little reason to believe that altering the suspicion framework will increase the number of young black delinquents who pose a serious threat to the safety and well-being of the community.[360] Although black youth are arrested at higher rates than white youth, self-report studies consistently show that white youth engage in the same risky and delinquent behavior as black youth.[361] Further, the most dangerous offenders are still likely to be detected by police relying on the remaining factors in the reasonable articulable suspicion test—the report of a crime, a suspect's match with an adequately detailed description, a suspect's proximity to a precise crime location within a reasonably short time after the report of crime, presence of an obvious weapon, verbal threats to harm an officer (mitigated by adolescent development), physically threatening gestures toward the police, and engagement in an obvious criminal act, among others.[362]

5. Slippery Slope

Although this Article limits its discussion to black youth, the arguments herein could easily apply to other racial and ethnic minorities—most notably Latino Americans and Muslim Americans, given the current political backlash against immigrants.[363] No doubt,

---

cases sent to criminal court had dropped by fifty percent from the peak in 1994). About 1.4 million cases were brought through juvenile courts in 2010. *Id.* at 6.

360. Most juvenile offenses involve non-violent offenses. *See, e.g.*, MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 71, 118 (2014) (reporting that theft, assault, drug violations, and disorderly conduct accounted for more than half of juvenile arrests in 2010); *see also* Hutchins, *supra* note 156, at 912 (noting that most states allow civilians to possess registered firearms and arguing that mere possession of a weapon does not present the same threat as imminent robbery or other alleged offense in which a weapon is believed to be in use).

361. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408–15 (2013) (discussing disproportionate arrests and self-report studies).

362. *See* Hutchins, *supra* note 156, at 884 & n.2 (listing cases in which courts have looked to a vast range of other factors to establish reasonable suspicion).

363. *See* Brett Barrouquere, *FBI: Hate Crimes Reach 5-Year High in 2016, Jumped as Trump Rolled Toward Presidency*, SOUTHERN POVERTY L. CTR. (Nov. 13, 2017), https://www.splcenter.org/hatewatch/2017/11/13/fbi-hate-crimes-reach-5-year-high-2016-jumped-trump-rolled-toward-presidency-0 (highlighting that hate crimes hit a five-year high following the 2016 presidential election); *see also, e.g.*, Brian Levin, *Explaining the Rise of Hate Crimes Against Muslims in the United States*, CONVERSATION (July 19, 2017, 9:50 PM), http://theconversation.com/explaining-the-rise-in-hate-crimes-against-muslims-in-the-us-80304 (explaining trends and causes in hate crimes against

some will object to any modification of the reasonable articulable suspicion framework that opens the door to a "slippery slope" argument[364]—that is, if we adopt a reasonable black child standard, then there is no limit to the number of "special" standards we must create to account for the unique experiences of other demographic groups. Must there be a reasonable Asian child standard? A reasonable Asian adult standard? Should the standard be different for black males and black women? Should the standard be different for black children and black adults?

Ultimately, as Professor Nourse argues, "The subjective/objective debate tends to keep us arguing about whether we are creating 'special' new rules for favored and disfavored classes when the real hard work is in the law's history, application, and meaning."[365] Our challenge as a society is to adopt a standard that does not penalize disadvantaged groups simply for being disadvantaged.[366] A "reasonable black child" lens is necessary only because the current reasonable person doctrine is culturally normed to penalize black youth and favor white adults in traditional legal analysis.[367]

B. Police Training and Reform

This Article has focused most of its attention on the role of courts in setting standards and evaluating the legality of police conduct on review. But reform must start much earlier. Black youth make up a unique demographic, with whom police departments should be intentional in fostering positive and equitable interactions. Long-term change will require department-wide cultural shifts that can only be achieved through training, sustained professional development, police accountability, and positive community engagement with black youth.[368]

Muslims); Jessica Weiss, *Six Months of Hate: How Anti-Immigrant Sentiment Is Affecting Latinos in the United States*, UNIVISION (June 14, 2017, 3:27 PM), https://www.univision.com/univision-news/united-states/six-months-of-hate-how-anti-immigrant-sentiment-is-affecting-latinos-in-the-united-states (reporting personal accounts of Hispanic individuals who were targets of verbal and physical race-related harassment).

364. *See* Carter, *supra* note 17, at 1420–21 (positing that allowing courts to consider age when determining if a reasonable person would feel free to disengage would create a slippery slope where courts consider other individual characteristics, such as race and gender).

365. Nourse, *supra* note 120, at 50.

366. *Id.* at 48.

367. *Cf. id.* at 49 (recognizing the need for a reasonable woman standard that does not penalize women for being women).

368. *See, e.g.*, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra*

From the outset, entry-level cadet training should help police understand the fundamental features of adolescence and the role of implicit racial bias in decision making. Training exercises should help police officers develop special skills in working with youth and encourage them to relinquish entrenched stereotypes and assumptions about the behavior of black children. Fortunately, research suggests that well-intentioned actors can overcome automatic or implicit biases, at least to some extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.[369] Similarly, studies have found that officers who participate in training to enhance their knowledge of normal adolescent behavior hold more favorable attitudes toward youth after the training.[370] A few innovative programs have been launched across the country to improve youth-police relations.[371] In Philadelphia, for example, new and experienced law enforcement officers have participated in workshops to help them understand youth culture, adolescent development, and youth coping skills and to teach them to distinguish between normal adolescent behavior and criminal conduct.[372] In separate sessions, youth learned how their own demeanor and behavior impacts their interactions with the police and discussed strategies for creating positive and safe encounters with law

---

note 279, at 3–5 (analyzing the "systemic deficiencies in [the Baltimore Police Department's] policies, training, supervision, and accountability structures[,]" noting that "there is widespread agreement that [the Department] needs reform[,]" and "encourag[ing] [the Department] to be proactive, to get to know Baltimore's communities more deeply, build trust, and reduce crime together with the communities it serves").

369. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 8–9 (2010) (summarizing research on strategies to reduce implicit judicial bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1529–30, 1529 n.207 (2005); Rachlinski et al., *supra* note 197, at 1196–97, 1221 (indicating that judges are able to control implicit biases when they are aware of them and motivated to do so).

370. *See* Valerie LaMotte et al., *Effective Police Interactions with Youth: A Program Evaluation*, 13 POLICE Q., 161, 174 (2010) (highlighting the benefits of adolescent behavior training for police officers).

371. MACARTHUR FOUND. & INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN JUVENILE JUSTICE REFORM: ACTIONABLE RECOMMENDATIONS FOR PRACTICE AND POLICY 18–19, 21 (2014) [hereinafter LAW ENFORCEMENT'S LEADERSHIP], http://www.theiacp.org/portals/0/documents/pdfs/JuvenileJusticeSummitReport.pdf (discussing the development of programs designed to reduce the disproportionate arrest rate of youths of color).

372. *Id.*

enforcement.[373] In joint sessions, police and youth engaged in honest and open dialogue about tensions in the community.[374] To promote training and youth-police dialogue on a national scale, youth advocate Lisa Thurau founded Strategies for Youth ("SFY") to develop a national curriculum for training police on how to work effectively with young people.[375] Recognizing that youth respond differently to social cues and that a child's developmental stage affects how he or she will perceive, process, and respond to the police, SFY teaches officers to engage youth with empathy, patience, and techniques designed to de-escalate adolescent outbursts.[376]

Beyond training, appropriate youth-police relationships require organizational commitment from the top down. Police chiefs must articulate and demonstrate a public commitment to both racial equity and policing strategies that promote healthy and appropriate interactions with youth. Law enforcement agencies may develop and enforce internal departmental regulations that specifically guide officers in their interactions with adolescents, prevent racial profiling, and require officers to treat blacks with dignity and respect. Officers who violate these regulations should be held accountable. Supervisors may monitor officers' behavior by routinely reviewing body-worn cameras and completing performance reviews that evaluate the officers' interactions with youth and racial minorities. Police departments may also engage youth informally through youth-police sports leagues, community service activities, team-building or leadership-development courses, and other less structured activities at a local recreation facility.[377]

Police departments should also significantly reduce their footprint on, if not withdraw entirely from, public school governance and return primary responsibility for school discipline to teachers, parents, and school counselors. Police officers should collaborate with school officials to decrease the scope of disciplinary issues SROs may address. Memoranda of understanding and school offense protocols for SROs may preclude arrests

---

373. *Id.*

374. *Id.*

375. *See About*, STRATEGIES FOR YOUTH, http://strategiesforyouth.org/about (last visited June 1, 2018). SFY offers courses such as Policing the Teen Brain, Policing the Teen Brain in School, Policing Youth on Public Transit, and Policing Youth Chronically Exposed to Trauma and Violence. *Courses*, STRATEGIES FOR YOUTH, http://strategiesforyouth.org/for-police/training/courses (last visited June 1, 2018).

376. *See Philosophy*, STRATEGIES FOR YOUTH, http://strategiesforyouth.org/about/philosophy (last visited June 1, 2018).

377. LAW ENFORCEMENT'S LEADERSHIP, *supra* note 371, at 19.

for typical adolescent behavior, such as marijuana possession, disorderly conduct, adolescent aggressive speech that sounds like a threat, and even non-serious assaults common in school fights.[378] To compensate for the reduced police presence, schools might hire school administrators, counselors, social workers, and mental health professionals who are particularly trained to identify and assist troubled youth.[379]

Federal agencies should also realign funding priorities to reduce support for school resource officers and other militaristic crime control measures like metal detectors and instead reallocate funding to innovative policing programs that embrace age-appropriate policing. The Office of Juvenile Justice and Delinquency Prevention, in partnership with the International Association of Chiefs of Police, recently acknowledged the importance of successful youth policing in its brief, *The Effects of Adolescent Development on Policing*.[380] The brief not only recognizes the importance of educating the police on adolescent brain development and its effect on law enforcement interactions with youth, but it also offers specific policing tips and highlights innovative programs and best practices.[381]

Finally, state and federal legislation may regulate police conduct by banning racial profiling by the police, mandating on-going training,[382] and insisting upon equal and uniform enforcement of the law.[383] In a recent fifty-state survey, the NAACP found only thirty states with any anti-racial profiling legislation at all, and found no state with all of the necessary components of an effective policy.[384] New and existing statutes

---

378. For example, in Philadelphia, in 2014, the police chief instructed his officers to stop arresting youth for minor infractions, such as schoolyard fights and possession of small amounts of marijuana, which together accounted for about sixty percent of all school-based arrests. *Police in Schools*, *supra* note 106. Similarly, Denver Public Schools entered into an agreement with the Denver Police Department to prevent officers from writing tickets for minor misbehavior, such as ban language. Sadie Gurman, *Agreement Keeps Denver Police Out of Most School Discipline Problems*, DENVER POST (Feb. 19, 2013, 7:39 AM), https://www.denverpost.com/2013/02/19/agreement-keeps-denver-police-out-of-most-school-discipline-problems.

379. Jackson, *supra* note 104, at 631.

380. INT'L ASS'N OF CHIEFS OF POLICE, THE EFFECTS OF ADOLESCENT DEVELOPMENT ON POLICING 1, 4 (2014), http://www.theiacp.org/Portals/0/documents/pdfs/IACPBriefEffectsofAdolescentDevelopmentonPolicing.pdf.

381. *Id.*

382. *See, e.g.*, 50 ILL. COMP. STAT. 705/7 (2018) (equal and uniform enforcement of the law in traffic cases); 625 ILL. COMP. STAT. 5/11-212 (2018) (requiring data collection in traffic stops).

383. *See, e.g.*, 20 ILL. COMP. STAT. 2605/2605-85 (2018) (training).

384. NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES AND THE CONTINUED FIGHT TO

should be enhanced to ban the stop of pedestrians and motorists for minor violations such as jay walking or failure to wear a seatbelt as a pretext for the search for illegal contraband.[385] Effective anti-racial profiling laws should also mandate data collection for all stops and searches, require analysis and publication of racial profiling data, create special commissions to review and respond to complaints of racial profiling, and provide state funds for mandatory training.[386] Effective policies will also specify penalties for officers who engage in racial profiling and allow aggrieved individuals to seek relief in state courts.[387]

CONCLUSION

"No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[388] This Article contends that the current interpretation of the search and seizure doctrine does not adequately protect the Fourth Amendment rights of black youth. Examining four aspects of the Fourth Amendment framework, this Article urges police and courts to consider the unique interplay between race and adolescence in evaluating the onset of a seizure, voluntariness in the consent to search doctrine, the reliability of an officer's observed facts in the reasonable articulable suspicion rubric, and the court's assignment of meaning to those facts.

This Article argues that our current reliance on a reasonable person standard in the seizure analysis fails to account for what we know about adolescent development and the ever-growing tensions between black youth and law enforcement. Further, although the voluntariness test in the consent-to-search doctrine allows courts more flexibility to consider the unique vulnerabilities of individuals who consent, reviewing courts rarely, if ever, consider the intersecting effects of race and age on a child's capacity to freely and voluntarily consent. Similarly, police and courts rarely acknowledge the impact of implicit racial bias on the accuracy of an officer's objective factual observations

---

END RACIAL PROFILING IN AMERICA 26 (2014), https://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf.

385. *Id.* at 19.

386. *See id.* app. 2 (describing the components of an effective racial profiling law).

387. *Id.* at 19 (noting that even Connecticut, which has one of the most comprehensive anti-profiling statute, fails to provide a specific right of action).

388. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

in the reasonable articulable suspicion standard. Even when the officer's factual observations are not distorted by race, current judgments about the meaning of behaviors like nervousness and flight from police are outdated and ignore the realities of normal adolescent behavior and police-on-black violence that provide black youth with many reasons to flee.

To ensure adequate Fourth Amendment protection for black youth, police and courts must be honest and thoughtful about how race and age affect every critical decision in the Fourth Amendment framework. To this end, it is incumbent upon police officers to better understand the key features of normal adolescent development and the cognitive science of implicit racial bias. It is equally incumbent upon reviewing courts to hold the police accountable for conscious and subconscious biases by inquiring specifically about the role of race and adolescence at each stage of the Fourth Amendment analysis.