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Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" *Terry* Stops

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STRIKING A SINCERE BALANCE: A REASONABLE BLACK PERSON STANDARD FOR "LOCATION PLUS EVASION" *TERRY* STOPS

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Under the current race-neutral standard for reasonable and articulable suspicion to justify a police stop, Blacks are subject to a disproportionate number of stops because the current standard fails to take account of the unique experience of Blacks in the criminal justice system. This paper will propose a new standard for evaluating reasonable suspicion in "flight plus evasion"[1] police stops justified by the United States Supreme Court in *Terry v. Ohio*: a reasonable Black person standard that would explicitly take into account the perspective of a reasonable Black person.

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1. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) (using this term to refer to cases where crime-prone location and movement away from the police qualify as reasonable suspicion to justify stopping the person).

Randall Susskind originally proposed the "reasonable African American standard" for *Terry* stops as a way to minimize racial disparities in Fourth Amendment jurisprudence.[2] This paper will expand upon Susskind's suggested standard within the specific context of "location plus evasion" stops, in which suspects are stopped upon flight in a high-crime neighborhood. Part one will present the reasonable Black person standard in the context of *Illinois v. Wardlow*, a recent "location plus evasion case."[3] Part one will then show how this alternative standard better accounts for Wardlow's "raced" decision to flee, the police officers' "raced" decision to stop him, and the Court's "raced" decision to find reasonable and articulable suspicion. Part two will discuss and compare the reasonable Black person standard with analogous alternative reasonable person standards in sexual harassment and criminal law. Part three will anticipate and rebut potential criticisms of the proposed standard.

I. THE REASONABLE BLACK PERSON STANDARD

The United States Supreme Court formulated the current race-neutral reasonable suspicion standard for investigatory police stops in *Terry v. Ohio*.[4] Because the Fourth Amendment protects individuals from unreasonable searches and seizures, police can only stop a suspect to investigate a crime if the stop is reasonable.[5] Before the *Terry* decision, police needed probable cause to justify any search and seizure.[6] In *Terry*, the Court lessened the standard to reasonable and articulable suspicion for brief investigatory stops.[7] Reasonable suspicion is evaluated in light of the totality of the circumstances and from the perspective of a reasonable person in the police officer's situation.[8] Race and ethnicity are not directly taken into account under this analysis.

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2. Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 349 (1994).

3. 120 S. Ct. 673 (2000).

4. 392 U.S. 1 (1968).

5. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

6. *Terry*, 329 U.S. at 20–21, 30.

7. *Id.* at 27, 30.

8. *See id.* at 21–22 (footnotes omitted).

The Supreme Court reiterated its commitment to a colorblind analysis of *Terry* stops in *Wardlow* when it applied the race-neutral reasonable suspicion standard to the stop of a Black man fleeing in a high-crime neighborhood.[9] In *Wardlow*, the defendant, a middle-aged African American male,[10] was spotted fleeing police officers in a known drug trafficking neighborhood in Chicago.[11] Uniformed police officers Nolan and Harvey, who arrived at the scene in a four-car caravan expecting to find drug customers and dealer lookouts, stopped Wardlow, who fled the scene after seeing the police.[12] A subsequent pat-down search yielded a .38-caliber handgun.[13] Reversing the appellate court, the Supreme Court found sufficient reasonable and articulable suspicion to justify the stop based on Wardlow's combined flight and presence in a high-crime area.[14] Differentiating unprovoked flight from the right to go 'about one's business,' the Court held that, "headlong flight—whenever it occurs—is a consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[15]

By failing to incorporate the individual suspect's perspective into the reasonableness standard for suspicion, the Court applied and articulated a superficial reasonableness standard that is too deferential to police officers' perceptions of reasonableness. Wardlow's stop satisfied the current reasonable suspicion standard because Officer Nolan was able to point to race-neutral reasons for the stop.[16] Consequently, under this current standard, courts can essentially rubber-stamp an officer's interpretation of a suspect's behavior as long as that interpretation does not explicitly rely upon race.[17]

This paper proposes a new standard for "location plus evasion" cases such as *Wardlow*. Under a new reasonable Black person standard, reasonable suspicion would be evaluated in light of the race of the suspect. For example, to justify the stop in *Wardlow*, the officers' suspicion must

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9. *See Wardlow*, 120 S. Ct. at 675–76.

10. *See* David C. Slade, *Run! It's the Cops!*, WORLD & I, Dec. 1, 1999, at 86. Note that the Supreme Court does not identify Wardlow's race in an attempt to de-emphasize the significance of race in this police encounter. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (examining the Court's persistent attempts to remove race from cases in an effort to enforce a color-blind notion of the Fourth Amendment).

11. *Wardlow*, 120 S. Ct. at 674.

12. *See id.* at 674–75.

13. *See id.* at 675.

14. *See id.* at 675–77.

15. *Id.* at 676.

16. *See id.* at 676.

17. *See* Susskind, *supra* note 2, at 331–32 (noting that the current standard is "highly deferential" to the government and "shields racially discriminatory law enforcement practices from judicial scrutiny").

qualify as reasonable in light of Wardlow's behavior as a Black person. If Wardlow acted reasonably and non-suspiciously given his race, the officers were not justified in stopping him. This race-specific standard will force police officers and the Court to recognize the unique experience of racial minorities in the United States and the significance of race in *Terry* stops. By adopting this reasonable Black person standard, the Supreme Court would finally recognize and begin correcting the racial double standard for *Terry* stops.[18]

Under the reasonable Black person standard, courts would more closely scrutinize the reasonableness of an officer's interpretation of a defendant's behavior. If the officers in *Wardlow* knew or should have known that Blacks in high-crime areas frequently flee to avoid police misconduct or bystander violence, then their interpretation of Wardlow's behavior was not reasonable and did not constitute reasonable and articulable suspicion necessary to allow the officers to stop him.

A. *The Need for a Reasonable Black Person Standard*

In our criminal justice system, reasonable behavior is defined as White behavior. By painting the reasonable White person standard as a race-neutral reasonableness standard, courts undermine the significance of race. Race does matter when it comes to a person's decision to flee from police, a police officer's decision to stop a person, and a court's decision whether to accept a police officer's judgment. As such, a criminal justice system predicated on equality under the law should aim to cure this discriminatory reality.[19] The current reasonable police officer standard for *Terry* stops fails to recognize the unique Black perspective on police encounters. As such, it perpetuates racial discrimination by re-enforcing existing racial hierarchies while maintaining a façade of race-neutrality.

Professor Amar's writings on the reasonableness standard in Fourth Amendment jurisprudence support the deeper reasonableness analysis proposed above.[20] According to Professor Amar, the Fourth Amendment reasonableness requirement in *Terry*, unlike the warrant and probable cause requirements, allows us to consider race.[21] Professor Amar argues

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18. *See* DAVID COLE, NO EQUAL JUSTICE, RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 54–55 (1999) (noting two different balances are struck between competing interests in preventing crime and protecting rights for disadvantaged Black Americans and for well-off White Americans).

19. *See generally id.* at 169–208 (arguing for reform to alleviate current double standards in the American criminal justice system).

20. Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1099 (1998).

21. *Id.* at 1098 (stating that "the spacious concept of reasonableness allows us to look race square in the eye, constitutionally").

that "[t]he views of ordinary citizens—especially citizens specially intruded upon—are highly relevant to the reasonableness balance."[22] Professor Amar's conception of reasonableness as crafted in part by those subject to searches and seizures,[23] supports a deeper reasonableness standard.

1. The Suspect's "Raced" Decision to Flee

There are a variety of legitimate, non-criminal reasons why a Black person would flee a crime scene. These reasons relate to the sociological experience of communities of color as minorities in the United States. When we recognize the race-specific underpinnings that influence the decision to flee, we accept the centrality of race to one's experience in the criminal justice system.

a. Violence Avoidance

Perhaps the most obvious reason a Black person would choose to flee in a high-crime neighborhood is to avoid bystander violence. Considering Blacks are more likely than other groups to be victims of crimes,[24] a Black person's decision to flee a crime scene to escape potential harm is rational and innocent. The irony here is self-evident. Those most in need of police protection are Blacks residing in high-crime neighborhoods.[25] When such residents flee crime scenes to escape victimization, they then become police targets themselves.

Of course, anyone near a crime scene is a potential victim and suspect. Therefore, it would be rational for anyone to flee a crime scene. Furthermore, witnessing a violent crime does not exhaust all rational justifications for flight to avoid harm. Sam Wardlow fled upon seeing the police, not upon witnessing the commission of any violent crime.[26] For

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22. *Id.* at 1099.

23. *See id.*

24. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 290–91 (1999) (citing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE HOSTILE AND UNEQUAL 183 (1992), which found that Blacks accounted for 50.8% of murder victims in 1990; and U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1993 15 (1996), which showed by empirical study that the rate of victimization of Blacks exceeds the rates for other racial groups); *see also* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994) (citing Hanna Rosin, *Action Jackson: Jesse's Volte-face on Crime*, NEW REPUBLIC, Mar. 24, 1994, at 17, which reported in 1994 that Blacks are four times as likely as Whites to be raped, three times as likely to be robbed, twice as likely to be assaulted, and seven times as likely to be murdered).

25. *See* Harris, *supra* note 24.

26. *See* Illinois v. Wardlow, 120 S. Ct. 673, 675 (2000).

these reasons, Sam Wardlow's flight may be rationally explained as both skepticism toward police and a general association of police presence with the existence of violence.

b. Skepticism Toward Police

A second reason an innocent Black person might flee a crime scene is to avoid confrontation with police. Lack of confidence in police officers as unbiased law enforcers[27] contributes to Blacks' avoidance of police contact, regardless of guilt or innocence.[28] Black men perceive the police as a controlling force that functions only to enforce the social, economic and political interests of Whites rather than as their protectors.[29] Residents of high-crime neighborhoods, many of whom are Black,[30] tend to view themselves and the police as "natural adversaries in constant conflict with one another."[31] In particular, minority men, such as Sam Wardlow, anticipate police officers' perception of them as criminal.[32] African Americans are more skeptical of police behavior than Whites.[33] African Americans feel that they are at risk of being treated unfairly in police encounters.[34] Unlike Whites, Blacks view police misconduct as commonplace, rather than anomalous.[35] Blacks are also more suspicious than

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27. *See* Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 50 OKLA. L. REV. 451, 482 (1997).

28. *See Wardlow*, 120 S. Ct. at 680 (Stevens, J., concurring in part and dissenting in part).

29. *See* Leslie Casimir, *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, Mar. 26, 1999, at 34 (describing interviews with minority men in New York City where more than half of interviewees perceive the police as a controlling force, rather than as protectors).

30. *See* Harris, *supra* note 1, at 660, 677–78.

31. Keith D. Parker et al., *African Americans' Attitudes Toward the Local Police: A Multivariate Analysis*, 25 J. BLACK STUD. 396, 406 (1995).

32. *See* Casimir, *supra* note 29, at 34 (describing interviews with minority men in New York City where more than half of interviewees believed they were singled out because of their race and because police officers see everyone in a high-crime neighborhood as a criminal.)

33. Only 26% of African Americans hold a great deal or quite a lot of confidence in the police, as opposed to 63% of Whites. Jean Johnson, *Americans' Views on Crime and Law Enforcement*, 233 NAT'L INST. OF JUST. J. 9, 12 (1997) (referring to a 1995 Gallup survey). Similarly, 35% of African Americans have very little or no confidence in the police, compared to 8% of Whites. *Id.*

34. *See* In Soo Son et al., *Race and Its Effect on Police Officers' Perceptions of Misconduct*, 26 J. CRIM. JUST. 21, 22 (1998) (Referring to a Time/Cable News Network poll in May 1992 in which almost one half of African American respondents felt at risk of unfair police treatment).

35. *See* Ronald Weitzer & Steven A. Tuch, *Race, Class and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494, 502 (1999) (finding Blacks more likely to

Whites that police "would use expanded stop-and-search powers unfairly against Blacks" if the police were granted more authority to stop-and-search suspects.[36] In light of widespread skepticism among communities of color toward police officers, it is not surprising that even innocent people of color may flee to avoid police contact potentially leading to public humiliation and harassment.[37]

Recent studies indicate that police disproportionately target African Americans.[38] In particular, a study by the New York State Attorney General indicates that African American New Yorkers are disproportionately targeted for stops and frisks.[39] Furthermore, the perception of police misconduct and racial targeting are prevalent amongst Blacks.[40] The reality and perception of police misconduct and racial targeting may lead Blacks to make a rational choice to flee crime scenes. Given these circumstances,[41] Wardlow's decision to flee may have been rational and reasonable, rather than suspicious.

Minority suspicion of police enforcement is rooted in history. While recent incidents of police brutality toward communities of color have confirmed existing minority suspicions about racially biased law

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perceive racial disparities in policing and less likely to perceive law enforcement as color-blind than Whites); Eric S. Jefferis et al., *The Effect of a Videotaped Arrest on Public Perceptions of Police Use of Force*, 25 J. CRIM. JUST. 381, 391 (1997) (describing minorities' dissatisfaction with police as chronic and noting that minorities are consistently more likely to perceive use of force by police as unjustified or excessive); Johnson, *supra* note 33, at 13 (noting that despite agreement about what constitutes appropriate police behavior between Blacks and Whites, Blacks perceive a greater prevalence of police bias and brutality); Lee Sigelman et al., *Police Brutality and Public Perceptions of Racial Discrimination: A Tale of Two Beatings*, 50 POL. RESEARCH Q. 777, 790 (1997) (concluding Blacks were more likely to generalize highly publicized incidents of police brutality as confirmations of their "existing perceptions of past racial injustice", while Whites were more likely to "'isolate' these incidents by treating them outside the historical context").

36. *See* Sigelman, *supra* note 35, at 782.

37. *See* Alex Kotlowitz, *Hidden Casualties: Drug War's Emphasis on Law Enforcement Takes a Toll on Police*, WALL ST. J., Jan. 11, 1991, at A1 (noting some teenagers in the Black community of Dayton, Ohio ran at the sight of the police task force even if they were not selling drugs because they feared the police).

38. *See* Michael A. Fletcher, Criminal Justice Disparities Cited, WASH. POST, May 4, 2000, at A2 (detailing a report by the Leadership Conference on Civil Rights released on May 4, 2000).

39. *See id.* (detailing findings by the New York State Attorney General that 84% of 175,000 stops performed by New York City police between January 1998 and March 1999 involved Hispanics or African Americans).

40. *See* COLE, *supra* note 18, at 46–47 (noting "[t]he routine stopping of Black citizens, particularly young Black men, is a consistent complaint in Black communities of color across the country, and no doubt contributes to the pervasive sense among African Americans that the criminal justice system is biased against them").

41. *See* Fletcher, *supra* note 38, at A2.

enforcement, these suspicions are not new.[42] The willingness of police to enforce discriminatory laws, such as the southern slave codes prior to the Civil War and "Jim Crow" thereafter, the inability or unwillingness of police to protect Blacks from mob violence and lynching, and police precipitation of mob violence against Blacks during the Civil Rights Era, have all contributed to a history of betrayal of minorities by the police force.[43]

However, this skepticism perpetuates a cycle of cynicism whereby flight and subsequent police pursuit become virtually inevitable. Professor Harris describes African Americans as being caught in a "cycle of mistrust and suspicion."[44] Areas considered high-crime neighborhoods are predominately inner city neighborhoods with disproportionately poor, African American and Hispanic residents.[45] As frequent targets of police misconduct, African Americans in these crime-ridden neighborhoods are more likely to flee to avoid police contact and escape harassment, brutality and unreasonable stops and frisks.[46] Past experience, both personal and historical, leads Blacks to anticipate biased treatment and therefore exhibit resistant behavior, such as flight.[47] When police react to flight with harsh treatment, they reinforce existing perceptions of racial bias. As a result, Blacks continue to resist out of fear for harsh treatment during police encounters. In turn, police continue to respond harshly to resistant behavior, perpetuating the cycle of cynicism.[48] Thus, perceptions of racial bias in police conduct directly impact the reality of police-citizen encounters and the decision to flee.

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42. *See* Sigelman, *supra* note 35, at 789 (noting a publicized incident of police brutality in Detroit confirmed Black residents' long held perceptions of racial prejudice).

43. *See* Thomas B. Priest, *Evaluations of Police Performance in an African American Sample*, 27 J. CRIM. JUST. 457, 463 (1999) (offering history as a probable source of African Americans' negative evaluations of police performance); *see also* Kennedy, *supra* note 24, at 1267 (stating that "[t]hroughout American history, officials have wielded the criminal law as a weapon with which to intimidate blacks"); Don Wyclif, *Black and Blue Encounters*, CRIM. JUST. ETHICS, Summer/Fall 1998, at 84 (1988) (noting that "for most of their history in this country, blacks have felt the edge [of the law] that enforces social control").

44. Harris, *supra* note 1, at 660.

45. *See id.* at 677–78.

46. *See id.* at 681.

47. *See supra* note 43 and accompanying text.

48. *See* Son, *supra* note 34, at 27 (noting that because Blacks mistrust police they behave resistively, which police respond to more harshly, confirming Black's perceptions of racial bias).

2. A Police Officer's "Raced" Decision to Stop a Suspect

A police officer's decision whether to stop a suspect is just as "race-conscious" as is the suspect's decision to flee.[49] In a colorblind world where we refuse to acknowledge the centrality of race, a police officer's "raced" decision to stop a suspect can be disguised by other supposedly suspicious factors. The result is a racially discriminatory criminal justice system facilitated by a supposedly race-neutral reasonable police officer standard and sanctioned by a Supreme Court supposedly committed to anti-discrimination principles.

a. Police Officer Bias Against Blacks

According to a 1990 study, over fifty-six percent of Americans perceive Blacks as "violent prone."[50] According to Professor Cole, if most Americans associate Blacks with criminality we can assume police officers also hold these racist assumptions.[51] Other scholars also suggest that race plays a significant role in police officers' perceptions of citizens.[52] Research indicates that police officers hold negative and anxious attitudes toward Blacks.[53] For example, a Los Angeles Police Department survey published in 1991 revealed that twenty-four and a half percent of 650 responding officers agreed that "'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.'"[54] Such attitudes may be attributed to the reality that the human brain relies on default assumptions, such as stereotypes of Blacks as violent or dangerous,

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49. This paper focuses on the race of the suspect as an influential factor in the police officer's decision to stop a suspect. A more complete analysis would examine the influence of the race of the police officer on her decision to stop a suspect, as well.

50. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (quoting TOM W. SMITH, ETHNIC IMAGES 9, 16 (1990)).

51. *See* COLE, *supra* note 18, at 41 (citing Armour, *supra* note 49).

52. Thompson, *supra* note 10, at 982–91 (discussing the influence of racial categorization, schemas, and stereotyping in police officers' decisions about who to stop and frisk); *cf.* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 463 (1996) (relying on research indicating that the "human brain relies on default assumptions to interpret ambiguous situations" for support that racial stereotypes influence reasonableness determination in self-defense cases).

53. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 243–44 n.2 (1991) (citing six different studies and articles by scholars and researchers spanning three decades that point to police officers' negative attitudes toward Blacks) (citations omitted).

54. *See id.* (quoting REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991)).

to interpret ambiguous situations.[55] Thus, a police officer is likely to rely on racial stereotypes in interpreting ambiguous behavior such as flight.

(i) Cognitive Schema Theory

Cognitive Schema Theory provides a psychological explanation for why people rely on stereotypes in interpreting people's actions. According to this theory, individuals form cognitive schemas in interpreting other people's actions. These schemas are based upon unique experiences with certain types of people.[56] For example, almost everyone has developed a schema of the typical criminal that includes specific details based upon the person's unique experience with criminals.[57] "Beat" police officers, whose experience is shaped by their disproportionate exposure to Blacks in crime-ridden areas, are more likely to formulate a schema of the typical criminal as Black.[58] Since a police officer's criminal schema is constantly referenced on the job, it is easily accessible and a police officer will likely refer to and rely upon that schema to determine that innocent Blacks are guilty.[59]

According to one study involving Cognitive Schema Theory, law enforcement officials were more likely than laypersons to assume that the typical burglar is Black and were more likely to view the actions of Blacks as guilty.[60] This study also found that when a police officer is convinced of a suspect's guilt, she is less likely to value or look for exculpatory evidence.[61]

Following Cognitive Schema Theory, Officers Norton and Harvey may have stopped Wardlow because he matched the officers' criminal schema. If they were convinced of his guilt because he fit into their schema of the typical criminal, they would have been less likely to objectively evaluate Wardlow's flight and its potentially exculpatory value before stopping him. The current deferential reasonable police officer standard permits officers to rely on criminal schemas. A reasonable Black person standard that forces police officers to examine conduct from the perspective of the suspect would minimize the exclusive reliance on a police officer's subjective criminal schema in evaluating reasonable and articulable suspicion.

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55. *See* Lee, *supra* note 52, at 463.

56. *See* C.L. Ruby & John C. Brigham, *A Criminal Schema: The Role of Chronicity, Race, and Socioeconomic Status in Law Enforcement Officials' Perceptions of Others*, 26 J. APPLIED SOC. PSYCHOL. 95, 95–96 (1996).

57. *See id.*

58. *See id.* at 96.

59. *See id.*

60. *See id.* at 104, 107.

61. *See id* at 107–08.

(ii) Reliance on Proxies for Race

Criminal Schema Theory also explains why police officers rely on racist stereotypes. The current criminal justice system does not permit police officers to explicitly rely on race as a proxy for criminality based on such stereotypes. Courts consistently invalidate explicit race-based justifications for police conduct where race is used as a proxy for propensity to commit crime.[62] However, unless the officer's explanation for the stop explicitly identifies race as the sole contributing factor in the decision to stop a suspect, the Supreme Court permits police officers to rely on stereotypes and cognitive schemas even if heavily influenced by race.[63] As long as the police officer offers some race-neutral reason for the stop, other reasons can act as proxies for race.[64]

For example, the police officers in *Wardlow* relied on the presence of a high-crime neighborhood and flight as proxies for race. Though the *Wardlow* standard is facially race-neutral, both the "high-crime" location and flight are closely linked to race. High-crime neighborhoods are overwhelmingly poor, segregated, inner city and minority.[65] Similarly, because minorities have unique and compelling reasons to flee in many circumstances, the act of flight itself becomes racialized.[66] Consequently, given that many people of color living in high-crime locations rationally flee, when police are allowed to stop someone fleeing in this type of neighborhood, they are essentially given blanket authority to stop suspects on the basis of race.[67]

While police officers could still offer race-neutral reasons to disguise the racial motivation for a stop under the reasonable Black person standard, the new standard would make police officers more accountable for their reasons. Such proxies for race as high-crime location and evasive behavior would be evaluated in light of the suspect's experience. To justify their reliance on location and evasion, Officers Nolan and Harvey would have had to show that a Black man fleeing in this high-crime neighborhood specifically arouses reasonable suspicion because such

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62. Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 236 (1983) (discussing United States v. Robinson, 535 F.2d 881, 884 (5th Cir. 1976), United States v. Nicholas, 448 F.2d 622, 625–26 (8th Cir. 1971), United States v. Carrizoza-Gaxiola, 523 F.2d 239, 241 (9th Cir. 1975)).

63. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884–87 (1975).

64. *See* Harris, *supra* note 24, at 291.

65. *See* Harris, *supra* note 1, at 677–78. This is probably true not only in reality, but also in the American imagination.

66. *See id.* at 660.

67. *See id.* While this paper focuses on the specific scenario of flight in a high-crime neighborhood, it is worth noting that flight alone serving as a proxy for race may constitute reasonable suspicion sufficient to stop a Black person fleeing even in a low-crime, affluent White neighborhood.

behavior is not reasonable for a Black person in this neighborhood. Still, the reasonable Black person standard would not completely eliminate proxies. Any enforcement of constitutional limits on police conduct relies upon the good faith of police officers to testify truthfully.[68] There will always be a danger that police officers will commit perjury to hide their true racial motivation. However, a reasonable Black person standard will hopefully make falsifying testimony harder as police officers are required to specifically explain the reasonableness of their suspicion relative to the perspective of a reasonable Black person.

Some commentators suggest that adding more factors might alleviate the racial bias inherent in *Terry* stops.[69] But even if additional factors were required, it is possible that police officers could contrive additional factors to serve as a proxies for race, such as a likelihood of weapons possession.[70] Requiring a multitude of factors, each serving as a proxy for race, will do little to eliminate the reality that police officers choose who to stop on the basis of race. Until the Court explicitly recognizes the significance of race in a police officer's decision to stop a suspect, police will always be able to contrive new proxies for race to disguise true racial motivations. The reasonable Black person standard offers a color-conscious resolution to the high-incidence of unwarranted *Terry* stops of Blacks that would effectively minimize the use of proxies for race.

b. The Cycle of Mistrust and Resistance

Differential police treatment of Blacks and Whites may also be attributed to the previously mentioned cycle of mistrust.[71] Blacks may exhibit resistant behavior during police encounters because they anticipate harsh and discriminatory treatment by the police. In turn, the police fulfill Black expectations of police brutality and discrimination by responding harshly to resistant behavior.[72] Similarly, police officers' perceptions of people of color as resistant may contribute to their biased treatment of such citizens. For example, because police officers know

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68. *See* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 128–29 (1999).

69. *See* Harris, *supra* note 1, at 687.

70. *See* Edna Erez, *Self-Defined 'Desert' and Citizens' Assessment of the Police*, 75 J. CRIM. L. & CRIMINOLOGY 1276, 1295 (1984). One sociologist suggests Blacks may be searched more often than Whites because of greater police suspicion of weapon possession in certain neighborhoods and among certain groups. *Id.*

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

72. *See* Son, *supra* note 48.

that Blacks distrust them,[73] they expect resistance and therefore stop Black suspects like Wardlow even though his behavior does not arouse reasonable suspicion.

Just as Black citizens assume police bias and respond accordingly, police officers assume resistance by Blacks and respond accordingly, regardless of the innocence or appropriateness of this behavior in light of the experiences of Black people. Under a race-specific standard that forces the police officer to consider the suspect's race, reasonable and articulable suspicion is restrained by context. The reasonable Black person standard mandates that officers be more perceptive in assessing a defendant's behavior. This standard would make it more difficult for police officers to rely on racial stereotypes when stopping Blacks they perceive as resistant. The reasonable Black person standard would alleviate the cycle of mistrust and resistance by not permitting officers to rely on assumptions about Black behavior. If fewer Blacks perceive police contact as discriminatory, fewer would resist police encounters in the future and innocent flight might no longer be necessary.

c. Subcultural Gap

Because the reasonable police officer standard is based on a dominant, White perspective, it excludes the experiences of Blacks. Evasive behavior is culturally defined: "Behavior that reflects consciousness of guilt among the dominant culture—of which the officer is usually a member—may reflect only an ethnic difference when displayed by a minority group member."[74] If nonverbal cues, such as body movement, vary among subcultures, the race and subculture of the suspect and of the police interpreting the suspect's actions are relevant.[75] Thus, "commonsense judgements and inferences about human behavior" look less and less race-neutral when it comes to interpreting body movement as an indicator of consciousness of guilt.[76]

Studies indicating that Blacks are disproportionately arrested without probable cause, suggest that police are too quick to interpret

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73. *See* Illinois v. Wardlow, 120 S. Ct. 673, 680–81, 681 n.9 (2000) (Stevens, J., concurring in part and dissenting in part) (pointing to evidence that police are aware of minorities' concerns and fears of police).

74. Johnson, *supra* note 62, at 238.

75. *See id.* at 238 (citing to M. ARGYLE, BODILY COMMUNICATION 73–105 (1975); E. HALL, THE HIDDEN DIMENSION (1966); E. HALL, THE SILENT LANGUAGE (1959); and Ekman, *Universal and Cultural Differences in Facial Expressions of Emotion*, in NEBRASKA SYMPOSIUM ON MOTIVATION (1972)).

76. *Wardlow*, 120 S. Ct. at 676 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

minorities' behavior as indicative of criminality.[77] Assuming the police officer is White and the suspect is Black, as in *Wardlow*, misinterpretation of behavior may be due to a subcultural gap. The reasonable Black person standard would help correct for the subcultural gap by forcing White and other non-Black police officers to take into account the "racial culture" of the suspect in formulating reasonable and articulable suspicion, rather than ignoring culture-specific cues and relying on a White cultural norm.

3. The Court's "Raced" Approach to Reasonable and Articulable Suspicion

Despite the Supreme Court's purported "colorblind" approach, race influences the Court's determination of reasonable suspicion as much as it does a suspect's decision to flee and an officer's decision to stop the suspect. The Justices invoke their own set of race-based judgments when they hear the story of Sam Wardlow and apply standards for reasonable suspicion based upon "commonsense judgments and inferences about human behavior."[78]

a. The Supreme Court's Persistent "Colorblind" Analysis of Fourth Amendment Law

Despite the reality that Blacks have attained success relative to Whites under race-conscious policies, (such as the Freedman's Bureau during Reconstruction and governmental policies during World War II and the Vietnam War,)[79] the Supreme Court remains wedded to the notion of colorblindness as a "moral requirement"[80] of society, particularly in the field of criminal law.[81]

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77. *See* Johnson, *supra* note 62, at 239 (citing Hepburn, *Race and the Decision to Arrest: An Analysis of Warrants Issued*, 15 J. RES. CRIME & DELINQ. 54, 59, 66 (1978)).

78. *Wardlow*, 120 S. Ct. at 676 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

79. *See* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 173 (1994) (citing Richard B. Freeman, *Black Economic Progress after 1964: Who Has Gained and Why?*, in STUDIES IN LABOR MARKETS 247, 251 (Sherwin Rosen ed., 1981); and WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 48–49 (1991)).

80. *Id.* at 162–63 (arguing that the colorblindness principle ought to be seen as a policy argument, not a moral goal in itself because it does not aim to change the status quo and is merely a "legal fantasy.")

81. *See generally* Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231 (1993); Johnson, *supra* note 62.

The Supreme Court applied a colorblind analysis in *Wardlow*. Reasoning that *Terry* permits officers to stop even innocent individuals to resolve ambiguity, the Court concluded that Wardlow's legitimate reasons for flight did not make the stop unconstitutional. Race-specific reasons for flight are irrelevant to the determination of reasonable suspicion.[82] However, *Terry* explicitly recognized the centrality of race in the criminal justice system by acknowledging that stops and frisks are a main source of racial tension between Blacks and Whites.[83] Nonetheless, the Court still insists upon a colorblind analysis in *Wardlow* and other search and seizure cases.[84]

The Court's limited recognition of race as central only when race is explicitly identified as the sole factor in a decision to stop invites the use of racial proxies and prohibits the Court from challenging the use of race as a proxy for criminality. By refusing to acknowledge the constant forces of racial discrimination, the Court actually reinforces existing informal racism. The Court reinforces the existing White majority perception that racism is anomalous in Fourth Amendment law.[85]

A reasonable Black person standard would make race central to the law regarding *Terry* stops. A race-specific standard would force the Court to account for the unique experience of Blacks in police stops. Unfortunately, the Court's decisions since *Terry* make this unlikely, despite the *Terry* court's understanding of race as central to police-citizen contact.[86]

b. Ramifications of the Court's Colorblind Approach to Reasonable Suspicion

The Supreme Court's willingness to justify a stop based on flight in a high-crime neighborhood gives the police more power to stop and frisk innocent people without reasonable suspicion.[87] *Wardlow* legitimized *Terry* stops based on flight in high-crime areas. Permitting such stops without concern for the suspect's perspective perpetuates a cycle: Black skepticism toward police enforcement is reaffirmed when courts sanction police targeting of Blacks attempting to avoid police contact because of

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82. *See Wardlow*, 120 S. Ct. at 677.

83. Terry v. Ohio, 392 U.S. 1, 14–15, 14 n.11. *See generally* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 1022 (arguing that subsequent decisions have redefined *Terry* to permit more stops and frisks). *But see* Thompson, *supra* note 10 (analyzing how the *Terry* Court ignored the racial dimension of the case by portraying the facts in race-neutral terms and scarcely mentioning race in its legal analysis).

84. *See Wardlow*, 120 S. Ct. at 673-77; *See also* Thompson, *supra* note 10, at 973–77 (discussing a series of Fourth Amendment cases where the Court removed the racial dimensions of the case).

85. *See supra* note 35 and accompanying text.

86. *See Terry*, 392 U.S. at 14–15, 14 n.11.

87. *See Wardlow*, 120 S. Ct. at 673–77.

their skepticism and mistrust of police.[88] Unlike the current, deferential reasonableness standard, a reasonable Black person standard would combat this cycle of cynicism by instructing courts to consider the motivation of a fleeing Black person when evaluating reasonable suspicion.

Furthermore, in *Wardlow*, by equating the police officer's perception of the defendant with a "commonsense judgment," the Court essentially prioritizes one "raced" perception of Wardlow's behavior, that of a White police officer, over another, that of a Black defendant.[89] The Supreme Court reinforces the perceptions of the dominant subculture of White America by refusing to recognize the perceptions of the subordinated, Black America subculture. This is done under the guise of "race-neutrality" and a "colorblind" application of the Fourth Amendment. In practice, this "colorblind" approach allows the Court to substitute its proxies for race for those of the government. By preferencing the dominant, White subculture perception of Wardlow's behavior and referring to it as "commonsensical" the Court demonstrates its own preference for White subculture and illustrates its own racial bias.[90]

Instead of adopting the police officer's perception as reasonable and race-neutral, the Court could have alleviated its racial bias by analyzing the police officer's interpretation of Wardlow's behavior in light of Wardlow's race and culture. If Wardlow fled because he acted as a reasonable Black man in a high-crime neighborhood who feared an encounter with police and/or bystander violence, the Court should have taken this into account when evaluating the reasonableness of Officers Nolan and Harvey's suspicions. Certainly, the reasonableness of Wardlow's decision to flee is relevant to the reasonableness of the officers' suspicion.

c. The False Hope of the Equal Protection Clause of the Fourteenth Amendment

In its insistence on a colorblind analysis of the Fourth Amendment, the Court recognizes discrimination claims under the Fourth Amendment when race is explicitly used as a proxy for propensity to commit

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88. *Id.*; *See also generally* COLE, *supra* note 18, at 169–78 (discussing the detrimental effects of Black's persistent cynicism toward the criminal justice system).

89. This argument assumes that a Black suspect's sub-culture would reflect a different commonsense perception of flight than a White judge or police officer's sub-culture. However, Blacks may also perceive Black flight as indicative of criminality due to internalized stereotypes regarding the criminality of Blacks. Regardless, statistical studies refute the stereotype that Blacks are prone to criminality. *See* COLE *supra* note 18, at 42 (citing to *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1508 (1988)) (noting that only 2% of Blacks are arrested in any given year).

90. *See Wardlow*, 120 S. Ct. at 676 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

crime.[91] Otherwise, the Court encourages defendants to bring suits alleging racial discrimination under the Equal Protection Clause, rather than the Fourth Amendment.[92] However, as discussed below, this alternative route offers little hope for success. Black defendants' rights would be better protected if reasonable and articulable suspicion were rooted in a reasonable Black person standard.

The Court suggests that defendants such as Wardlow seek redress in the Equal Protection Clause of the Fourteenth Amendment, rather than in the confines of a strictly colorblind Fourth Amendment.[93] For example, in *Whren v. United States*, a pretextual traffic stop where officers stopped two Black men to search for suspected drug paraphernalia after the driver committed a traffic offense, the Court urged the defendants to bring claims under the Equal Protection Clause[94] and buried the issue of racism in a "few tepid lines" in the middle of the opinion.[95] In doing so, the Court made claims of racial proxies and pretexts essentially off-limits in Fourth Amendment law.[96]

By urging defendants to seek redress in the Equal Protection Clause, the Court limits redress for discrimination stemming from *Terry* stops to Fourteenth Amendment claims. Professor Lawrence identifies a similar move by the Court in First Amendment law.[97] He questions why the First Amendment is perceived as a race-neutral "regular" amendment that works for all people, while the Fourteenth Amendment is perceived

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91. *See* Thompson, *supra* note 10, at 976 (discussing the Court's rejection of illicit racial motivation as the sole justification for a border stop in United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding Mexican descent, by itself, insufficient to justify a stop)); *see also* Johnson, *supra* note 62, at 235 (discussing circuit court cases in which explicit generalizations about race and propensity for criminal activity have been rejected under the Fourth Amendment).

92. *See* Whren v. United States, 517 U.S. 806, 813 ("the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment").

93. *See id.*

94. *Id.*

95. David A. Harris, Whren v. United States*: Pretextual Traffic Stops and 'Driving While Black'*, CHAMPION, Mar. 1997, at 41, 42.

96. *See id.* at 43 (arguing that *Whren* "takes the courts out of the business of supervising" racially motivated police policies); *see also* Thompson, *supra* note 10, at 981–82 (describing the *Whren* Court's bifurcated analysis of Fourth Amendment and Equal Protection issues as permitting the Court to ignore racial bias in reviewing *Terry* stops); Saleem, *supra* note 27, at 484–85 (arguing the *Whren* Court's insistence that the Equal Protection Clause is the more appropriate constitutional basis for racial discrimination claims because subjective intentions play no role in Fourth Amendment analysis, "disembodies" the Fourth Amendment because the Court has previously admitted that race is a relevant factor in reasonable suspicion analyses and ignores the politics of race in the criminal justice system).

97. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 474–75 (1990).

as a less valued "special interest" amendment for minorities.[98] Professor Lawrence attributes this perception to unconscious racism whereby minorities are made to sacrifice for the sake of society at large when "regular" interests are defined as White interests.[99]

Additionally, as Professor Lawrence suggests in the context of free expression, the Court should place the burden on the government to justify a reading of the Fourth Amendment that requires sacrificing the rights guaranteed to Blacks through the Fourteenth Amendment.[100] Under the current reasonable suspicion standard, the Court places the burden of persuasion on those claiming discrimination under the Fourth Amendment to show that the two amendments need not be mutually exclusive and to explain why discrimination claims should survive outside of the Fourteenth Amendment. A reasonable Black person standard would incorporate principles of racial equality in the Fourth Amendment.

Even if we accept the Court's unconsciously racist premise that discrimination claims are beyond the purview of the Fourth Amendment, the Fourteenth Amendment offers little hope itself. Despite the Court's urging toward the use of the Equal Protection Clause challenges to racial discrimination in law enforcement, such challenges have provided minimal affirmation of defendants' rights. First, such claims are difficult to prove because they require a showing of intentional discrimination.[101] Additionally, the Court has refused to accept arguments of police racial discrimination based on statistical evidence in Equal Protection claims.[102] Because the Supreme Court has repeatedly refused to accept the correlation between race and police practice despite extensive social science research, Wardlow's potential equal protection claim would likely fail.

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98. *Id.*

99. *Id.* at 475 (citing DERRICK BELL, RACE, RACISM AND AMERICAN LAW 30 (2nd ed. 1980); and Derrick Bell, *The Real Status of Blacks Today: The Chronicle of Constitutional Contradiction*, *in* AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26, 40 (1987)).

100. *See id.* at 474.

101. *See* Susskind, *supra* note 2, at 340–42 (noting that it is unlikely that a minority defendant will be able to prove racial discrimination in a *Terry* stop because the Equal Protection Clause requires intentional discrimination and police officers rarely admit racial motivations).

102. *See* United States v. Armstrong, 517 U.S. 456 (1996) (holding statistics showing all defendants in crack cocaine cases handled by the Los Angeles public defender in the past year were Black irrelevant to the defendant's selective prosecution claim); McCleskey v. Kemp, 481 U.S. 279 (1987) (Rejecting a statistical study evidencing racial patterns in Georgia's application of the death penalty because the defendant failed to show direct racial discrimination); Harris, *supra* note 95, at 42–43; Saleem, *supra* note 27, at 487 (offering United States v. Armstrong to support his thesis that neither the Fourth Amendment nor the Equal Protection Clause protect defendants against racially discriminatory *Terry* stops and frisks).

Second, even when the Court has been willing to recognize that race matters in criminal procedure cases under the Equal Protection Clause, it does not usually benefit defendants. For example, in *Batson v. Kentucky*,[103] the Supreme Court prohibited the use of race in preemptory challenges for jury selection. However, the Court prohibited such use of race primarily out of concern for the equal protection rights of jurors, rather than those of defendants.[104]

Similarly, an Equal Protection claim based on a racially motivated *Terry* stop may actually elevate the rights of residents in high-crime neighborhoods over the rights of defendants.[105] In its amicus curiae brief on behalf of petitioner in *Wardlow*, the National Association of Police Organizations, Inc. ("NAPO") argued that reducing stops and frisks in high-crime neighborhoods would violate the equal protection of residents of such neighborhoods.[106] Scholars have relied upon similar rationales in arguing for stronger law enforcement in Black communities.[107] Thus, even the Court's suggested alternative avenue of equal protection for racially motivated *Terry* stops might not help defendants. The *Wardlow* Court did not address NAPO's argument.[108] However,

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103. 476 U.S. 79 (1986).

104. *See* Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1814–1815 (1993).

105. *See id.*

106. *See* Amicus Curia Brief of the National Association of Police Organizations et al. at 8, Illinois v. Wardlow, 120 S. Ct. 673 (2000) (No. 98-1036).

107. Professor Kennedy supports laws imposing a higher punishment for crack possession than cocaine possession. He notes that Blacks are more likely to be victims of crime and have suffered a history of racially invidious under-enforcement of laws. As such, Professor Kennedy argues discrimination against Black communities consists of the state's failure to provide equal protection of the laws via law enforcement, not excessive policing and invidious punishment. Kennedy, *supra* note 24, at 1256, 1267. Additionally, because not all Blacks are criminals, the burden of law enforcement in Black communities falls only upon a subset of the Black community, Black criminals, while simultaneously benefiting law abiding Blacks who deserve protection from crime. *See id.* at 1269. Finally, because diverse members of the Black community often disagree about what constitutes good policy, courts should not invalidate criminal policy unless there is a clear discriminatory purpose behind the policy. *See id.* at 1274.

Professor Cole challenges Kennedy's central premise that law enforcement in Black communities benefits law abiding Blacks. Cole argues the impact of vast incarceration of Blacks affects the Black community at large and does not effectively reduce crime. *See* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2558 (1995). Plus, while Blacks residing in inner cities are disproportionately victimized by crime, they are also disproportionately victimized by the police. *See id.* at 2561. Finally, even policies with a mere racially disparate impact reinforce stereotypes of all Blacks as potential criminals. *See id.* Facially neutral criminal policies stigmatize Blacks as much as intentionally discriminatory policies. *See id.* at 2551, 2569.

108. NAPO's argument can be refuted on the same grounds that Professor Cole uses to refute Professor Kennedy's theory. *See supra* note 107.

given the limited success of defendants with Equal Protection claims in criminal procedure cases such as *Batson*,[109] an Equal Protection claim by Wardlow would do little to protect suspects from racially discriminatory stops despite the Court's urging.

A civil suit for damages alleging a violation of a defendant's civil rights will also offer little hope to Black defendants. Even if a civil suit alleging a violation of a defendant's civil rights under a federal law was a tenable alternative to Fourth Amendment exclusion of evidence obtained through searches precipitated by racial discrimination,[110] this type of suit would not be easy.[111] As Professor Harris points out, civil suits alleging racial discrimination are difficult to file against the police.[112] Such cases require tremendous monetary resources and a brave, appealing plaintiff without a criminal record.[113] Furthermore, defendants like Wardlow are seeking immediate relief via the exclusion of incriminating evidence. A civil suit is of minimal personal gain to a plaintiff serving a prison sentence because a police officer stopped him because of his race. Because principles of equality should apply to the Fourth Amendment, and because Equal Protection claims and civil suits for damages offer little hope of success for defendants, a reasonable Black person standard would provide greater protection for Blacks under the Fourth Amendment.

II. ANALOGOUS ALTERNATIVE REASONABLE PERSON STANDARDS

The reasonable Black person standard for "location plus evasion" cases draws on several analogous models for alternative reasonable standards proposed in other areas of the law.

A. *The Reasonable Woman Standard in Sexual Harassment Law*

The reasonable woman standard in sexual harassment law is similar to the proposed reasonable Black person standard. Feminist legal theorists propose the implementation of a reasonable woman standard by which to evaluate sexual harassment claims because the supposedly neutral reasonable person standard functions as a reasonable man standard.[114] "[B]ecause

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109. Batson v. Kentucky, 476 U.S. 79 (1986).

110. *See* Amar, *supra* note 20 (advocating civil damages instead of an application of the exclusionary rule to remedy of the Fourth Amendment violations).

111. *See generally* COLE, *supra* note 18, at 161–68 (detailing the legal barriers and practical hurdles to such suits for damages).

112. *See* Harris, *supra* note 24, at 324.

113. *See id.*

114. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202–13 (1989); *See also* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Environment Claims Under Title VII: Who is*

men still exercise control over most workplaces, their views of sexual behavior in the workplace remain the norm" and thereby define reasonableness.[115] Similarly, most judges are men who have been socialized to accept the male notion of normalcy in workplace conduct.[116] Finally, because men are also most often the perpetrators of sexual harassment, they are unable to relate to the experience of women as victims of sexual harassment.[117] For these reasons, several courts have adopted a reasonable woman standard to account for a reasonable woman's experience and perspective in determining what behavior qualifies as sexual harassment.[118]

The concept of a gender-specific standard for sexual harassment law is analogous to the concept of a race-specific standard for *Terry* stops. Because most police officers, both Black and White, are socialized to associate Blacks with criminal propensity, a reasonable police officer standard will do little to avoid reliance on unfounded stereotypes in *Terry* stops.[119] Additionally, because police officers are the perpetuators of illegal, racially motivated *Terry* stops, at least White police officers will be unable to relate to the experience of Blacks in the criminal justice system. As such, the current reasonable police officer standard only preserves the status quo of racially motivated stops.

Recognizing the inherent bias in a gender-neutral reasonableness standard for sexual harassment, the Ninth Circuit applied the reasonable woman standard.[120] In doing so, the court cited the EEOC manual, which encourages courts to consider the victim's perspective and reject stereotyped notions of acceptable sexual behavior in the workplace.[121] Similarly, the reasonable Black person standard asks courts and police officers to consider the suspect's perspective in deciding to flee and to reject stereotyped notions of Black criminality. The Ninth Circuit recognized the different and unique experience of women regarding sexual behavior.[122] The court was careful not to reinforce existing levels of discrimination and sanction behavior merely because it qualifies as

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the Reasonable Person?, 38 B.C.L. REV. 861, 869–77 (1997) (detailing the implementation of the reasonable woman standard in sexual harassment case law).

115. Abrams, *supra* note 114, at 1203.

116. *Id.*

117. *Id.* at 1202–03.

118. Zalesne, *supra* note 114.

119. *See supra* notes 50–62, 71–77 and accompanying text.

120. *See* Ellison v. Brady, 924 F.2d 872, 874 (9th Cir. 1991); *See also* Yates v. Avco, 819 F.2d 630, 637 (6th Cir. 1987) (acknowledging that men and women are offended by different behavior and therefore applying the reasonable woman standard for sexual harassment case involving a male supervisor and female plaintiff).

121. *Ellison*, 924 F.2d at 878.

122. *Id.* at 879.

commonplace.[123] The reasonable Black person standard also warns against reinforcing existing unconscious racism on the part of police officers by rubber stamping their raced perceptions of reasonable behavior. The Ninth Circuit explicitly admitted that a sex-blind standard is male biased because it ignores the unique experiences of women.[124] Similarly, the reasonable police officer standard preferences majority, White perceptions of reasonableness while ignoring the unique experiences of Blacks.[125]

B. *The Battered Woman Standard for Self-Defense Claims*

Feminist legal scholars have also proposed a battered women standard for self-defense claims in an effort to expand legal theories of self-defense to include an appreciation for the unique experience of battered women.[126] Because female traits are perceived as irrational and illogical, battered women's responses to abusive partners do not fit within a male-oriented reasonable man standard of self-defense.[127] A battered woman's self-defense claim is unlikely to succeed under a reasonable man standard rooted in male norms.[128] The sex bias inherent in the reasonable man standard for self-defense claims excludes evidence of a woman's individual experience and perspective and thereby inhibits her ability to present an adequate theory of self-defense.[129]

Professor Elizabeth Schneider advocates for a more individualized standard that would account for the individual woman's circumstances and perceptions by recognizing the real difference between male and female notions of self-defense.[130] A more individualized approach to self-

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123. *Id.* at 881.

124. *Id.* at 879.

125. Critics of the reasonable Black person standard will distinguish sexual harassment claims from Fourth Amendment claims by highlighting that Title VII was enacted to prevent the perpetuation of stereotypes in the workplace. Conversely, the Fourteenth Amendment, not the Fourth Amendment, was designed to protect the rights of Black Americans. However, as discussed above, there is no good reason why the protection of Black Americans' right to be free from unreasonable searches and seizures need be exclusively relegated to the Fourteenth Amendment. *See supra* note 99 and accompanying text.

126. *See* Elizabeth Schneider, 15 HARV. C.R.-C.L. L. REV. 623 (1980). Feminist legal theorists have proposed revisions of reasonableness standards in other areas of criminal law, as well. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091–94 (1986) (arguing for revised standards for evaluating force and resistance in rape to account for the women's perspective).

127. Schneider, *supra* note 126, at 636 (citing Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man*, 8 RUTGERS-CAM. L.J. 311, 323 (1977)).

128. *Id.* at 636.

129. *Id.*

130. *Id.* at 639–40.

defense theories for battered women would allow women to present evidence about their particular circumstances and perspectives. This would alleviate the lack of appreciation for the circumstances of a battered woman's acts of self-defense and achieve greater gender equality in the courts.[131]

Professor Schneider's individualized standard for battered women's claims of self-defense is analogous to the reasonable Black person standard for *Terry* stops. The current reasonable police officer standard makes it impossible for a Black defendant to present evidence to the court regarding the defendant's individual circumstances and perspective that influenced his decision to flee, because the defendant's perspective is irrelevant to the determination of reasonable suspicion.[132] Similarly, the current reasonable man standard for self-defense claims inhibits a battered woman's ability to present evidence of her own experience surrounding her decision to attack her batterer.[133] For both battered women and Black suspects, a seemingly neutral standard only reinforces White male notions of reasonable behavior, to the exclusion of the Black and female experience.

C. *A Reasonable Black Person Standard for Seizures*

Professor Tracey Maclin offers a similar race-specific standard for Fourth Amendment law within the context of seizures.[134] The Fourth Amendment protects individuals from unreasonable searches and seizures.[135] The Supreme Court has held that a seizure occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[136] Professor Maclin proposes that the Court "disregard the notion that there is an average, hypothetical, reasonable person" by which to judge whether a seizure has occurred.[137] Rather, "when assessing the coercive nature of an encounter, the Court should consider the race of the person confronted

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131. *Id.* at 644.

132. *See* Illinois v. Wardlow, 120 S. Ct. 673, 677 (2000).

133. *See* Schneider, *supra* note 126, at 647.

134. *See* Maclin, *supra* note 53, at 274; *see also* In re: J.M., 619 A.2d 497, 512 (D.C. 1992) (Mack, J., dissenting, but concurring in order of remand) (suggesting an appropriate standard for determining whether an African American has been seized would incorporate the African American perspective); Susskind, *supra* note 2, at 346–48 (arguing for a reasonable African American standard for evaluating whether a police encounter qualifies as a seizure).

135. U.S. CONST. amend. IV. *See supra* note 5.

136. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion).

137. Maclin, *supra* note 53, at 250.

by the police, and that that person's race might have influenced his attitude toward the encounter."[138]

Professor Maclin argues that Black men have unique reactions to police encounters based on the reality of their experience on the streets of America.[139] The mythical reasonable person standard ignores the feelings of fear and distrust toward police that cause Black men to feel unable to leave a police encounter even though the encounter would not be considered coercive enough to qualify as a seizure under the reasonable person standard.[140] Similarly, the mythical reasonable police officer standard ignores the fear and distrust Blacks feel in a police encounter that may propel them to flee. The reasonable Black person standard for reasonable suspicion is grounded in the same concerns as Professor Maclin's proposed standard for coercive seizures.

D. *Limited Consideration of the Character of the Neighborhood in Terry Stops*

Professor Raymond has proposed a framework for reasonable suspicion that would alleviate at least the reliance on location in a high-crime neighborhood as a factor for determining reasonable suspicion. Professor Raymond argues that the character of a neighborhood should be considered only where the observed behavior offered to support the reasonable suspicion determination is not common among persons engaged in law-abiding activity at the time and place observed."[141] Raymond's proposal seeks to maintain the flexibility of the current reasonable person standard while simultaneously curbing overly broad police power to stop anyone found in a high-crime neighborhood.[142]

While Professor Raymond's proposal is not a race-specific proposal, it is similar to the reasonable Black person standard. Both proposals refocus the inquiry into reasonable suspicion on particularized observations of an individual suspect within the norms of her particular community.[143] Suspicious behavior is relative to one's community. In addition, both proposals rely on police familiarity with the nuances and behavioral norms of the policed community.[144] Under both proposals, the police officers' stop of Sam Wardlow would have violated the Fourth Amendment.

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138. *Id.*

139. *See id.* at 254.

140. *See id.* at 255. *But see* Commonwealth v. Hart, 45 Mass. App. Ct. 81, 84 (1998) (rejecting the reasonable Black person standard in determining whether a seizure has occurred).

141. Raymond, *supra* note 68, at 101.

142. *See id.*

143. *See id.* at 131.

144. *See id.* at 139.

The United State District Court for the Southern District of New York applied a standard analogous to Professor Raymond's proposal in *United States v. Bayless*.[145] The court granted the defendant's motion to suppress evidence seized during an unreasonable stop by finding no reasonable suspicion upon which to base the police officer's stop of the Black men.[146] In reasoning that the flight did not constitute reasonable suspicion because it would have been unusual for Black men not to run, the court explicitly considered a report indicating that residents in the "neighborhood tended to regard police officers as violent, corrupt, abusive and violent."[147] While the court claimed it was evaluating reasonable suspicion from the perspective and experience of a reasonable police officer, it suggested that police experience would require these officers to realize that flight by Black men in this neighborhood was not reasonably suspicious.[148]

While Raymond's proposal would help protect Black men in Sam Wardlow's situation, it may not go far enough to combat racially discriminatory police practice in other flight-based *Terry* stops because her proposal focuses on the neighborhood and not on the race of the suspect. Raymond's theory offers no help to a Black man who is fleeing in a low-crime, predominately White neighborhood. This behavior may not be common for the average community member, yet it may be completely rational for a Black man who has been previously targeted by police in such a community. The race-specific reasonable Black person standard would account for the suspect's perceptions of the police, beyond mere analysis of the suspect's behavior within a particular community. While Raymond's proposal points correctly toward circumscribing police discretion in stopping Blacks based on minimal suspicion, the reasonable Black person standard would strike directly at the heart of police-minority tension by limiting raced decisions to stop Blacks even beyond the confines of high-crime neighborhoods.

After a rehearing, the District Court retreated from its original holding in *Bayless* and adhered to the reasonable police officer standard.[149] The government produced evidence to convince the court that the stop was reasonable under the deferential reasonable suspicion standard.[150] The court apparently abandoned its prior concern with the norms of the neighborhood despite the defendant's claim that the new holding was

145. 913 F. Supp. 232 (S.D.N.Y. 1996).

146. *Id.* at 236–37.

147. *Id.* at 242.

148. *See id.* at 239.

149. United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996) (vacating 913 F. Supp. 232 (S.D.N.Y. 1996)).

150. *See id.* at 216.

prompted by extensive political pressure.[151] If the District Court had justified its initial reasoning on a race-specific standard rather than tweak its reasoning to fit into a modified traditional reasonable suspicion standard similar to Professor Raymond's, the decision would have been more defensible. Under the reasonable Black person standard, the court would not have been restrained by a race-neutral reasonable suspicion standard and could have more easily justified incorporation of the defendant's perspective into its evaluation of reasonable suspicion.

Furthermore, Professor Raymond's race-neutral standard sidesteps race. High-crime neighborhoods are predominately poor and Black or Latino.[152] By not explicitly stating the centrality of race to this problem of high-crime neighborhood stops, Raymond's race-neutral standard only perpetuates the use of high-crime neighborhood as a proxy for race.

III. POTENTIAL CRITICISMS OF THE REASONABLE BLACK PERSON STANDARD

The reasonable Black person standard will undoubtedly face broad criticism. Nonetheless, the reasonable Black person standard offers a tenable solution to racial bias in "location plus evasion" cases.

A. *The Standard As Too Subjective Criticism*

The new standard will face criticism based on its individualized approach to reasonable suspicion. First, critics will argue that a reasonable Black person standard that forces police officers to evaluate a suspect's behavior in light of a particular suspect's race is too subjective and idiosyncratic. However, this argument assumes that the current reasonable police officer standard is objective. As illustrated above, the reasonable police officer standard prioritizes White notions of reasonableness and excludes Blacks' unique discriminatory history and experience in the criminal justice system.[153]

Second, critics of an individualized approach to reasonable suspicion will contend that the race-specific reasonable Black person standard is counter-intuitive to the long-term goal of attaining a race-neutral society.[154] Furthermore, classifying individual suspects by race will perpetuate racial differences and will not survive strict scrutiny under the Equal

151. *See* United States v. Bayless, 926 F. Supp. 405, 406 (1996).

152. *See* Harris, *supra* note 1.

153. *See supra* notes 62, 74–77 and accompanying text.

154. *See* Saleem, *supra* note 27, at 489–90 (criticizing Professor Maclin's standard for seizures as unrealistic because it clashes with the "current colorblind constitutional Supreme Court").

Protection Clause.[155] Professor Maclin identified this potential criticism to her race-specific approach to determining the level of coercion in a seizure.[156] She persuasively rebuts this criticism by arguing that the standard merely considers race as one of several factors.[157] Furthermore, it is narrowly tailored to achieve the legitimate state interest in protecting individuals' Fourth Amendment right to not be subject to unreasonable seizures.[158] Finally, to adequately combat racism and not perpetuate current hostility between Blacks and the police, the legal system must first account for true racial disparities in the criminal justice system.[159]

Third, critics may also fear that requiring police officers to explicitly consider race will invite theories of rational racism.[160] Under such theories, race is a permissible proxy for criminal propensity when statistical data supports the correlation between race and criminal propensity.[161] Racism seems rational and police officers are justified in relying upon the predictive power of race in stopping Blacks, because Blacks commit a disproportionate number of street crimes.[162] If one accepts the correlation between criminality and Blackness, then there is no need to disguise the rational use of race with a proxy, such as high-crime neighborhoods.

However, several scholars have effectively refuted theories of rational racism while simultaneously recognizing the centrality of race in criminal law. For example, Professor Harris criticizes rational racism as relying on a self-fulfilling prophecy.[163] If police stop more Blacks, then more Blacks are likely to be prosecuted and ultimately convicted.[164] Professor Cole also argues that while Blacks are arrested and convicted for a disproportionate amount of violent crimes, only about two percent of Blacks are arrested for any crime in any given year, making it likely that a police officer who stops suspects on the basis of race will stop many more

155. Racial classification are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See* Koresmatsu v. United States, 323 U.S. 214 (1944) (proclaiming all racial classifications are subject to the "most rigid scrutiny").

156. *See* Maclin, *supra* note 53, at 270.

157. *See id.* at 270 n.107.

158. *See id.*

159. *See id.* at 270.

160. Such theories are rarely admitted by police officers because when the police rely upon theories of rational racism in deciding whom to stop they violate the Equal Protection Clause by employing a racial classification as state actors. *See* Susskind, *supra* note 2, at 339–42.

161. *See* COLE, *supra* note 18, at 41–42 (presenting and refuting rational reliance on racism).

162. *Id.*

163. *See* Harris, *supra* note 24, at 294–98.

164. *See Id.*

innocent people than guilty people.[165] Finally, Professor Armour refutes arguments of rational racism within the context of criminal self-defense theories. Armour concludes that by permitting the consideration of rational racism in self-defense claims the court impermissibly emphasizes or exploits racial fears.[166] Similarly, if the Court were to permit rational racism to justify *Terry* stops under the reasonable Black person standard, the Court would impermissibly exploit racial fears.

While the new standard would require police officers to explicitly consider race, it would not permit reliance on theories of rational racism because the standard would take the suspect's perspective into account. Under the current reasonable police officer standard, unconsciously racist motivations are accepted as rational by defining the reasonable police officer as an unconscious racist.[167] Because most police officers hold racist assumptions or subscribe to theories of rational racism, and a *Terry* stop is justified if a reasonable police officer would be suspicious of a Black suspect, the reasonable person standard perpetuates and exploits racist stereotypes.[168] The reasonable Black person standard is an alternative standard by which to measure reasonable suspicion and would not permit even unconscious reliance on rational racism.

Fourth, critics will also argue that the reasonable Black person standard creates a special Fourth Amendment standard for Blacks as a form of affirmative action. Professor Maclin anticipates this critique of her standard for seizures.[169] As Professor Maclin argues, a race-specific standard would only provide Blacks with rights currently denied, but granted by the Fourth Amendment.[170]

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165. COLE, *supra* note 18, at 42 (citing Developments in the Law: Race and the Criminal Process, 101 HARV. L. REV. 1472, 1508 (1988)).

166. *See* Armour, *supra* note 50 (identifying three models of rational racists: the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe and distinguishing their illegitimate self-defense claims from legitimate battered women's self-defense claims). For a more detailed discussion, see JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM, THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997).

167. Similarly, Judge Posner's opinion in Wassel v. Adams, 865 F.2d 849 (7th Cir. 1989), implies that the reasonable person standard is really a reasonable racist. Judge Posner, although willing to adjust the actual share of negligence, affirmed a jury's decision that held a female rape victim 97% to blame for failing to anticipate the inherent danger in allowing a Black man into her motel room in a high-crime neighborhood. *See id.* at 856. The opinion suggests that a reasonable person should have known better. Judge Posner's, and the jury's, "reasonable person" is a reasonable racist working under racist assumptions. By preferencing the reasonable racist standard over the reasonable person standard of a non-racist woman, Posner reinforces stereotypes of Black men as criminals and presents such stereotypes as normal and rational reactions to Black men.

168. *See supra* notes 50–62, 71–77 and accompanying text.

169. Maclin, *supra* note 53, at 272.

170. *Id.*

Furthermore, if we are truly committed to treating suspects equally regardless of their race, we could simply raise the baseline for reasonable suspicion. Rather than evaluate all *Terry* stops under the reasonable police officer standard, which excludes Black perspectives, we could evaluate all *Terry* stops under a stricter reasonable Black person standard. To avoid the perception that Blacks are receiving special treatment, the new standard would be applicable to all people. Consequently, flight in a high-crime neighborhood would not be considered reasonably suspicious behavior for a suspect of any race.[171] Applying this standard to all people would achieve the same legitimizing and equalizing goals sought by applying it strictly to Blacks.[172] The obvious trade-off would be a decrease in safety because Whites who do not share the logical Black rationale for fleeing would not be stopped. Still, this would at least ensure that Blacks and Whites would be afforded equal protection from unreasonable stops and provide a honest balance between competing interests in individual rights and law enforcement.[173]

Fifth, additional critics who perceive the standard as too subjective will claim that acknowledging a race-specific standard for Blacks will invite other race, gender, ethnic or sexual-orientation specific standards resulting in different reasonable suspicion standards for every potentially marginalized group. Again, Professor Maclin refutes this objection in the context of her race-specific standard for seizures when she writes, "[j]ust because similar claims may be presented by other groups today or at some future date is no reason not to consider the case of Black males who have sufficient cause for complaint now."[174]

Sixth, critics will argue that a race-specific standard leads to a slippery slope of specificity. One scholar objected to the reasonable woman

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171. This theory of raising the baseline, developed from Professor Cole's writings on legitimizing the criminal justice system, is similar to Professor Raymond's theory discussed and criticized above. *See supra* notes 149–152 and accompanying text. This theory is presented as a lesser, though acceptable, alternative to the reasonable person standard. It is offered as a resolution to those who would not accept the reasonable Black person standard as an impermissible form of affirmative action privileging Blacks over non-Blacks. Furthermore, unlike Professor Raymond's proposition that courts limit their consideration of the character of the neighborhood, this theory does not sidestep race. *See supra* note 152 and accompanying text. By explicitly raising the baseline for reasonable suspicion to a standard based on the experience of Blacks, this theory confronts the centrality of race head on, making this a preferable alternative to the reasonable Black person standard than Professor Raymond's proposal. *See infra* note 194 and accompanying text.

172. *See* COLE, *supra* note 18, at 187 (arguing in order to restore legitimacy in the criminal justice system we must eradicate its double standards by "adopting measures that extend the same rights and protections to all, even if that means reducing the rights now enjoyed by the privileged").

173. *See id.*

174. Maclin, *supra* note 53, at 273.

standard on similar grounds by noting that, "[I]f every distinctive characteristic defining a person is taken into account, the standard will eventually become completely individualized."[175] The reasonable Black person standard will become more individualized to take into account socio-economic class in addition to race. As such, the reasonable low-income Black may have a different perspective on police encounters than a middle-class Black. Thus, the standard will become increasingly specific and individualized to account for differences among Blacks. Critics will argue that a completely individualized standard will become purely subjective and thereby leave no clear standard for police to follow.[176] However, such critics fail to explain why this result is any worse than the inequitable results inherent in the reasonable person standard. Any balancing between individual rights and public safety will entail trade-offs and cost. The costs inherent in a reasonable Black person standard only appear greater than those of the current standard because underprivileged Blacks primarily bear the burden of the costs of the current standard, while both privileged Whites and underprivileged Blacks alike would bear the burden of a reasonable Black person standard.[177]

B. *The Standard As Unworkable Criticism*

Another criticism of the reasonable Black person standard rejects the standard as unworkable. Contrary to the objection that the race-specific standard is too individualized, this criticism argues that the standard is too broad. By creating a standard for all Blacks, the reasonable Black person standard fails to account for diversity between Blacks.[178] A similar criticism has been made against the reasonable women standard for sexual harassment law.[179] While race and gender-specific standards assume a commonality of experience based on race and gender and may not ade-

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175. Zalesne, *supra* note 114, at 880.

176. *See id.*

177. *See infra* notes 192–195 and accompanying text.

178. Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 2048 n.253 (1993) (rejecting the reasonable Black man standard as not allowing "adequate room" for the variety of Black men's experience with White policemen).

179. *See* Zalesne, *supra* note 114, at 878 ("[b]y assuming that there is an 'essential' woman, the reasonable woman standard ignores the realities of differences among women and fails to protect. . .claimants who do not conform to the norms of the 'reasonable woman'); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (suggesting an even more subjective reasonable woman standard particular to the race or ethnicity of individual women because the reasonable woman standard is too broad to encompass the perspective of all women).

quately account for intraracial differences, the alternative race and gender neutral standard does not even account for interracial differences.

Second, these critics object to the standard because it unfairly holds police officers to an unrealistic standard.[180] If police officers are currently unable to perceive when a Black suspect has rational reasons for fleeing a crime scene because of invidious and socialized racism, how can we create a standard that asks them to do just that? The *Terry* standard requires an evaluation of reasonable suspicion based on the totality of the circumstances.[181] Therefore, race would only constitute one factor police officers should consider in determining reasonable suspicion.[182] In addition, police officers would be able to effectively perceive conduct from the perspective of the suspect if they stayed abreast of community perceptions of police behavior and community norms.[183] In fact, the reasonable Black person standard would encourage programs in community policing, potentially restoring Black communities and reducing crime.[184]

Third, critics also argue that the reasonable Black person standard deviates from the *Terry* court's original concerns for police safety. The *Terry* stop was formulated as an exception to the warrant requirement for searches and seizures partly out of concern for police safety.[185] If police officers are permitted to stop citizens based on reasonable suspicion to protect themselves, they should not have to look beyond their own reasonable concerns for safety. However, *Terry* was not designed to give officers free reign to stop people based on "inarticulate hunches."[186] Requiring police officers to evaluate reasonable suspicion from the perspective of a reasonable Black person only requires them to sincerely adhere to the *Terry* standard by refusing to permit officers to rely upon racist hunches.

Fourth, critics will claim that the reasonable Black person standard will not successfully recalibrate the balancing of individual and state interests. Professor Harris dismisses the possibility of reforming *Terry* by recalibrating the balance it strikes between individual interests and state interests in law enforcement as having little actual effect and leaving in

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180. *See* Saleem, *supra* note 27, at 489–90 (criticizing Professor Maclin's standard for seizures as unworkable because it asks police officers to determine race, socio-economic and political background, which is even difficult for detainees themselves in an increasingly multi-cultural society).

181. Terry v. Ohio, 392 U.S. 1, 21–22.

182. *See* Maclin, *supra* note 53, at 273–74 (arguing the same in deciding whether a police confrontation constitutes a seizure).

183. *See id.* at 274.

184. *See* COLE, *supra* note 18, at 192–94.

185. *Terry*, 392 U.S. at 24 ("[w]e cannot blind ourselves to the need for law enforcement to protect themselves").

186. *Id.* at 22.

place a balancing process that inevitably and inherently favors state's interests.[187]

However, a reasonable Black person standard would successfully recalibrate the *Terry* standard. Unlike other proposals that attempt to recalibrate the *Terry* balancing act, but fail because they are complex and yield minimal results, the reasonable Black person standard is not complicated and would fundamentally shift the focus to a race-specific interpretation of reasonable suspicion.[188] While this standard would leave the balancing process in place, it would force the Court to perform a more even-handed balancing act. Unlike Professor Harris, I do not presume that the balancing process inherently preferences the state's interest in law enforcement.[189] Rather, the process is simply applied that way.[190]

C. *A Matter of Balancing Costs and Benefits*

The above criticisms assume a certain balance between costs and benefits. When critics contend that the reasonable Black person standard is too subjective or unworkable, they are merely identifying a cost and determining that these costs outweigh the benefits of a race-specific standard.[191] This assumption is unconsciously racist in itself by forcing Blacks to sacrifice for the sake of the rest of society.[192] Our criminal justice system must strike a balance between competing interests in individual liberties and crime prevention. White middle class America perceives the current balance as inevitable and legitimate because the costs of crime prevention are primarily borne by Blacks and the lower class.[193] Privileged Whites have the "cake" of crime prevention and "eat it too" by not suffering the corresponding burdens on individual liberty when rational Black behavior, but not rational White behavior, qualifies as arousing reasonable suspicion.[194] The reasonable police officer standard appears workable and the reasonable Black person standard does not because in the former, the individual rights infringed upon in the name

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187. *See* Harris, *supra* note 1, at 684–85.

188. *See id.* at 684–85 n.187 (criticizing Scott E. Sunby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988)).

189. *See id.* at 682–83, 685 n.188.

190. *See* COLE, *supra* note 18, at 151 (arguing if the criminal justice system burdened Whites the way it currently burdens Blacks, the nation would not accept the trade-off between crime prevention and individual rights as "inevitable").

191. *See* COLE, *supra* note 18, at 153, 182 (noting that "no remedy is without costs," but that privileged Whites avoid the costs of the current criminal justice system because these costs are disproportionately born by Blacks).

192. *See supra* note 99 and accompanying text.

193. *See* COLE, *supra* note 18, at 153.

194. *See id.*

of crime prevention are those of privileged Whites, while in the latter, the individual rights infringed upon are those of poor Blacks.

If a race-specific standard is truly unworkable, there is a viable alternative. If we care more about individual rights and are willing to legitimately strike the balance in favor of such rights, we could conceive of flight as insufficient proof of reasonable suspicion for everyone; rather than insisting upon a reasonable Black person standard for Black suspects to ensure that Blacks are not subjected to more intrusive searches and seizures than Whites, we could apply a standard from the perspective of those most intruded upon, Black people, to everyone. This would require privileged Whites to sacrifice some safety and crime prevention, but it would at least strike a sincere balance.[195]

Alternatively, if we care more about crime prevention and are willing to legitimately strike the balance in favor of crime prevention, we could subject Whites to the same degree of intrusion on individual rights as Blacks. This would force society at large to sacrifice individual rights for the sake of crime prevention, rather than disproportionately burdening the individual rights of Blacks.[196]

CONCLUSION

The Supreme Court's opinion in *Wardlow* illustrates the inherent racial bias embedded in the current reasonable suspicion standard for *Terry* stops. The Court could eliminate such bias by adopting a reasonable Black person standard to account for the suspect's perspective in evaluating reasonable suspicion. This standard would equalize Blacks and Whites in "location plus evasion" stops. By preventing Blacks from disproportionately bearing the burden of "location plus evasion" stops, a reasonable Black person standard would help to strike a sincere balance between competing interests in crime prevention and individual rights.

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195. *See supra* notes 172–173 and accompanying text.

196. *See* COLE, *supra* note 18, at 153, 187–208 (suggesting if police intrusion upon individual rights were as prevalent in privileged White communities as in Black communities, the White majority would be more willing to explore alternative means of crime prevention that do not directly conflict with individual rights).