

# Advancing Racial Justice Through the Restatement of Children and the Law: The Challenge, the Intent, and the Opportunity

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## INTRODUCTION

The Restatement of Children and the Law<sup>1</sup> explores the regulation of children in four categories: “Children in Families,” “Children in Schools,” “Children in the Justice System,” and “Children in Society.”<sup>2</sup> Each category surveys the laws that facilitate or guard against the intrusion of the state into the lives of young people. Despite the state’s ostensibly noble aims, racial bias often frustrates children’s interactions with the law. Even state interventions that are meant to protect and aid children often reflect societal biases that disproportionately harm historically marginalized youth. When the state intervenes to protect children at risk of abuse from family members, bias frequently leads the state to remove Black and Indigenous youth from their homes at disproportionately high rates.<sup>3</sup> When schools discipline

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<sup>1</sup> Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

<sup>2</sup> See generally *Restatement of the Law, Children and the Law* (AM. L. INST., Tentative Draft No. 5, 2023) [hereinafter *RESTATEMENT* Draft No. 5].

<sup>3</sup> See, e.g., *Child Welfare and Foster Care Statistics*, ANNIE E. CASEY FOUND. (May 30, 2023), <https://perma.cc/9HMJ-3GUU> (“In 2021, 203,770 children under 18 entered foster care in the United States . . . Black children represented 20% of those entering care but only 14% of the total child population, while American Indian and Alaska Native kids made up 2% of those entering care and 1% of the child population.”); Shereen A. White & Stephanie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let’s Talk About It That Way*, AM. BAR ASS’N (Oct. 13, 2022), <https://perma.cc/75DW-VSFZ> (“Nearly 10% of Black children will be removed from their parents and placed into foster care (double the rate of white children). One in 41 Black children will have their relationship with their birth parent or parents legally terminated (more than double the rate of the general population).”); NAT’L INDIAN CHILD WELFARE ASS’N, *DISPROPORTIONALITY IN CHILD WELFARE FACT SHEET 1* (2021) (summarizing a national study finding American Indian and Alaska Native (AI/AN) children four times as likely to be placed in foster care than

youth to maintain order and mold them into responsible citizens, stereotypes of violence and myths of intellectual inferiority commonly influence how staff and teachers manage Black and Latino youth and contribute to overly punitive responses to their normal adolescent behaviors.<sup>4</sup> When police intervene to keep youth and the public safe, they often increase surveillance in communities of color and routinely interpret innocent or ambiguous behaviors among Black and Latino youth as suspicious.<sup>5</sup>

The disparate treatment of youth in each of these contexts—family, school, and community—increases the likelihood that youth of color will enter our nation’s juvenile and criminal legal systems.<sup>6</sup> Once in these systems, children of color are especially vulnerable to the coercive nature of police interrogation and are further disadvantaged in the adjudicative process when they are judged by traditional legal standards that fail to account for racial

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white children, and finding that “[n]ationwide, AI/AN children are overrepresented in state foster care at a rate 2.66 times greater than their proportion in the general population”).

<sup>4</sup> See generally, e.g., Jing Liu, *Disciplinary Referrals, Teachers, and the Sources of Racial Disciplinary Disproportionalities*, BROOKINGS (Jan. 30, 2023), <https://perma.cc/ENV3-2MM4>; DANIEL J. LOSEN & PAUL MARTINEZ, *LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN OPPORTUNITY TO LEARN* (2020); Mark J. Chin, David M. Quinn, Tasmina K. Dhaliwal & Virginia S. Lovison, *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RSCHR. 566 (2020).

<sup>5</sup> See, e.g., Lois James, *The Stability of Implicit Racial Bias in Police Officers*, 21 POLICE Q. 30, 34–35 (2018); Amy G. Halberstadt, Alison N. Cooke, Pamela W. Garner, Sherick A. Hughes, Dejah Oertwig & Shevaun D. Neupert, *Racialized Emotion Recognition Accuracy and Anger Bias of Children’s Faces*, 22 EMOTION 403, 412 (2020); Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384, 390–91 (2016); Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCH. SCI. 342, 345 (2004) [hereinafter Hugenberg & Bodenhausen, *Ambiguity*]; Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 641–42 (2003) [hereinafter Hugenberg & Bodenhausen, *Facing Prejudice*].

<sup>6</sup> See, e.g., Julie Gerlinger, Samantha Viano, Joseph H. Gardella, Benjamin W. Fisher, F. Chris Curran & Ethan M. Higgins, *Exclusionary School Discipline and Delinquent Outcomes: A Meta-Analysis*, 50 J. YOUTH & ADOLESCENCE 1493, 1500–02 (2021) (“[U]se of exclusionary discipline—in all forms (i.e., in-school suspension, out-of-school suspension, and expulsion)—is associated with more . . . delinquent outcomes.”); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 277–79 (2021); BARBARA TATEM KELLEY & PAUL A. HASKINS, NAT’L INST. OF JUST., *DUAL SYSTEM YOUTH: AT THE INTERSECTION OF CHILD MALTREATMENT AND DELINQUENCY* 1–2 (2021); Thomas Mowen & John Brent, *School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest*, 53 J. RSCH., CRIME & DELINQ. 628, 643–44 (2016).

bias and the traumatic effects of policing in communities of color.<sup>7</sup> Youth of color are also more likely to face harsh and punitive sentences that ignore the developmental science that mitigates adolescent culpability and urges a more rehabilitative response to adolescent offending.<sup>8</sup> The American Law Institute's (ALI) release of its first Restatement of Children and the Law provides an important opportunity to assess the law's role in perpetuating these disparities and its power to dismantle them.

By its very name, a restatement is a recitation of existing law. As such, we cannot expect it to do the radical work of transforming oppressive systems that were designed from their outset to limit and control indigent families and people who look different from those in power. We also cannot expect it to eliminate generations of deeply entrenched biases that drive fears and cause people to criminalize youth of color. However, with some intention and nuance, a restatement can guide, shape, and even push the law toward racial justice by embracing those rules, judicial opinions, and legal standards within the common law that reduce unnecessary intrusions into the lives of children and offer the greatest procedural protections for all youth when intrusions are necessary.

The Restatement of Children and the Law includes black-letter rules, "comments" that describe the basis of the black letter, "illustrations" that provide concrete and real-world examples of the black-letter law, and "reporters' notes" that further elaborate on the rules by analyzing judicial authority and other material of interest. The Restatement also includes a series of "introductory notes"—at the beginning of the project and at the start of each section—that frame the overarching themes and principles undergirding the work. Even when the black-letter law does not explicitly address race, these additional elements of the Restatement allow the reporters to identify emerging trends; incorporate data and science on adolescent development, cognitive bias, and the traumatic effects of state interventions; and offer rationales for Restatement rules that might reduce racial inequities.

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<sup>7</sup> See Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. ST. L.J. 883, 901–12 (2020).

<sup>8</sup> See Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck & Jennifer L. Eberhardt, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS, no. 5,1; CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, MARCH 2022: RACIAL DISPARITIES IN YOUTH SENTENCING 2 (2022) (finding that while Black youth made up 61% of the population of juveniles sentenced to life without parole prior to *Miller v. Alabama*, 567 U.S. 460 (2012), they make up 70% of new cases since 2012).

Racial inequities are addressed to varying degrees in at least three of the four sections of the Restatement of Children and the Law. This Essay evaluates whether and how well this Restatement advances racial justice and identifies additional opportunities for the ALI to address racial inequities now and in future iterations of the Restatement. The Essay begins in Part I with an acknowledgement of the challenges that any reporter will face in drafting a restatement to achieve radical reform. Part II recognizes that the reporters for the Restatement of Children and the Law were concerned about the harmful impacts of racial bias in the laws and systems that impact children and hoped their commentary and analysis would highlight and reduce those harms. Specifically, Part II identifies examples from “Children in Families,” “Children in Schools,” and “Children in the Justice System” to show how the reporters effectively addressed race in their comments, reporters’ notes, and illustrations. Part III recognizes that our understanding of racial disparities and their root causes is ever evolving as new research emerges, and a small but growing number of judges across the country make decisions that acknowledge the importance of race in society and establish much-needed safeguards for people of color in the legal system. Focusing on selections from “Children in the Justice System,” Part III capitalizes on the opportunity created by this rapidly changing landscape to identify additional areas of the Restatement that can reduce harm and increase protections for youth of color. The Conclusion recognizes that as the reporters near the end of this work, there is still time to edit the reporters’ notes and urges the ALI to create mechanisms to quickly update the Restatement without reconvening their advisers for a second Restatement of Children and the Law.

#### I. THE CHALLENGE: OBSTACLES TO ADVANCING RACIAL JUSTICE IN A RESTATEMENT

The purpose of any restatement is to clearly state the common law and its statutory elements as they presently stand or

might appropriately be stated by a court.<sup>9</sup> Restatements are primarily addressed to courts,<sup>10</sup> and their reporters hope to make the law accessible by discerning its underlying principles, explaining its rationale, and demonstrating its application. Unfortunately, the rules that comprise the law are not always clear. Reporters have the tremendous task of compiling the common law and distilling it into coherent, generalizable, and precise rules. Often, the law varies by jurisdiction and splits in ways significant enough to require reporters to discern majority and minority rules.<sup>11</sup>

Although restatement rules aspire toward the precision of statutory language, they are also intended to “reflect the flexibility and capacity for development and growth of the common law.”<sup>12</sup> Thus, restatements not only reflect the current law, but also seek to capture trends that anticipate how the law is changing. “Like a Restatement, the common law is not static.”<sup>13</sup> Given this complexity, a central tension is evident in the drafting process—the desire to recite the law as it presently exists, on the one hand, and “the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process,” on the other.<sup>14</sup> Unlike model rules and codes, restatements are not meant to be “prescriptive.”<sup>15</sup> While a restatement should evaluate competing rules and common law with an eye toward identifying those rules that lead to more desirable outcomes, the choices are generally “constrained by the need to find support in sources of law,”<sup>16</sup> and the ALI has “limited competence and no special authority to make major innovations in matters of public policy.”<sup>17</sup>

Nonetheless, a restatement may lead to changes in the law, which is an appropriate outcome for an organization of lawyers

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<sup>9</sup> See AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (rev. ed. 2015) [hereinafter AM. L. INST., ALI HANDBOOK] (defining “restatement”).

<sup>10</sup> See *id.* at 3; *Frequently Asked Questions*, AM. L. INST., <https://perma.cc/TC7J-BEDH> [hereinafter AM. L. INST., ALI FAQs] (responding to the question, “What is the difference between Restatements, Principles, and Model Codes?”).

<sup>11</sup> See AM. L. INST., ALI HANDBOOK, *supra* note 9, at 5; AM. L. INST., ALI FAQs, *supra* note 10 (responding to the question, “How does ALI approach clarifying and simplifying the law in a Restatement when the law is unclear or there are conflicting interpretations?”).

<sup>12</sup> AM. L. INST., ALI HANDBOOK, *supra* note 9, at 5.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 3–4 (discussing differences between restatements and model and uniform codes).

<sup>16</sup> *Id.* at 6.

<sup>17</sup> AM. L. INST., ALI HANDBOOK, *supra* note 9, at 6.

committed to making the law “better adapted to the needs of life.”<sup>18</sup> At a minimum, restatements take a position on unsettled and evolving areas of the law, and some even include explicit suggestions for legislators.<sup>19</sup> As such, a restatement will never be completely impartial or devoid of perspective.

As the handbook for ALI reporters states:

A Restatement . . . assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to . . . “a preponderating balance of authority” but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.<sup>20</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 4 (“Some Restatements may contain elements addressed to institutions other than courts . . . . [F]or example . . . ‘suggestions for legislation.’”).

<sup>20</sup> *Id.* at 5–6.

Ultimately, those who wish to limit the Restatement to a formalistic recitation of existing law will be dissatisfied with any attempt to address racial inequities through the Restatement of Children and the Law. Those who expect the Restatement to articulate a set of rules that benefit everyone equitably and remedy inequities in the law will be dissatisfied with any recapitulation of the common law that ignores new research and emerging trends to maintain a status quo that harms people of color.

The restatement drafting process is long and unwieldy, regularly taking place over the course of many years. Dozens of advisers, a members consultative group, and a council contribute to the work, parsing out the law in meetings, and offering comments on multiple drafts.<sup>21</sup> The drafting cycle continues until each segment of the project has been approved by both the Council and the membership.<sup>22</sup> The law can change significantly during this process. For example, the Restatement of Children and the Law was launched in 2015,<sup>23</sup> and work on the draft continues to this day. If this Restatement had been launched in 2000 rather than 2015, the black letter would look remarkably different than it does now. In just eight years, the U.S. Supreme Court issued four landmark opinions—*Roper v. Simmons*<sup>24</sup> (2004), *Graham v. Florida*<sup>25</sup> (2009), *J.D.B. v. North Carolina*<sup>26</sup> (2011), and *Miller v. Alabama*<sup>27</sup> (2012)—that transformed the way the criminal law responds to children. Recognizing the limitations of children in understanding and abiding by the law and their unique vulnerabilities when interacting with law enforcement, these four cases have drastically changed the way courts analyze and sentence children. Drawing upon contemporary research on adolescent brain development and important psychosocial features of adolescence, state and federal courts have adopted a developmental jurisprudence that significantly constrains the sentencing of youth in adult court and follows a reasonable child standard in its evaluation of procedural questions like those involving custodial interrogation. Most changes to the law are not this sweeping, and identifying

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<sup>21</sup> See *How the Institute Works*, AM. L. INST., <https://perma.cc/6XR6-TCVP>.

<sup>22</sup> See AM. L. INST., ALI HANDBOOK, *supra* note 9, at 19.

<sup>23</sup> See Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 FAM. L.Q. 91, 92 (2020).

<sup>24</sup> 543 U.S. 551 (2005).

<sup>25</sup> 560 U.S. 48 (2010).

<sup>26</sup> 564 U.S. 261 (2011).

<sup>27</sup> 567 U.S. 460 (2012).

more discrete and incremental trends that are likely to shape the law in the short term and long term is a difficult and tedious task.

Finally, updating a restatement after it has been published presents another set of challenges. There is no mechanism to substantially edit a restatement once its final version has been published.<sup>28</sup> Instead, the ALI will typically convene a second restatement to make necessary changes and the process begins again. In short, the reporters on the Restatement of Children and the Law have a very difficult job and have maybe only one chance to do it right in the near future.

## II. THE INTENT: ADDRESSING RACE IN THE RESTATEMENT OF CHILDREN AND THE LAW

Notwithstanding the difficulty of advancing racial justice through a restatement, the reporters for the Restatement of Children and the Law have been clear about the disparate regulation of children and families of color and transparent in their desire to protect all youth from the harms of state intervention. This Restatement arose in response to changing views about children's legal status.<sup>29</sup> The law has come to regard children as having varying degrees of autonomy, legal competence, and authority despite once viewing them as entirely dependent on their parents.<sup>30</sup> Lawmakers in the twenty-first century are also increasingly concerned with promoting the well-being of the child.<sup>31</sup> From this emerges the "Child Wellbeing Framework," which guides the development of this Restatement and includes the recognition and remediation of "racial and class biases that have long permeated the regulation of children and families" as one of its three pillars.<sup>32</sup> The reporters also invited several legal scholars on race and juvenile and family law to serve as advisers to the Restatement.<sup>33</sup>

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<sup>28</sup> See AM. L. INST., ALI HANDBOOK, *supra* note 9, at 19.

<sup>29</sup> See Huntington & Scott, *supra* note 23, at 91–92:

Lawmakers have begun to grant children some adult rights and privileges, raising questions about their traditional status as vulnerable, dependent, and legally incompetent beings . . . . In response to this uncertainty, and in an effort to bring clarity and coherence to this area of legal regulation, the American Law Institute (ALI) launched a new project in 2015: the Restatement of Law, Children and the Law.

<sup>30</sup> See *id.* at 91.

<sup>31</sup> See *id.* at 92.

<sup>32</sup> *Id.*

<sup>33</sup> Advisers included Professor Barry Feld, Professor James Forman, Professor Martin Guggenheim, Professor Kristin Henning, Professor Joshua Gupta-Kagan, Associate

Perhaps the best evidence of the reporters' desire to advance racial equity in the Restatement is in their existing comments, reporters' notes, and illustrations. The most robust examples of the reporters' engagement with race can be found in Part 1, "Children in Families;" Part 2, "Children in Schools"; and Part 3, "Children in the Justice System."<sup>34</sup>

Throughout these parts, the reporters incorporate history, data, empirical research, and analysis that contextualize the law and carefully consider the interplay between race and various legal principles. In this way, the Restatement serves a critical role in educating its audience and embracing rules and rationales that reduce harms and enhance protections for all youth, including youth of color.

#### A. Part 1: Children in Families

In Part 1 of the Restatement, "Children in Families," the introduction establishes that "[r]espect for the diversity of families is a critically important principle that should, and typically does, guide courts and legislatures."<sup>35</sup> The introduction further explains that robust legal protections for parental authority are necessary to restrict state interventions that may be grounded in racial, cultural, or class bias.<sup>36</sup> These two concerns—respecting diversity and combatting biased results in the law—drive the discussion in "Children in Families," and the reporters return to these themes several times throughout this section.<sup>37</sup> "Children in Families" acknowledges that there is a history of racial discrimination against parents of minority backgrounds and bias against practices, particularly corporal punishment, that are more commonly used in minority households.<sup>38</sup> Much of the introduction to Chapter 2, "State Intervention for Abuse and Neglect," and its accompanying reporters' notes are devoted to the disparate racial impacts of the child welfare system.<sup>39</sup>

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Justice of the California Supreme Court Goodwin Liu, and Professor Dorothy Roberts, among others.

<sup>34</sup> RESTATEMENT Draft No. 5 pts. 1–3.

<sup>35</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 1, ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter RESTATEMENT Draft No. 1].

<sup>36</sup> *See id.*

<sup>37</sup> *See, e.g., id.* § 2.30.

<sup>38</sup> *See id.* pt. 1, ch. 3, intro. note.

<sup>39</sup> *See id.* § 2.30.

Drawing connections between the early child welfare system and emerging juvenile courts, the reporters explain that state intervention historically focused on low-income families of color and note that Black women, who were excluded from social supports available to white women, often formed their own groups to address children's needs.<sup>40</sup> This historical context provides a backdrop for the reporters' discussion of modern family regulation. Startling statistics show that children of color, particularly Black children, are more likely to be removed from their homes and more likely to have negative experiences while in the system.<sup>41</sup> Similar racial disparities exist in the issuance of Child in Need of Services (CHINS) petitions, which is highest for Native American<sup>42</sup> youth and followed closely by petitions for Black youth.<sup>43</sup> Although the Restatement notes that Native American youth have a high rate of foster care placement,<sup>44</sup> a more in-depth discussion of the impact of state intervention on Native American families is reserved for the Restatement of the Law of American Indians.<sup>45</sup>

The reporters examine several factors that are believed to contribute to the overrepresentation of families of color in the welfare system.<sup>46</sup> This analysis situates the root cause of racial disparities in systemic forces outside of the home and pushes back on any suggestion that something is inherently broken within

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<sup>40</sup> See RESTATEMENT Draft No. 1 pt. 1, ch. 3, intro. note.

By the end of the 19th century, intervention in the family—particularly low-income families and families of color—had become more common, with reformers founding private child protection societies. These societies worked in tandem with the newly created juvenile courts. These courts were empowered to oversee families and remove children from homes that were considered failures . . . . During the same period, Black women, who were barred from the private societies, formed their own groups to address the well-being of children. These groups did not seek to remove children from their homes and instead tried to support mothers, believing that assisting mothers would benefit children.

<sup>41</sup> See *id.*

<sup>42</sup> This Essay uses the term “Native American” in keeping with the language of the Restatement.

<sup>43</sup> See RESTATEMENT Draft No. 5 pt. 1, ch. 3, intro. note (noting more specifically that Black children are more likely to have a CHINS petition for ungovernability, while Native American children are more likely to have a CHINS petition for liquor use as compared with other demographic groups).

<sup>44</sup> RESTATEMENT Draft No. 1 pt. 1, ch. 1, intro. note.

<sup>45</sup> RESTATEMENT OF THE LAW OF AMERICAN INDIANS (AM. L. INST. 2022).

<sup>46</sup> See RESTATEMENT Draft No. 1 pt. 1, ch. 3, intro. note.

families of color.<sup>47</sup> By promoting respect for the diversity of parenting styles, including corporal punishment,<sup>48</sup> the reporters prevent readers from misinterpreting the statistics and assuming that families of color are simply more likely to mistreat their children. As courts look to the Restatement for guidance in the resolution of child welfare cases, the Restatement guides decision-makers to culturally competent decisions that understand and respect parenting styles that may differ from white middle-class perspectives but are not abusive.

## B. Part 2: Children in Schools

Within Part 2 of the Restatement, “Children in Schools,” the reporters address race in Chapter 7, “Discipline and Order Maintenance” and Chapter 8, “Student Speech Rights.” Race is central to the Restatement’s discussion of school discipline and exclusion. Chapter 7 educates readers on the history of exclusionary discipline, including how the adoption of zero tolerance policies exacerbated existing racial disparities in suspensions and expulsions.<sup>49</sup> The reporters’ note includes data on disparities in multiple forms of discipline and summarizes research on the harms of exclusion.<sup>50</sup> The reporters also draw an important distinction between corporal punishment in schools and corporal punishment in families by refusing to extend their deference to diverse parental discipline to staff in the school setting.<sup>51</sup> Absent this deference, racial disparities in school-based corporal punishment are especially suspect.<sup>52</sup> The reporters’ notes incorporate research showing that disabled children of color are especially likely to suffer corporal punishment at school<sup>53</sup> and note that racial disparities alone have been cited as a reason to end the use of corporal punishment altogether in schools.<sup>54</sup>

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<sup>47</sup> See *id.* (noting that, once you control for socioeconomic status and other similar factors, racial disparities in maltreatment largely disappear).

<sup>48</sup> See RESTATEMENT Draft No. 5 § 2.23.

<sup>49</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 8.20 reporters’ note, cmt. a (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* § 8.10 cmt. a.

<sup>52</sup> See *id.* § 8.10 reporters’ note, cmt. g.

<sup>53</sup> See *id.*

<sup>54</sup> See RESTATEMENT Draft No. 2 § 8.10 reporters’ note, cmt. c.

In their discussion of student speech rights in Chapter 8, the reporters meaningfully incorporate race into several of the illustrations exploring the permissible bounds of student speech. In its black letter, the Restatement concludes that

[p]ublic school students cannot be prevented from or disciplined for expressing their own ideas in school unless the expression: (1) causes or is likely to cause a material and substantial disruption in the operation of the school; (2) interferes with the legal rights of others; (3) promotes illegal conduct that threatens to undermine a school's educational mission; or (4) sharply departs, in its form or manner of expression, from the school's norms of civility.<sup>55</sup>

To illuminate the rule prohibiting speech that will likely provoke violence or other material and substantial disruption of the school, the reporters offer an illustration to demonstrate that a school that already has a history of racial violence and tension may censor a student wearing a T-shirt with a Confederate flag on its front during a period of national unrest concerning police shootings of African Americans.<sup>56</sup> In another illustration, the reporters conclude that a district-wide ban on Confederate symbols does not violate students' First Amendment<sup>57</sup> rights in a high school where Black students, who comprise just 2% of the school population, have been verbally and physically antagonized by white students on and off school grounds.<sup>58</sup> The reporters' notes recognize that cases involving the regulation of students wearing or otherwise displaying Confederate flag symbols turn on whether there is a prior history of racial violence or tension at the school or in the district.<sup>59</sup> By highlighting these cases and illustrations, the reporters acknowledge the importance of racial harms in context and help the courts recognize racialized assaults and police shootings as a concrete basis for censoring speech to prevent substantial disruption in schools.<sup>60</sup>

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<sup>55</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 8.10(a) (AM. L. INST., Tentative Draft No. 3, 2021) [hereinafter RESTATEMENT Draft No. 3].

<sup>56</sup> See *id.* reporters' note, cmt. b, illus. 4.

<sup>57</sup> U.S. CONST. amend. I.

<sup>58</sup> RESTATEMENT Draft No. 3 § 8.10 reporters' note, cmt. b, illus. 5.

<sup>59</sup> *Id.* § 8.10 reporters' note, cmt. b.

<sup>60</sup> See *id.*

### C. Part 3: Children in the Justice System

Part 3, “Children in the Justice System,” begins by examining a minor’s capacity to consent to a law enforcement search. In its black-letter articulation of the standard, the Restatement concludes that the search of a minor based on the minor’s consent is lawful only if the government demonstrates that consent was voluntary and not the result of duress or coercion.<sup>61</sup> Determination of whether the search was voluntary involves a consideration of the totality of the circumstances, including the minor’s age, education, intelligence, understanding of the right to refuse consent, experience (or lack of experience) in the justice system and “any other relevant circumstance.”<sup>62</sup> Again, drawing upon developmental research regarding youths’ deference to adult authority figures and vulnerabilities to police coercion and surveying state courts that embrace that research,<sup>63</sup> the Restatement requires courts to give special attention to the age and maturity of the minor in the consent analysis.

Although the black letter does not explicitly identify race as a factor to be considered in the voluntariness inquiry, the comments acknowledge that youth of color may be particularly reluctant to refuse consent to a search when pressed by a law enforcement officer or instructed by parents to show deference to law enforcement for the child’s personal safety.<sup>64</sup> The reporters’ notes cite scholarship addressing the importance of race in the Fourth Amendment<sup>65</sup> consent analysis<sup>66</sup> and note that some state courts have been asked to adopt a reasonable Black child standard in cases involving police encounters with Black youth.<sup>67</sup> Even as

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<sup>61</sup> See *id.* § 12.10.

<sup>62</sup> *Id.* § 12.10(b).

<sup>63</sup> See RESTATEMENT Draft No. 3 § 12.10 cmt. b.

<sup>64</sup> See *id.*

<sup>65</sup> U.S. CONST. amend. IV.

<sup>66</sup> See *id.* §12.10 reporters’ note, cmt. a (citing Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1533–34 (2018); Beau C. Tremiere, *The Fallacy of a Colorblind Consent Search Doctrine*, 112 NW. U. L. REV. 527, 556–57 (2017)).

<sup>67</sup> See *id.* (citing *In re D.S.*, 2021 WL 212363, at \*6–7 (Md. Ct. Spec. App. Jan. 21, 2021)). For additional requests to apply a reasonable Black child standard, see generally *Commonwealth v. Orlando O.*, 2022 WL 1122696 (Mass. App. Ct. Apr. 15, 2022) (describing the youth defendant’s argument that he was in custody for purposes of *Miranda* “because a reasonable Black juvenile would have felt compelled to come to the police station and answer questions”). See also Brief for Appellant at 42 n.15, *Commonwealth v. Correia*, 2022 WL 2967623 (Mass. 2022) (No. SJC-13223) (arguing that it would be particularly inappropriate to treat prearrest silence by 18-year-old young Black male as an admission of guilt because Black boys often fear police officers).

these questions remain unsettled in the courts, the Restatement's acknowledgement of these concerns in their commentary increases awareness of the very real impact of race in the search and seizure context. Although restatements are primarily directed at courts, they are also read by practitioners, scholars, and students. Educating this broad audience on the racialized impacts of the law paves the way for new legal standards that better protect youth of color from unwarranted intrusions by the state.

Part 3 of the Restatement also discusses race in its review of the law related to dispositions and risk assessment tools that predict the level of threat a person poses to themselves and the community. Chapter 14, "Delinquency Dispositions," and its comments embrace the requirement that individualized dispositions be no more restrictive than necessary<sup>68</sup> and evaluate the effectiveness of risk-assessment instruments to guide and limit sentencing in delinquency cases.<sup>69</sup> Risk-assessment tools have long been controversial given the racialized outcomes they frequently produce. Summarizing the research and debate in favor of and in opposition to these tools, the reporters note that risk assessments can perpetuate racial bias embedded in the information submitted for assessment<sup>70</sup> and amplify the impacts of preexisting racial disparities in the defendants' criminal history scores, which are themselves symptomatic of biases in policing and enforcement.<sup>71</sup> The reporters also consider the contrary view that risk assessments can accurately predict criminal violence and are no more biased than structured professional judgment or judicial discretion.<sup>72</sup> Some researchers have even speculated that risk assessments

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<sup>68</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.10 (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4]. This section crystallizes several rules that govern juvenile justice dispositions: First, under subsection (a), a judge's failure to give individualized consideration to, or to make specific findings regarding, each of the statutorily prescribed criteria amounts to an abuse of discretion. Second, subsection (b) spells out and illustrates the 'least restrictive alternative' principle. Within these boundaries, a dispositional order is typically reviewed only for abuse of discretion.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* § 14.10, reporters' note, cmt. i. For example, a frequently cited 2016 analysis of COMPAS, a proprietary adult risk assessment instrument, found that Black defendants were more commonly assigned to the highest-risk group as compared to white defendants, and thus (due to the assessment's error rates) were more likely to be *incorrectly* classified as high risk.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

have the potential to reduce racial bias.<sup>73</sup> This debate helps readers understand the reporters' ultimate decision to endorse "a structured professional judgment" approach that relies on tools for information gathering and decision-making without binding decision-makers to any one outcome.<sup>74</sup> The reporters hope this approach will both minimize the abuse of discretion and reduce racial disparities in decisions that require an assessment of risk.

### III. THE OPPORTUNITY: ADDITIONAL WAYS TO ADVANCE RACIAL JUSTICE IN THE RESTATEMENT OF CHILDREN AND THE LAW

As the previous discussion demonstrates, a restatement can guide the courts to a more equitable framework for the regulation (or deregulation) of children and families. By integrating important history, supplying data and statistics, citing empirical research and other scholarship, spotlighting case law, providing thoughtful commentary and analysis, and creating instructive and relatable illustrations, the Restatement of Children and the Law can be an effective tool to advance racial justice. Just as the Restatement draws upon developmental science to shape the law on children in the justice system, the Restatement can also draw upon new and evolving research to help us understand how race and trauma impact legal outcomes for children. Even in the eight short years since the ALI launched this Restatement, we have a wealth of new empirical research on racial bias, the traumatic effects of policing on youth of color, and the impact of stereotype threat on encounters between police and youth.<sup>75</sup> Ignoring this research would ignore the real-world implications of race on the law and reinforce prevailing racial biases that perpetuate social inequities in the juvenile and criminal legal systems.<sup>76</sup>

Recognizing that youth as a class are particularly vulnerable to the intimidating presence of the police and are often disadvantaged in the adjudicative process, the Restatement attempts to guard against these vulnerabilities by providing special protections to youth in several contexts, including search and seizure,

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<sup>73</sup> RESTATEMENT Draft No. 4 § 14.10, reporters' note, cmt. i.

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

<sup>75</sup> For empirical research on the traumatic effects of policing, see *infra* note 106. For empirical research on racial bias in the perception of adolescents, see *infra* notes 112–13. For empirical research on stereotype threat, see *infra* note 149.

<sup>76</sup> See Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 73 (2007) (criticizing the Supreme Court's failure to confront the problems with the reasonable man standard).

interrogation, and sentencing, among others. Each of these discussions also provides an opportunity to consider whether additional protections might be necessary for youth of color. This Part of the Essay identifies sections of the Restatement that can be enhanced by history, research, and the growing number of judicial opinions that have acknowledged the importance of race in criminal law. This discussion focuses primarily on Part 3 of the Restatement, “Children in the Justice System,” as racial disparities are especially pronounced in delinquency proceedings.<sup>77</sup>

At the time this Essay was written, most of the black-letter provisions and comments for the Restatement of Children and the Law were completed and approved by the ALI. Yet in the months leading up to final publication, there is still time for Reporters to edit their notes. After publication, the Restatement will need to be edited soon, and race should remain at the forefront of this project. The sections highlighted here are prime candidates for early, if not immediate, revision.

#### A. Race, Adolescence, and Search and Seizure

In 2011, the Supreme Court announced a major shift in criminal justice jurisprudence when it held in *J.D.B.* 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*<sup>78</sup>—must be evaluated through the lens of a “reasonable child” rather than a reasonable adult.<sup>79</sup> Since then, several scholars—and now courts—have called for the extension of the reasonable child standard to other aspects of criminal law and procedure, including *Terry* stops, consent searches, and other critical Fourth Amendment questions.<sup>80</sup> Although the Restatement surveys the

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<sup>77</sup> Although “racial/ethnic minority” youth made up 47.3% of the youth population, they accounted for 66.6% of cases detained, 67.4% of cases resulting in a placement disposition, and only 46.7% of cases receiving diversion in 2020. See *Statistical Briefing Book: Case Processing Characteristics of Delinquency Offenses by Race, 2020*, U.S. DEPT OF JUST. OFF. OF JUST. PROGRAMS, <https://perma.cc/L5CN-R2NV> [hereinafter OJJDP]. Black youth, in particular, made up just over 15% of the youth population, but accounted for 34.6% of all youth referred to juvenile court, 38.8% of all cases formally prosecuted in juvenile court, 39.9% of all cases in which a youth was sent to a detention facility, and 53.3% of all youth transferred to adult court. See *id.*

<sup>78</sup> 384 U.S. 436 (1966).

<sup>79</sup> *J.D.B.*, 564 U.S. at 272.

<sup>80</sup> 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” to search); Hillary B. Farber, *J.D.B. v. North Carolina: Ushering in a New “Age” of Custody Analysis Under Miranda*, 20 J.L. & POLY 117, 120

law regarding consent searches and the interrogation of minors,<sup>81</sup> it does not define seizure or examine the justifications for a *Terry* stop and frisk. As each of those questions is deeply impacted by race and adolescent development, they are both worthy of review and guidance in a Restatement of Children and the Law.

### 1. Seizure.

The Supreme Court articulated the black-letter definition of seizure when it held in *United States v. Mendenhall*<sup>82</sup> that “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.”<sup>83</sup> As embraced throughout the Restatement of Children and the Law, a child’s age should be given weight in multiple questions of criminal law and procedure. Just as a child’s age affects the determination of whether a child is in custody for purposes of *Miranda*, it should also affect the determination of whether a child has been seized in the Fourth Amendment context.

The child’s race should also be considered in each of these questions. Youth of color know from personal and vicarious experiences how dangerous contact with the police can be. Young people are routinely exposed to videos and news clips of police encounters that quickly turn into serious, and even deadly, beatings or shootings.<sup>84</sup> Black youth, in particular, often have relatives and

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(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); *see also* Commonwealth v. Evelyn, 152 N.E.3d 108, 114 (Mass. 2020) (holding that a suspect’s age must be considered in the totality of the circumstances for determining whether the suspect has been seized pursuant to the Fourth Amendment when the individual’s age is known or should be known to the officer); Harris v. Klare, 902 F.3d 630, 639, 641 (6th Cir. 2018) (reversing summary judgment granted in favor of officer in a § 1983 action, and concluding that reasonable jury could find that search of 17-year-old girl violated her Fourth Amendment rights when minor’s age weighed against voluntariness of her consent); *In re J.G.*, 228 Cal. App. 4th 402, 410–11 (Cal. Ct. App. 2014) (recognizing strength of argument that *J.D.B.*’s holding should be extended to Fourth Amendment custody determinations, but declining to resolve the issue in J.G.’s case because any reasonable person in J.G.’s position would not have felt free to go regardless of age).

<sup>81</sup> See RESTATEMENT Draft No. 3 § 12.10.

<sup>82</sup> 446 U.S. 544 (1980).

<sup>83</sup> *Id.* at 554.

<sup>84</sup> Brendesha M. Tynes, Henry A. Willis, Ashley M. Stewart & Matthew W. Hamilton, *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J. ADOLESCENT HEALTH 371, 375–76 (2019); Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, *Police Brutality and Black Health: Setting the Agenda for*

friends who share stories of police violence and caution them to keep their hands where police can see them, avoid sudden movements, and behave in a courteous and respectful manner when they engage with the police.<sup>85</sup> Data show that these fears are far from unfounded as police use force against people of color at disproportionately high rates.<sup>86</sup> These experiences, combined with developmental features of adolescence, leave Black youth particularly vulnerable to the psychological pressures of police presence.<sup>87</sup> The Restatement would benefit from a brief recitation of this data and social context along with a review of new research on the traumatic effects of policing on Black and Latino youth.<sup>88</sup>

Several courts have already acknowledged that race is relevant in the seizure analysis. One of the earliest such acknowledgments came in 2015 from the United States Court of Appeals for

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*Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 663 (2017) (explaining that witnessing or experiencing police brutality can be a stressor that can have a negative impact on mental and physical health).

<sup>85</sup> See, e.g., Corey Williams & Gary Fields, *Distrust of Police: Black Parents, Children Have “The Talk,”* AP NEWS (Jan. 28, 2023), <https://perma.cc/24PX-D3MP> (quoting a Black father, who was himself a former police officer, who reported telling his children, “Always be respectful to the cop. Don’t talk down to him. Do what he says . . . [I]t does make a difference in our encounters with the cops. It sends a message that you are not a threat”); Geeta Gandbhir & Blair Foster, *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>; 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), <https://perma.cc/D2L8-V4XK>.

<sup>86</sup> See, e.g., Abbie Vansickle & Weihua Li, *Police Hurt Thousands of Teens Every Year. A Striking Number Are Black Girls*, MARSHALL PROJ. (Nov. 2, 2021), <https://perma.cc/TJ5S-4SJ8> (finding no comprehensive national database of violent interactions between police and civilians, but when looking at data for six large police departments that provided detailed demographic information on use-of-force incidents, finding nearly four-thousand youth 17-and-under experienced police violence from 2015 through 2020. More than 2,200 of those youth were Black boys and almost eight hundred of the children and teens were Black girls); Roland G. Freyer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1210 (2019) (“On non-lethal uses of force, blacks and Hispanics are more than 50 percent more likely to experience some form of force in interactions with police. Adding controls that account for important context and civilian behavior reduces, but cannot fully explain, these disparities.”).

<sup>87</sup> See Annitto, *supra* note 80, at 5 (discussing the psychology of coercion and its application to police encounters with minors). For a discussion of the psychological trauma Black youth experience in direct and vicarious contact with police, see Dylan B. Jackson, *The Case for Conceptualizing Youth-Police Contact as a Racialized Adverse Childhood Experience*, 111 AM. J. PUB. HEALTH 1189, 1189 (2021). See also Dylan B. Jackson, Juan Del Toro, Daniel C. Semenza, Alexander Testa & Michael G. Vaughn, *Unpacking Racial/Ethnic Disparities in Emotional Distress Among Adolescents During Witnessed Police Stops*, 69 J. ADOLESCENT HEALTH 248, 252 (2021).

<sup>88</sup> See *supra* note 87.

the Seventh Circuit, which held in *United States v. Smith*<sup>89</sup> that a Black man was seized and not free to leave when the police encountered him in a dark alley and immediately asked him if was armed.<sup>90</sup> Addressing arguments in the appellant’s brief that “no reasonable person in his ‘position’—as a young black male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained—would have felt free to walk away” from the police, the Seventh Circuit echoed the sentiments of the Supreme Court in *Mendenhall* that while Mr. Dontray Smith’s race is ‘not irrelevant’ to the question of whether a seizure occurred, it is not dispositive either.<sup>91</sup> The Court was able to find on the strength of other factors that Mr. Smith was seized.

Other courts have given more weight to race in the seizure analysis. The United States Court of Appeals for the District of Columbia Circuit held in *Dozier v. United States*<sup>92</sup> that a Black man was seized when he was approached by the police in an isolated setting and “reasonably could have feared that unless he complied with the police requests, he would be vulnerable to police violence, without hope that anyone would come to his aid or witness what happened.”<sup>93</sup> The court further recognized that “[t]he fear of harm . . . at the hands of police is relevant to whether there was a seizure because feeling ‘free’ to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so.”<sup>94</sup> The Washington Supreme Court held in *State v. Sum*<sup>95</sup> that a petitioner who identified as Asian/Pacific Islander was seized when a sheriff’s deputy requested his identification while implying that he was under investigation for car theft.<sup>96</sup> That case held for the first time under Washington state law that the race and ethnicity of an allegedly seized person are relevant to the determination of whether a seizure occurred. In doing so, the court noted that any objective observer “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police

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<sup>89</sup> 794 F.3d 681 (7th Cir. 2015).

<sup>90</sup> *Id.* at 682.

<sup>91</sup> *Id.* at 687–88 (quoting *Mendenhall*, 446 U.S. at 558).

<sup>92</sup> 220 A.3d 933 (D.C. Cir. 2019).

<sup>93</sup> *Id.* at 945.

<sup>94</sup> *Id.* at 944.

<sup>95</sup> 511 P.3d 92 (Wash. 2022).

<sup>96</sup> *Id.* at 97.

contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington.”<sup>97</sup>

Although *Smith*, *Dozier*, and *Sum* involved adult defendants, the U.S. Supreme Court noted in *Mendenhall* that race, age, gender, and education are all relevant in the totality of evidence in deciding whether a police encounter was consensual.<sup>98</sup> The Massachusetts Supreme Court addressed race and age more directly in its seizure analysis in *Commonwealth v. Evelyn*<sup>99</sup> in 2020. There, the court concluded that 17-year-old Tykorie Evelyn was seized when an officer in the front passenger seat of a police cruiser opened his door after having trailed Evelyn and repeatedly trying to talk with him.<sup>100</sup> The court acknowledged the troubled history of policing in Black communities, but declined to decide in Evelyn’s case whether the race of a defendant must be considered in the seizure inquiry.<sup>101</sup> The court, however, did hold that age must be considered in the totality of the circumstances when the suspect’s age is known or objectively apparent to the officer.<sup>102</sup>

These five cases, and others like them, signal a shift in the courts’ recognition of both race and adolescence in the seizure analysis. By locating and embracing those cases, the Restatement could educate readers, provoke more thoughtful analysis, and expand our understanding of the totality of the circumstances in the Fourth Amendment and other legal inquiries. Together, the social context, emerging common law, developmental science, and empirical evidence of racial trauma make clear that race and age are relevant in the regulation of children and should guide courts to more racially equitable outcomes.

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

<sup>98</sup> *Mendenhall*, 446 U.S. at 558 (citations omitted):

[I]t is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant . . . , neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court’s finding that the respondent voluntarily consented to accompany the officers to the DEA office.

<sup>99</sup> 152 N.E.3d 108 (Mass. 2020).

<sup>100</sup> *Id.* at 113–14.

<sup>101</sup> *Id.* at 120–21.

<sup>102</sup> *Id.* at 114.

## 2. Reasonable articulable suspicion.

The Restatement would also benefit from a review of relevant case law and research on adolescent development, racial bias, trauma, and the common justifications for a police stop. Here, the blackletter would be guided by the basic articulation in *Terry v. Ohio*<sup>103</sup> that officers must have reasonable articulable suspicion that criminal activity is afoot before they may stop a child.<sup>104</sup> Thereafter, the comments, reporters' notes, and illustrations should highlight the ways in which both adolescence and racial bias distort perceptions of suspicion. Police officers often interpret behaviors like flight, nervousness, and furtive gestures as evidence of a suspect's consciousness of guilt,<sup>105</sup> but even a brief analysis of adolescent development would remind judges that impulsivity, peer influence, and lack of experience influence how children respond in the presence of police. A teenager who is nervous or afraid during a police contact might fidget, avoid eye contact, or even run away without being guilty of any crime. These nervous responses are amplified for youth of color.

As discussed above, youth of color have every reason to fear the police. Empirical research shows that Black and Latino youth who share these fears often experience trauma-like symptoms, such as hyperarousal, trembling, a rapid heartbeat, nausea, excessive sweating, and trouble breathing when they encounter the police.<sup>106</sup> Studies also show that youth of color are more likely to feel unsafe, scared, or angry during a stop,<sup>107</sup> which can trigger a

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<sup>103</sup> 392 U.S. 1 (1968).

<sup>104</sup> *Id.* at 30.

<sup>105</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

<sup>106</sup> Dylan B. Jackson, Chantal Fahmy, Michael G. Vaughn & Alexander Testa, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 J. ADOLESCENT HEALTH 627, 628, 631 (2019) (documenting “physical reactions such as sweating, trouble breathing, nausea, or a pounding heart” as a measure of PTSD among youth when recalling a police encounter and finding that “youth who have been stopped more frequently were more likely to report heightened emotional distress and posttraumatic stress symptoms after the encounter”); Thema Bryant-Davis, Tyonna Adams, Adriana Alejandre & Anthea A. Gray, *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. SOC. ISSUES 852, 866 (2017); Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. 2321, 2324–25 (2014) (finding that young men who experienced more police stops also experienced more trauma symptoms).

<sup>107</sup> Jackson et al., *supra* note 106, at 631; Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. L. 176, 181 (2019).

classic “fight-flight-freeze” response.<sup>108</sup> Sometimes the fight-flight-freeze response can become so persistent and overactive that it triggers reactions to nonthreatening situations, especially among youth who live in heavily-surveilled neighborhoods and have an extensive history of direct and vicarious contact with the police.<sup>109</sup> Unfortunately, these natural trauma responses are often misinterpreted as suspicious.

Reasonable articulable suspicion rests not only on the youth’s behavior but also on the officer’s assignment of meaning to that behavior. Police officers, like most people, have implicit racial bias, especially racial bias that associates Black people with criminality.<sup>110</sup> Black youth are particularly vulnerable to a stop and frisk when police evaluate their conduct through a racially biased lens. The Restatement could introduce readers to empirical evidence demonstrating that individuals are more likely to interpret ambiguous facial expressions and innocuous behaviors as threatening and aggressive when associated with a Black face while interpreting those same behaviors and facial expressions as harmless when associated with a white face.<sup>111</sup> The Restatement should also educate readers on the many ways racial bias distorts perceptions of

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<sup>108</sup> See, e.g., Kirsten Nunez, *Fight, Flight, Freeze: What This Response Means*, HEALTHLINE (Feb. 21, 2020), <https://perma.cc/764G-BJHS> (discussing the psychological explanation for “fight-flight-freeze response”); Kasia Kozłowska, Peter Walker, Loyola McLean & Pascal Carrive, *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARV. REV. PSYCH. 263, 280 (2015); Maria Trent, Danielle G. Dooley & Jacqueline Dougé, *The Impact of Racism on Child and Adolescent Health*, 144 PEDIATRICS 1, 2–3 (2019).

<sup>109</sup> See Lindsey Webb, Dylan B. Jackson, Monique Jindal, Sirry Alang, Tamar Mendelson & Laura K. Clary, *Anticipation of Racially Motivated Police Brutality and Youth Mental Health*, 83 J. CRIM. JUST., no. 101967, 2022, at 1, 6 (“Youth with anticipatory stress stemming from both personal and vicarious police brutality had more symptoms of anxiety, depression, and PTSD, as well as lower hope, compared to youth without anticipatory stress. The association between anticipatory stress and anxiety was stronger for girls than boys.”); *Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development* (Nat’l Sci. Council on the Developing Child, Working Paper No. 9, 2010) (discussing generally the negative impacts of persistent fear for youth).

<sup>110</sup> Marie Pryor, Kim Shayo Buchanan & Phillip Atiba Goff, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 ANN. REV. OF L. & SOC. SCI. 343, 349–50 (2020); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1136 (2012).

<sup>111</sup> See generally Hugenberg & Bodenhausen, *Facing Prejudice*, *supra* note 5. See also Todd et al., *supra* note 5 (finding that white study participants more quickly and accurately categorized threatening objects and words as threatening when primed by photos of Black children as young as five and of Black men than white children of comparable age and men. Conversely, study participants were slower and less accurate in correctly categorizing nonthreatening objects and words when primed by photos of Black men and boys).

Black youth in particular—including research showing that both police and civilians are likely to perceive young Black males to be older, taller, stronger, more muscular, and more threatening than they actually are,<sup>112</sup> and that adults tend to perceive Black girls as more mature and less innocent than their white peers.<sup>113</sup>

The Restatement would also benefit from a discussion of the data documenting racial disparities in stops and frisks of Black, Latino, and other marginalized youth. For example, data show that Latino people are searched at higher rates than white people and report experiencing police use of force at more than twice the rate that white people do.<sup>114</sup> Empirical research further demonstrates that Black people congregated in a group are more likely to be stopped and frisked, and are more likely to experience force than white people in a group.<sup>115</sup>

Most important, the Restatement should review and embrace those judicial opinions—including concurring and dissenting opinions—that have already laid the groundwork for a race-conscious approach to reasonable articulable suspicion. Cases discussing the meaning of flight and nervousness in the reasonable articulable suspicion framework are particularly useful. In *Illinois v. Wardlow*,<sup>116</sup> the key Supreme Court case in which a 5–4 majority held that it was reasonable to infer consciousness of guilt from flight and nervousness, Justice John Paul Stevens wrote a dissenting opinion in which he argued that “flight” can often be

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<sup>112</sup> See, e.g., Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529 (2014); John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 74 (2017).

<sup>113</sup> REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEO. LAW CTR. ON POVERTY AND INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 1, 8 (2017).

<sup>114</sup> See Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 738 (2020); Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning’s The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 68 AM. U. L. REV. F. 55, 73 (2019); Ben Poston & Cindy Chang, *LAPD Searches Blacks and Latinos More. But They’re Less Likely to Have Contraband Than Whites*, L.A. TIMES (Oct. 8, 2019), <https://perma.cc/K3WD-38DC>.

<sup>115</sup> Erin Cooley, Neil Hester, William Cipolli, Laura I. Rivera, Kaitlin Abrams, Jeremy Pagan, Samuel R. Sommers & Keith Payne, *Racial Biases in Officers’ Decisions to Frisk are Amplified for Black People Stopped Among Groups Leading to Similar Biases in Searches, Arrests, and Use of Force*, 11 SOC. PSYCH. & PERSONALITY SCI. 761, 765 (2020).

<sup>116</sup> 528 U.S. 119 (2000).

attributed to other innocent explanations.<sup>117</sup> As he noted, “[a]mong some citizens, particularly minorities and those residing in high crime areas, there is [ ] the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police itself can be dangerous . . . . For such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal.’”<sup>118</sup>

Since *Wardlow* was decided in 2000, several state high courts have considered race in their assessment of flight and nervousness and have concluded that neither factor alone is per se evidence of guilt, especially among people of color who fear the police. The first state high court to reach this conclusion was Massachusetts when it noted in *Commonwealth v. Warren*<sup>119</sup> that Black men have “reasons for flight ‘totally unrelated to consciousness of guilt,’ such as the desire to avoid the recurring indignity of being racially profiled.”<sup>120</sup> The D.C. Court of Appeals relied heavily on race-based empirical research and data in *Miles v. United States*<sup>121</sup> to find that a Black man had ample reason to fear police considering “the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests.”<sup>122</sup> That court held that Mr. Miles’ flight was provoked and not probative of guilt. Taking a similar view as the state courts, the Ninth Circuit concluded in *United States v. Brown*<sup>123</sup> that “[g]iven that racial dynamics in our society—along with a simple desire not to interact with police—offer an ‘innocent’ explanation of flight . . . we are particularly hesitant to allow flight to carry the day in authorizing a stop.”<sup>124</sup> Considering nervousness in the more rigorous probable cause standard, the Vermont Supreme Court held that the defendant’s nervousness was only minimally relevant to the question of whether there was probable cause for the search of a vehicle. Referencing Justice Stevens’s dissent and discussion of minorities in *Wardlow*, the court agreed that “nervous behavior in the presence of police officers could be indicative of illegal behavior but could be completely innocuous. It is

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<sup>117</sup> *Id.* at 132 (Stevens, J., dissenting).

<sup>118</sup> *Id.* at 132–33 (Stevens, J., dissenting).

<sup>119</sup> 58 N.E.3d 333 (Mass. 2016).

<sup>120</sup> *Id.* at 342.

<sup>121</sup> 181 A.3d 633 (D.C. 2018).

<sup>122</sup> *Id.* at 641 (quoting appellant’s brief).

<sup>123</sup> 925 F.3d 1150 (9th Cir. 2019).

<sup>124</sup> *Id.* at 1157.

not uncommon for citizens to be nervous when confronted by law enforcement.”<sup>125</sup>

Again, although each of these cases involves adult defendants, the principles they articulate are no less applicable to youth. In fact, given everything we know about adolescent impulsivity, risk taking, peer influence, and the fears associated with police-youth encounters, these principles should be embraced even more vigorously when children are involved. As the Restatement continues to grapple with the meaning of adolescence in critical legal questions arising out of the Fourth Amendment, it must also consider the intersection of race and adolescence.

### 3. Consent to search.

As noted in Part II of this Essay, the Restatement already recognizes that youth of color are even more likely than white youth to feel compelled to consent to a police officer’s request for a search.<sup>126</sup> Notwithstanding this important acknowledgement, Chapter 12, § 12.10 can be enhanced with a more robust analysis of the role of race in the consent to search inquiry, either by incorporating or referring back to the history, research, data, and common law outlined above in the seizure analysis. In a basic black-letter reading of the law, the state has the burden of showing that consent was freely given and not the result of express or implied duress or coercion.<sup>127</sup> The consent analysis not only involves some objective evaluation of the facts and circumstances but is also a subjective inquiry that takes into account personal characteristics and experiences that drive fears and motivate people to act.<sup>128</sup> As such, the consent to search law is arguably already better suited to accommodate age and race in the assessment of the voluntariness of a child’s consent.

Multiple courts have explicitly identified race, without further discussion or application, as a characteristic that can impact the voluntariness of consent.<sup>129</sup> Other courts have discussed and

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<sup>125</sup> *State v. Clinton-Aimable*, 232 A.3d 1092, 1100–01 (Vt. 2020).

<sup>126</sup> RESTATEMENT Draft No. 3 § 12.10 cmt. a.

<sup>127</sup> *See Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>128</sup> *Id.* at 229.

<sup>129</sup> *See, e.g., State v. Hawkins*, 898 N.W.2d 446, 450 (N.D. 2017) (“The considerations for determining whether consent is voluntary include: ‘(1) the characteristics and condition of the accused at the time of the consent, including age, sex, race, education level, physical or mental condition, and prior experience with police.’”) (quoting *State v. Torkelsen*, 752 N.W.2d 640, 648 (N.D. 2008)); *In re J.M.*, 619 A.2d 497, 511 (D.C. Cir. Ct. App. 1992) (Mack, J., concurring in the judgment in part and dissenting in part) (“Moreover,

applied race more directly in the voluntariness analysis. Ironically, the most compelling discussion of the impact of race in a consent to search case appears in *Jamison v. McClendon*,<sup>130</sup> an opinion finding that qualified immunity ultimately protected an officer against a Black man's § 1983<sup>131</sup> claims for damages after his vehicle was unlawfully searched.<sup>132</sup> The court noted that "Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom,"<sup>133</sup> and emphasized that "Black people in this country are acutely aware of the danger traffic stops pose to Black lives."<sup>134</sup> With this history established as essential context, the court concluded that the "circumstances point to Jamison's consent being involuntary, a situation where he felt he had 'no alternative to compliance' and merely mouthed 'pro forma words of consent.'"<sup>135</sup> The *Jamison* court offers a thorough and evocative examination of the pressures that Black people feel when asked to submit to a police search and is a useful example for the Restatement to highlight in its effort to expose readers to the history and impact of racial trauma on critical legal questions.

#### 4. Race, adolescence, and interrogation.

Like the search and seizure analysis, the law governing police interrogations is deeply impacted by race and adolescence. Further embracing the developmental science, the Restatement joins a growing number of state and federal courts in recognizing the unique vulnerabilities of youth and the special protections they need when interrogated by police. Outlining the features of adolescence that leave youth vulnerable to involuntary waivers and false confessions, the reporters state that compared with adults, youth are less able to delay their impulses and appropriately evaluate the immediate and long-term consequences of a decision.<sup>136</sup> Youth also struggle to comprehend abstract concepts, like their

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personal characteristics of the accused such as age, sex, race and even widowhood have been worth noting in the assessment of coercion.").

<sup>130</sup> 476 F. Supp. 3d 386 (S.D. Miss. 2020).

<sup>131</sup> 42 U.S.C. § 1983.

<sup>132</sup> *Id.* at 392.

<sup>133</sup> *Id.* at 413.

<sup>134</sup> *Id.* at 414.

<sup>135</sup> *Id.* at 415–16 (quoting *United States v. Ruigomez*, 702 F.2d 61, 65 (5th Cir. 1983)).

<sup>136</sup> RESTATEMENT Draft No. 1 § 14.21 cmt. c (citing Thomas Grisso, *Protections for Juveniles in Self-Incriminating Legal Contexts, Developmentally Considered*, 50 CT. REV. 32 (2012)).

*Miranda* rights, and are more susceptible to the influence of both peers and adult authority figures.<sup>137</sup>

The Restatement also acknowledges that race is relevant in the interrogation analysis. In the introduction to Part 3, “Children in the Justice System,” the reporters note that youth of color are more likely to be the target of police suspicion and may be even more susceptible to coercive tactics due to fear of the police.<sup>138</sup> The Comment to § 14.20, “Rights of a Juvenile in Custody,” notes that “minority youth” may be instructed to comply with police for their own safety.<sup>139</sup> The reporters’ note that accompanies § 14.21, “Waiver of Rights in a Custodial Setting,” discusses the false confessions of five youth in the Central Park jogger case to highlight the difficulties youth have in resisting the pressures of a police interrogation.<sup>140</sup> While each of these discussions makes a valuable contribution in the work toward racial equity, each would also benefit from a more thorough and explicit examination of the intersecting effects of race and adolescence in the interrogation context, especially in light of new research on racial trauma and stereotype threat in police interrogations.

##### 5. *Miranda* analysis: custody and waivers.

The Supreme Court’s ruling in *J.D.B.* lies at the heart of the Restatement’s discussion of custodial interrogations involving youth. The black letter at § 14.20 recognizes that a child in custody is entitled to counsel and has the right to remain silent when questioned by police about their alleged involvement in criminal activity.<sup>141</sup> Following the Court’s lead in *J.D.B.*, the Restatement concludes that age is relevant in the determination of whether a child is in custody for purposes of *Miranda* and embraces the Court’s recently articulated “reasonable child standard” in its analysis of procedural protections for youth.<sup>142</sup> Thus the determination of whether a child is in custody turns on whether a reasonable person of the child’s age would believe their freedom of movement was substantially restricted such that they were not free to terminate the interview and leave.<sup>143</sup> The black letter at § 14.21 further

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

<sup>138</sup> *Id.* § 14-2 intro. note.

<sup>139</sup> *Id.* § 14.20 cmt. b.

<sup>140</sup> *Id.* § 14.21 reporters’ note, cmt. h.

<sup>141</sup> RESTATEMENT Draft No. 1 § 14.20(a).

<sup>142</sup> *Id.* § 14.20(b)(1).

<sup>143</sup> *Id.*

notes that a child's statement to the police during custodial interrogation is admissible only if the child has knowingly, intelligently, and voluntarily waived their rights to remain silent and to assistance of legal counsel.<sup>144</sup> The determination of whether a child's waiver is knowing, intelligent, and voluntary requires an assessment of the totality of the circumstances, again including the child's age, education, experience in the justice system, and intelligence.<sup>145</sup>

For all the reasons outlined in this Essay, subsequent iterations of the Restatement should explicitly name race as a relevant and significant factor in both the custody analysis and waiver of rights inquiry. Even now, before the black letter can be revised, the Reporters can use the comments and reporters' notes to help readers appreciate the fears that youth of color experience in their encounters with the police and enhance protections for those youth who are disproportionately targeted by police. As the Comment to § 14.20 notes, youth of color are even more vulnerable to the inherent coerciveness of any police encounter and may be instructed by parents to comply with an officer's interrogation out of concerns for the youth's physical safety.<sup>146</sup> Given this reality, youth of color are more likely to focus on their immediate safety instead of evaluating the advantages and disadvantages of waiving their rights and are less likely to believe they can terminate an interview.<sup>147</sup> Forensic psychologists have explored the psychological impacts of prior vicarious and direct police contacts on people of color and urge their colleagues to consider the impact of those contacts and other racial trauma in their evaluations of an individual's capacity to understand and appreciate their *Miranda* rights.<sup>148</sup> Forensic evaluations like these and their underlying research would enhance judicial decision-making in the waiver analysis.

Other relevant research shows that people of color often live with the pervasive fear that they will be stereotyped as criminal

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<sup>144</sup> *Id.* § 14.21(a)(1).

<sup>145</sup> *Id.* § 14.21(b).

<sup>146</sup> RESTATEMENT Draft No. 1 § 14.20 cmt. b.

<sup>147</sup> See e.g., Henning & Omer, *supra* note 7, at 901.

<sup>148</sup> See Antoinette Kavanaugh, Victoria Pietruszka, Danielle Rynczak & Dinisha Blanding, *Taking the Next Step in Miranda Evaluations: Considering Racial Trauma and the Impact of Prior Police Contact*, 47 LAW & HUM. BEHAV. 249, 250 (2023).

solely because of their race.<sup>149</sup> People who are afraid of being stereotyped spend a lot of mental energy trying to prevent others from thinking they are criminal. Researchers call this phenomenon “stereotype threat.”<sup>150</sup> Expending mental energy in this way creates a “cognitive overload” and depletes the mental capacity individuals need to make reasoned decisions about waiving their rights and the psychological strength they need to resist police pressure during an interrogation.<sup>151</sup> Awareness of stereotypes associating race with criminality can also instill hopelessness in people of color, undermining their confidence that any claim of innocence will be believed and increasing their risk of making an involuntary—and even false—confession.<sup>152</sup> The Restatement of Children and the Law would benefit from a review of this research as it considers the unique vulnerabilities of youth of color.

#### 6. Voluntariness and coercion.

The Restatement also concludes in § 14.21 that no child’s statement will be admissible unless it was made voluntarily and free of police coercion.<sup>153</sup> The Supreme Court first considered the voluntariness of youth confessions long before the familiar *Miranda* warnings were conceived. In its 1948 decision in *Haley v. Ohio*,<sup>154</sup> the Court acknowledged that a child can be an “easy victim of the law” and that “special care” must be taken in evaluating the circumstances of the interrogation.<sup>155</sup> As yet, the Supreme

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<sup>149</sup> Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens’ Experiences of Police Encounters*, 39 LAW & HUM. BEHAV. 463, 464 (2015); Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCH., PUB., POL’Y & L., 562, 566–67 (2011).

<sup>150</sup> Najdowski et al., *supra* note 149, at 464; Najdowski, *supra* note 149, at 564.

<sup>151</sup> J. Guillermo Villalobos & Deborah Davis, *Interrogation and the Minority Suspect: Pathways to True and False Confession*, in 1 ADVANCES IN PSYCHOLOGY AND LAW 1, 6–7 (Monica K. Miller & Brian H. Bornstein eds., 2016); Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 PSYCH., PUB. POL’Y & L. 673, 684–85 (2012).

<sup>152</sup> Najdowski, *supra* note 149, at 576.

<sup>153</sup> RESTATEMENT Draft No. 1 § 14.21 (discussing voluntariness and the totality of the circumstances).

<sup>154</sup> 332 U.S. 596 (1948).

<sup>155</sup> *Id.* at 599–60 (relying on the Fourteenth Amendment Due Process doctrine of voluntariness and using a “totality of the circumstances” test to determine whether a confession was freely made, the Court reversed fifteen-year-old John Haley’s conviction based on “force or coercion”); *see also* Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962) (holding that courts must consider the minor’s youth and immaturity when evaluating the potentially coercive effects of police behavior on the child’s psychological state).

Court has not explicitly opined on the unique vulnerabilities of youth of color to police coercion, but it has acknowledged in *Colorado v. Connelly*<sup>156</sup> that “unique characteristics” matter.<sup>157</sup> Without rehashing all that has been outlined in previous sections of this Essay, suffice to say that distrust, fear, and racial tensions in society make youth of color more vulnerable to coerced confessions. The Restatement would benefit from a more explicit analysis of the risk of false and involuntary confessions by youth of color.

The reporters’ note that accompanies § 14.21 of the Restatement discusses the Central Park jogger case as an example of how youth are vulnerable to aggressive police interrogation tactics.<sup>158</sup> The reporters remind us that five boys, ages 14 to 16, were wrongfully convicted of raping of a woman in Central Park in 1989.<sup>159</sup> In the detectives’ eagerness to solve the crime, police arrested and aggressively interrogated the boys. Four of the five falsely confessed.<sup>160</sup> The tragedy of the Central Park Five (now known as the Exonerated Five),<sup>161</sup> also presents a powerful opportunity to highlight the unique vulnerabilities of youth of color in police interrogations. Four of the Exonerated Five were Black and one was Latino.<sup>162</sup> The zeal with which detectives and prosecutors investigated the rape mirrored the racialized fear of Black and Latino youth in the late 1980s and 1990s.<sup>163</sup> The Restatement does not mention the race or ethnicity of any of the people involved in the Central Park case and does not discuss the political backdrop or racialized crime narratives that were propagated at the time. The Restatement’s comment and reporters’ note would benefit from a close examination of the media frenzy and pseudoscientific predictions of an emerging Black “superpredator” that made

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<sup>156</sup> 479 U.S. 157 (1986).

<sup>157</sup> *Id.* at 163. In acknowledging relevance of suspect’s schizophrenia, the Court noted Just last Term, in *Miller v. Fenton*, 474 U.S. 104, 109 (1985), we held that by virtue of the Due Process Clause ‘certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.’

*Id.* (emphasis added).

<sup>158</sup> RESTATEMENT Draft No. 1 § 14.21 reporters’ note, cmt. h.

<sup>159</sup> *Id.*

<sup>160</sup> Kate Storey, ‘When They See Us’ Shows the Disturbing Truth About How False Confessions Happen, *ESQUIRE* (June 1, 2019), <https://perma.cc/5WTC-8DEW>.

<sup>161</sup> See Yusef Salaam, Kevin Richardson & Raymond Santana, *We Are the ‘Exonerated 5.’ What Happened to Us Isn’t Past, It’s Present.*, *N.Y. TIMES* (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

these five youth particularly likely targets for police coercion and deception.<sup>164</sup> The reporters might also highlight the Connecticut Supreme Court, which admonished the trial court in *State v. Belcher*<sup>165</sup> for relying on the racially charged and thoroughly discredited “superpredator” myth in a sentencing and held that the trial court abused its discretion when it denied a youth’s motion to correct the illegal sentence based on its classification of him as a “superpredator.”<sup>166</sup>

Further, while the comment to § 14.21 does include research and data showing that youth as a class are more inclined than adults to give false confessions,<sup>167</sup> the comments should also include data showing that Black people make up over half of all exoneration cases involving false confessions,<sup>168</sup> and that Black youth, in particular, account for 66% of all exonerated youth who falsely confessed.<sup>169</sup> Fortunately, the reporters have laid a strong foundation for a discussion of race and age in their analysis of the law on interrogations and the admissibility of statements. A few additions could transform that foundation into a compelling summary of how both the developmental research and the research on racial bias and trauma can transform the law to ensure that all youth meaningfully benefit from the procedural protections they need in the interrogation setting.

## B Race, Adolescence, Transfer, And Sentencing

Recognizing that many modern courts now accept the developmental research indicating that adolescents are both less mature and less culpable for their behavior and more amenable to change than adults,<sup>170</sup> the Restatement embraces rules that call

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<sup>164</sup> Elizabeth Hinton, *How the ‘Central Park Five’ Changed the History of American Law*, ATLANTIC (June 2, 2019), <https://perma.cc/6HNX-XNH7>.

<sup>165</sup> 268 A.3d 616 (Conn. 2022).

<sup>166</sup> *Id.* at 618.

<sup>167</sup> RESTATEMENT Draft No. 1 § 14.21 reporters’ note, cmt. h.

<sup>168</sup> *Spread Sheet Request Form*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Spread-Sheet-Request-Form.aspx>.

<sup>169</sup> *Id.* The actual number of false confessions is likely much higher than the number of exoneration, as innocent people who plead guilty or falsely confess face more significant obstacles to exoneration. NAT’L REGISTRY OF EXONERATIONS, GUILTY PLEAS AND FALSE CONFESSIONS (2015).

<sup>170</sup> See Huntington & Scott, *supra* note 23, at 93 (“Many modern lawmakers have rejected the punitive reforms of the 1990s that were motivated in part by racist fears, instead deploying developmental science to formulate doctrines and policies grounded in rehabilitation.”); *id.* at 95:

for a less punitive approach to adolescent crime and that seek to reduce the harm legal systems impose on the developmental trajectory of youth.<sup>171</sup> Following recent Supreme Court rulings in *Roper*, *Graham*, and *Miller*, the Restatement rejects punitive sentences like juvenile life without the possibility of parole in non-homicide cases and requires an individualized approach to youth offending that considers the mitigating factors of adolescence.<sup>172</sup> Yet, even as the law has adopted new developmentally appropriate rules that reduce the overall number of youths in the justice system, racial disparities persist in criminal courts and suggest that youth of color have not enjoyed the full mitigating benefits of the developmental research. This hypothesis is bolstered by empirical research finding that when study participants were provided with information about the diminished capacity of adolescents and their amenability to change, the participants were more likely to agree that severe sentences like life without the possibility of parole are not appropriate for youth when they were prompted to believe that the youth involved were white.<sup>173</sup> Study participants were more likely to favor harsh sentences when they were prompted to believe the youth involved were Black. Just a one-word shift, from white to Black, changed participants' views on the appropriate response to serious adolescent sentencing.

To further highlight these disparities for readers, the reporters' notes in the Restatement would benefit from a brief summary of data showing that Black and Latino youth are significantly more likely to be prosecuted as adults. For example, in 2020, less than 15% of all youth under juvenile court jurisdiction aged 10 and up in the United States were Black, yet Black youth accounted for more than 53% of all youth who were transferred by a judge from juvenile court to a criminal court that year.<sup>174</sup> Racial disparities in juvenile transfer exist across the country even

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[L]aw and policy in this area increasingly are grounded in the developmental science of adolescence and are premised on the empirically based recognition that youth involved in the justice system, due to their developmental immaturity, are fundamentally different from adults—different in their culpability for their crimes, in their ability to navigate the justice system, and in their response to correctional settings.

<sup>171</sup> Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. CHI. L. REV. 279, 289 (2024).

<sup>172</sup> RESTATEMENT Draft No. 5 § 13.60 reporters' note, cmt. e.

<sup>173</sup> See Rattan et al., *supra* note 8, at 4.

<sup>174</sup> See OJJDP, *supra* note 77.

among children who have committed similar types of crimes;<sup>175</sup> and those disparities are even more pronounced in state records.<sup>176</sup> The reporters' notes should also include data highlighting disparities in the imposition of severe sentences like life without the possibility of parole. Although the overall number of youth serving juvenile life without parole (JLWOP) sentences declined 38% between 2016 and 2020, racial disparities increased.<sup>177</sup> While Black youth made up 61% of people serving JLWOP sentences before *Miller v. Alabama* was decided in 2012, they made up 70% of new cases between 2012 and 2022.<sup>178</sup> Youth of color made up 78% of all children who were sentenced to JLWOP between 2012 and 2022.<sup>179</sup> Again, racial disparities in JLWOP at the state level are often even more extreme.<sup>180</sup>

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<sup>175</sup> Although Black youth were accused in only 35.6% of cases involving crimes against a person in 2020, they accounted for 55.9% of youth who were transferred from juvenile to adult court for those same offenses. Similarly, although Black youth were accused in only 18.7% of drug cases in 2020, they made up 35.6% of all youth transferred in drug cases that year. M. Sickmund, A. Sladky & W. Kang, *Demographic Characteristics of Cases Handled by Juvenile Courts*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2022), <https://perma.cc/RL5F-UU4H>.

<sup>176</sup> For example, in Florida, 63.6% of the children transferred to adult court from 2021 to 2022 were Black, while only 21% of the state's youth population identified for intake was Black. *Delinquency Profile 2022*, FLA. DEP'T OF JUV. JUST., <https://perma.cc/N2FM-XNF9> (using the following criteria to obtain transfer data: Arrests/Youth/Pop: "Arrests," DJJ Status: "Adult Transfer," Data Display: "Race/Ethnicity Split," Select Location: "Statewide," Offenses: "All Offenses." And using the following criteria to obtain population data at intake: Arrests/Youth/Pop: "Youth Population," DJJ Status: "Intake," Data Display: "Race/Ethnicity Split," Select Location: "Statewide," Offenses: "All Offenses"). In Missouri, 57% of the children transferred to adult court by a juvenile court judge in 2021 were Black, even though they accounted for only 15% of the state's youth population and only 41% of youth charged with a felony offense. OFF. OF STATE CTS. ADM'R, SUP. CT. OF MO., JUVENILE AND FAMILY DIVISION ANNUAL REPORT 7, 17, 43 (2021). In New Jersey, 80% of all youth prosecuted in adult courts between 2011 and 2016 were Black in a state where only 17.9% of youth were Black in that time frame. Sarah Gonzalez, *Kids in Prison: Getting Tried as an Adult Depends on Skin Color*, WNYC NEWS (Oct. 10, 2016), <https://perma.cc/84QU-8V2N>; *Easy Access to Juvenile Populations (EZAPOP) 1990–2020*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2020), <https://perma.cc/FC7W-R6MA>.

<sup>177</sup> Joshua Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJ. (Apr. 7, 2023), <https://perma.cc/Q97J-CU3B>.

<sup>178</sup> CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 8; *Miller*, 567 U.S. 460 (2012) (holding that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders).

<sup>179</sup> CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 8.

<sup>180</sup> In Louisiana, since *Miller* was decided, Black children received 93% of JLWOP sentences (compared to 73% prior to *Miller*). In Mississippi since *Miller*, 89% of those sentenced to JLWOP have been Black (compared to 71% pre-*Miller*). In Michigan, Black youth made up 90% of children sentenced to JLWOP post-*Miller*. *Id.* In Arkansas, 70% of the youth serving life sentences in 2016 were Black in a state where the youth population was less than 20% Black. John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life*

Given the Restatement's commitment to a Child Wellbeing Framework and extensive reliance on the developmental science, the Restatement's comments and reporters' notes would be greatly enhanced by the developmental research showing that youth of all races, classes, and nationalities follow a remarkably similar developmental trajectory and have similar capacities to change. Many studies controlling for socioeconomic status and race have found similar patterns of impulsivity, sensation seeking, susceptibility to peer influence, and limited future orientation across all youth groups.<sup>181</sup> These studies challenge racialized

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*Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 603 (2016). In Texas, thirteen of the seventeen people serving juvenile life without parole sentences in 2015 were Black; the other four were Hispanic. *Id.* at 604.

<sup>181</sup> Grace Icenogle, Laurence Steinberg, Natasha Duell, Jason Chein, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana M. Uribe Tirado, Liane P. Alampay, Suha M. Al-Hassan, Hanan M. S. Takash & Dario Bacchini, *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 LAW & HUM. BEHAV. 69, 80 (2019) (finding youth in the majority of nations studied continued to develop self-restraint, impulse control, resistance to peer influence, and the ability to learn from negative outcomes well into their mid-20s); Laurence Steinberg, Grace Icenogle, Elizabeth P. Shulman, Kaitlyn Breiner, Jason Chein, Dario Bacchini, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Patrick S. Malone, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan & Hanan M. S. Takash, *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 DEV. SCI., no. 21:e12532, 2018, at 1, 8 (examining adolescents from eleven culturally, racially, ethnically, and economically diverse countries and finding higher sensation seeking during adolescence—peaking at age 19, whereas self-regulation continues to develop into the mid-20s); Natasha Duell, Laurence Steinberg, Grace Icenogle, Jason Chein, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan, Hanan M. S. Takash, Dario Bacchini & Lei Chang, *Age Patterns in Risk Taking Across the World*, 47 J. YOUTH ADOLESCENCE 1052, 1062–63 (2018) (finding that teenagers across the world experience increase in risk taking during late adolescence, which then declines in adulthood); Elizabeth Cauffman, Elizabeth P. Shulman, Laurence Steinberg, Eric Claus, Marie T. Banich & Sandra Graham, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCH. 193, 200, 204–06 (2010) (finding normative preference among adolescents for risk taking and short-term rewards over long-term gain, with no significant differences among ethnicities); Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Elizabeth Cauffman & Marie Banich, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 36–37 (2009) (controlling for ethnicity and socioeconomic class and finding that all youth of similar ages exhibited similar levels of weak future orientation); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCH. 1531, 1538–39 (2007) (finding patterns in resistance to peer influence vary only slightly by ethnicity and socioeconomic status and generally all groups follow the same basic age pattern in developing resistance to peer

presumptions that Black and Latino youth are more dangerous and less amenable to rehabilitation and would aid the courts—and the Restatement—in their quest for equitable decision-making.

### C. Other Areas of Opportunity

While this Section has centered on select topics within Part 3, “Children in the Justice System,” the recommendations offered here can apply to a range of topics in and beyond this Part. In Part 4, “Children in Society,” for example, Chapter 16, Topic 2, “Liability for Sexual Activity,” might consider how the adultification of Black boys and girls,<sup>182</sup> the longstanding myths of Black sexuality,<sup>183</sup> and the perceived increased culpability of Black children<sup>184</sup> might impact the law and its application. Chapters 19, “Juvenile Curfews,”<sup>185</sup> and 18, “Minor’s Civil Rights and Civil Liberties Outside the School Context,”<sup>186</sup> would benefit from a discussion of the disproportionate enforcement of curfew laws against people of color,<sup>187</sup> including the enforcement of curfews to restrict protests in pursuit of racial justice.<sup>188</sup> Ultimately, this Essay does

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pressure); Laurence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCH. 1764, 1774–75 (2008) (finding that youth demonstrate increased sensation seeking and impulsivity across ethnic groups).

<sup>182</sup> See Goff et al., *supra* note 112, at 540; Epstein et al., *supra* note 113, at 4.

<sup>183</sup> See Kristin Henning, *Raising ‘Brutes’ and ‘Jezebels’: Criminalizing Black Adolescent Sexuality*, in THE RAGE OF INNOCENCE 81, 81–105 (2021).

<sup>184</sup> See Goff et al., *supra* note 112, at 540.

<sup>185</sup> See RESTATEMENT Draft No. 5 § 19.10.

<sup>186</sup> *Id.* § 18.10.

<sup>187</sup> See, e.g., Linda Poon, *The Racist History of Curfews in America*, BLOOMBERG NEWS (June 18, 2020), <https://perma.cc/W22P-V3RU>; Brittany Levine Beckman, *Curfews Have a Disturbing Racist History*, MASHABLE (June 4, 2020), <https://perma.cc/66PE-HXLP>; Gregg Hennigan, *Minorities Receive Most Citations Under Iowa City Curfew*, GAZETTE (Dec. 16, 2021), <https://perma.cc/PFH3-78GU>; Mallory Noe-Payne, *In Richmond, Virtually All Juveniles Stopped for Curfew Violations Were African-Americans*, RADIO IQ (Aug. 12, 2019), <https://perma.cc/46VB-U5JH>; John Kelly & Pete Madden, *As Loitering and Curfew Arrests Decline Nationwide, Philadelphia’s Use of the Tactic Stands Out*, ABC NEWS (June 11, 2020), <https://perma.cc/SU8E-QR5K>.

<sup>188</sup> See, e.g., Christopher Petrella, *How Curfews Have Historically Been Used to Restrict the Physical and Political Movements of Black People in the U.S.*, WASH. POST (June 3, 2020), <https://perma.cc/L22M-3L3X>; Rosie Perper, *This Many U.S. Cities Haven’t Been Under Curfew Since Martin Luther King Jr.’s Assassination in 1968*, INSIDER (June 3, 2020), <https://perma.cc/MK6E-LTGS>; Justin Worland, *Baltimore Tightens Curfew Amid Skepticism and Protests*, TIME (Aug. 8, 2014), <https://perma.cc/63Y2-6AML>; Joy Powers & Jack Hurbanis, *Issues of Racial Disparities & Civil Rights Raised Around Curfew Tickets Given During Last Summer’s Protests*, WUWM 89.7 FM (May 27, 2021), <https://perma.cc/7F6W-CA2M>.

not purport to catalog every section of the Restatement that might address race but instead identifies those elements of a Restatement—such as reporters' notes and comments—that provide the greatest flexibility for advancing racial equity and highlights a few examples that address race well and others that could benefit from additional analysis.

### CONCLUSION

The ALI launched the Restatement of Children and the Law to bring clarity and coherence to the increasingly complex and uncertain landscape of the juvenile court and the law related to children. As the Restatement surveys the courts' growing respect for the developmental plasticity and potential of children, it is crucial that the law afford all youth—regardless of race and class—the full benefits of the developmental research and enhanced procedural protections.

Despite the limitations of any project that seeks primarily to recite existing law, this Restatement has great potential to advance racial equity in the care and regulation of youth. The Restatement should tell a complete story, including information to help readers understand how youth of color are impacted by the law. By painstakingly locating and embracing judicial opinions that acknowledge the role of race in juvenile, criminal, and family law, and by incorporating relevant history, data, research, and analysis, the Restatement can serve a crucial role in educating readers on the sources of and remedy for racial inequities in the various legal systems that affect children.

The reporters have already given significant attention to the historical and contemporary racial disparities that persist in the regulation of children in their families, school, and the justice system. They have also highlighted the unique challenges and pressures youth of color face in contact with law enforcement. And yet, the growing body of research on adolescent development, racial trauma, stereotype threat, and cognitive biases in policing, along with new and emerging trends in the law, make it clear that a Restatement of Children and the Law can do even more to advance racial justice in this field. Even now, as the black letter and comments have been completed, the reporters can modify their notes to amplify their great work and provide even more race-related context and legal analysis to guide and even push the law toward equity.

Finally, as the reporters close out this inaugural edition of the Restatement of Children and the Law, the ALI should also be thinking about how the Restatement can be updated with greater ease in the future. Advances in research and changes to the law itself will not wait until it is convenient to draft the Restatement (Second) of Children and the Law. The reporters might consider producing a periodic supplement or releasing online updates to keep the Restatement current and comprehensive.